M/S. SWASTIK GASES P. LTD.
v.
INDIAN OIL CORP. LTD.
(Civil Appeal No. 5086 of 2013)

JULY 03, 2013.

[R.M. LODHA, MADAN B. LOKUR AND KURIAN JOSEPH, JJ.]

Arbitration and Conciliation Act, 1996:

s. 11 – Application for appointment of arbitrator – Territorial jurisdiction – Jurisdiction clause in agreement specifying the court – Held: Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts — A clause like this is not hit by s. 23 of the Contract Act — Such a clause is neither forbidden by law nor it is against the public policy — It does not offend s. 28 of the Contract Act in any manner — Absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court — The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute – Contract Act, 1872 – ss.23 and 2 8 – Maxim, expressio unius est exclusio alterius.

An agreement was entered into between the appellant and the IBP Company (subsequently merged with the respondent Corporation) whereby the appellant was appointed the company's consignment agent for marketing lubricants at Jaipur (Rajasthan). Dispute arose between the parties and, ultimately, the appellant filed an application u/s 11 of the Arbitration and Conciliation Act,

1996 before the Chief Justice of the Rajasthan High Court for appointment of an arbitrator. The company contested the application, *inter alia*, by raising a plea of lack of territorial jurisdiction of the Rajasthan High Court in the matter since the agreement had been made subject to jurisdiction of the courts at Kolkata. The designated Judge held that Rajasthan High Court did not have any territorial jurisdiction to entertain the application and dismissed the same while giving liberty to the appellant to file the arbitration application in the Calcutta High Court.

In the instant appeal, the question for consideration before the Court was: "whether, in view of clause 18 of the consignment agency agreement dated 13.10.2002, the Calcutta High Court has exclusive jurisdiction in respect of the application made by the appellant u/s 11 of the Arbitration and Conciliation Act, 1996".

Dismissing the appeal, the Court

HELD:

<u>Per R.M. Lodha, J.(for himself and for Kurian Joseph, J.):</u>

1.1. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by s. 23 of the Contract Act at all. Such clause is neither forbidden by law nor is it against the public policy. It does not offend s.28 of the Contract Act in any manner. [para 31] [607-F-G]

Hakam Singh v. M/s. Gammon (India) Ltd. **1971 (3) SCR 314 = (1971) 1 SCC 286**; *A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem* **1989 (2) SCR 1 = (1989) 2 SCC 163;** *R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh*

Glass Works Ltd. **1993 (1) SCR 455 = (1993) 2 SCC 130;** *Angile Insulations v. Davy Ashmore India Ltd. and Another* **1995 (3) SCR 443;** *Shriram City Union Finance Corporation Limited v. Rama Mishra* **(2002) 9 SCC 613;** *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd*. **2004 (1) Suppl. SCR 333 = (2004) 4 SCC 671;** *Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited* **2009 (14) SCR 241 = (2009) 9 SCC 403;** *New Moga Transport Co., through its Proprietor Krishanlal Jhanwar v. United India Insurance Co. Ltd. and Others* **2004 (1) Suppl. SCR 623 = (2004) 4 SCC 677;** *Harshad Chiman Lal Modi v. DLF Universal Ltd. and Another* **2005 (3) Suppl. SCR 495 = (2005) 7 SCC 791;** *Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited* **2009 (1) SCR 138 = (2009) 3 SCC 107; and** *A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited* **2012 (1) SCR 318 = (2012) 2 SCC 315 - relied on.**

Harshad Chiman Lal Modi v. DLF Universal Ltd. and Another **2005 (3) Suppl. SCR 495 = (2005) 7 SCC 791; and** *Interglobe Aviation Limited v. N. Satchidanand* **2011 (6) SCR 1116 = (2011) 7 SCC 463 - referred to.**

1.2. Section 11(12)(b) of the Arbitration and Conciliation Act, 1996 provides that where the matters referred to in sub-ss. (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to 'Chief Justice' in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in s.2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-s. (1) of s.2, to the Chief Justice of that High Court. Clause (e) of sub-s. (1) of s. 2 defines 'Court' which means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction, having

jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes. [para 29] [605-F-H; 606-A-B]

1.3. Beside, when it comes to the question of territorial jurisdiction relating to the application u/s 11 of the 1996 Act, s.20 of the Code of Civil Procedure, 1908 is relevant, which states that subject to the limitations provided in ss. 15 to 19, every suit shall be instituted in a court within the local limits of whose jurisdiction (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part arises. The explanation appended to s.20 clarifies that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. [para 30] [606-B-F]

1.4. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. The case of the appellant is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator u/s 11.

Having regard to s.11(12)(b) and s. 2(e) of the 1996 Act read with s. 20(c) of the Code, the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. However, by making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. [para 31] [606-F-H; 607-A-E]

1.5. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this is not decisive and does not make any material difference. The intention of the parties — by having clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* (expression of one is the exclusion of another) comes into play as there is nothing to indicate to the contrary. The impugned order does not suffer from any error of law. The appellant shall be at liberty to pursue its remedy u/s 11 of the 1996 Act in the Calcutta High Court. [para 31 and 33-34] [607-C-E; 608-B-C]

Per Madan B. Lokur, J. (Concurring):

1.1.The law on the subject is well settled and it is to nobody's advantage if the same law is affirmed many times over. The exclusion of jurisdiction clause in some decisions of this Court* generally uses the word "alone" and, therefore, it is quite obvious that the parties have, by agreement, excluded the jurisdiction of courts other than those mentioned in the agreement. The exclusion clause in such cases is explicit and presents no difficulty in understanding or appreciation. [para 2, and 7-8] [608-D; 609-B-C; 611-C]

Hakam Singh v. M/s. Gammon (India) Ltd.* **1971 (3) SCR 314 = (1971) 1 SCC 286 *Globe Transport Corporation v. Triveni Engineering Works and Another* **(1983) 4 SCC 707** *Angile Insulations v. Davy Ashmore India Ltd. and Another* **1995 (3) SCR 443;** *New Moga Transport Co., through its Proprietor Krishanlal Jhanwar v. United India Insurance Co. Ltd. and others* **2004 (1) Suppl. SCR 623 = (2004) 4 SCC 677;** *Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia and Others* **2005 (20) SCR 1138 = (2005) 10 SCC 704** *Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited* **2009 (1) SCR 138 = (2009) 3 SCC 107; and** *A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited* **2012 (1) SCR 318 = (2012) 2 SCC 315 – relied on**

1.2. In some other decisions, the exclusion clause is not specific or explicit in as much as words like "only", "alone" or "exclusively" and so on have not been used. The very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. It will be seen from these decisions that except in *A.B.C. Laminart* where this Court declined to exclude the jurisdiction of the Courts in Salem, in all other similar cases an inference was drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words "only", "alone" or "exclusively" and the like. The reason for this is quite obvious. The parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of courts other than those mentioned in the concerned clause.**

Conversely, if the parties had intended that all courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties. [para 4, 9 and 26] [608-F-G; 611-C-D; 615-B-E]

***A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem* 1989 (2) SCR 1 = (1989) 2 SCC 163;** *R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd.* **1993 (1) SCR 455 = (1993) 2 SCC 130;** *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd.* **2004 (1) Suppl. SCR 333 = (2004) 4 SCC 671;** *Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited* **2009 (14) SCR 241 = (2009) 9 SCC 403** *Shriram City Union Finance Corporation Limited v. Rama Mishra* **(2002) 9 SCC 613 – relied on.**

Harshad Chiman Lal Modi v. DLF Universal Ltd. and Another **2005 (3) Suppl. SCR 495 = (2005) 7 SCC 791; and** *Interglobe Aviation Limited v. N. Satchidanand* **2011 (6) SCR 1116 = (2011) 7 SCC 463 – distinguished.**

1.3. Therefore in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. [para 28] [615-G-H; 616-A-B]

1.4. The appellant, in the instant case, did not dispute that a part of the cause of action arose in Kolkata. Therefore, jurisdiction in the subject matter of the proceedings vested, by agreement, only in the courts in Kolkata. [para 4 and 27] [608-G; 615-F-G]

Case Law Reference:

Per Lodha, J.

1989 (2) SCR 1	relied on	para 6
2009 (1) SCR 138	relied on	para 6
1971 (3) SCR 314	relied on	para 14
(1983) 4 SCC 707	relied on	para 15
1993 (1) SCR 455	relied on	para 17
1995 (3) SCR 443	relied on	para 18
(2002) 9 SCC 613	relied on	para 19
2004 (1) Suppl. SCR 333	relied on	para 20
2004 (1) Suppl. SCR 623	relied on	para 21
2005 (20) SCR 1138	relied on	para 22
2005 (3) Suppl. SCR 49	referred to	para 23
2009 (14) SCR 241	referred to	para 25
2011 (6) SCR 1116	referred to	para 26
2012 (1) SCR 318	relied on	para 28

Per Madan B. Lokur, J.

1971 (3) SCR 314	relied on	para 7
(1983) 4 SCC 707	relied on	para 7
1995 (3) SCR 443	relied on	para 7
2004 (1) Suppl. SCR 623	relied on	para 7
2005 (20) SCR 1138	relied on	para 7
2009 (1) SCR 138	relied on	para 7

2012 (1) SCR 318	**relied on**	**para 7**
1989 (2) SCR 1	**relied on**	**para 10**
1993 (1) SCR 455	**relied on**	**para 15**
2004 (1) Suppl. SCR 333	**relied on**	**para 18**
2009 (14) SCR 241	**relied on**	**para 21**
(2002) 9 SCC 613	**relied on**	**para 23**
2005 (3) Suppl. SCR 495	**distinguished**	**para 27**
2011 (6) SCR 1116	**distinguished**	**para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5086 of 2013.

From the Judgment and Order dated 13.10.2011 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S.B. Civil Misc. Arbitration Application No. 49 of 2008.

Uday Gupta, Shivani M. Lal, Hiren Sadan, M.K. Tripathi, Mohan Pandey for the Appellant.

Sidharth Luthra, ASG, Priya Puri, Sagar Singhal for the Respondent.

The Judgments of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The short question that arises for consideration in this appeal by special leave is, whether, in view of clause 18 of the consignment agency agreement (for short, 'agreement') dated 13.10.2002, the Calcutta High Court has exclusive jurisdiction in respect of the application made by the appellant under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act').

3. The above question arises in this way. The IBP

Company Limited, which has now merged with the respondent-Indian Oil Corporation Limited, hereinafter referred to as 'the company', was engaged in the business of storage, distribution of petroleum products and also manufacturing and marketing of various types of lubricating oils, grease, fluid and coolants. The company was interested to promote and augment its sales of lubricants and other products and was desirous of appointing consignment agents. The appellant, M/s. Swastik Gases Private Limited, mainly deals in storage, distribution of petroleum products including lubricating oils in Rajasthan and its registered office is situated at Jaipur. An agreement was entered into between the appellant and the company on 13.10.2002 whereby the appellant was appointed the company's consignment agent for marketing lubricants at Jaipur (Rajasthan). There is divergent stand of the parties in respect of the place of signing the agreement. The company's case is that the agreement has been signed at Kolkata while the appellant's stand is that it was signed at Jaipur.

4. In or about November, 2003, disputes arose between the parties as huge quantity of stock of lubricants could not be sold by the appellant. The appellant requested the company to either liquidate the stock or take back the stock and make payment thereof to the appellant. The parties met several times but the disputes could not be resolved amicably.

5. On 16.07.2007, the appellant sent a notice to the company claiming a sum of Rs.18,72,332/- under diverse heads with a request to the company to make payment of the above amount failing which it was stated that the appellant would pursue appropriate legal action against the company.

6. Thereafter, on 25.08.2008 another notice was sent by the appellant to the company invoking arbitration clause wherein name of a retired Judge of the High Court was proposed as the appellant's arbitrator. The company was requested to name their arbitrator within thirty days failing which it was stated that

the appellant would have no option but to proceed under Section 11 of the 1996 Act.

7. The company did not nominate its arbitrator within thirty days of receipt of the notice dated 25.08.2008 which led to the appellant making an application under Section 11 of the 1996 Act in the Rajasthan High Court for the appointment of arbitrator in respect of the disputes arising out of the above agreement.

8. The company contested the application made by the appellant, inter alia, by raising a plea of lack of territorial jurisdiction of the Rajasthan High Court in the matter. The plea of the company was that the agreement has been made subject to jurisdiction of the courts at Kolkata and, therefore, Rajasthan High Court lacks the territorial jurisdiction in dealing with the application under Section 11.

9. In the course of hearing before the designate Judge, two judgments of this Court, one *A.B.C. Laminart*[1] and the other *Rajasthan State Electricity Board*[2] were cited. The designated Judge applied *A.B.C. Laminart*[1] and held that Rajasthan High Court did not have any territorial jurisdiction to entertain the application under Section 11 and dismissed the same while giving liberty to the appellant to file the arbitration application in the Calcutta High Court. It is from this order that the present appeal by special leave has arisen.

10. We have heard Mr. Uday Gupta, learned counsel for the appellant and Mr. Sidharth Luthra, learned Additional Solicitor General for the company. Learned Additional Solicitor General and learned counsel for the appellant have cited many decisions of this Court in support of their respective arguments. Before we refer to these decisions, it is apposite that we refer to the two clauses of the agreement which deal with arbitration

1. *A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem;* (1989) 2 SCC 163.

2. *Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited;* (2009) 3 SCC 107.

and jurisdiction. Clause 17 of the agreement is an arbitration clause which reads as under:

17.0. Arbitration

If any dispute or difference(s) of any kind whatsoever shall arise between the parties hereto in connection with or arising out of this Agreement, the parties hereto shall in good faith negotiate with a view to arriving at an amicable resolution and settlement. In the event no settlement is reached within a period of 30 days from the date of arising of the dispute(s)/difference(s), such dispute(s)/difference(s) shall be referred to 2 (two) Arbitrators, appointed one each by the parties and the Arbitrators, so appointed shall be entitled to appoint a third Arbitrator who shall act as a presiding Arbitrator and the proceedings thereof shall be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof in force. The existence of any dispute(s)/difference(s) or initiation/continuation of arbitration proceedings shall not permit the parties to postpone or delay the performance of or to abstain from performing their obligations pursuant to this Agreement.

11. The jurisdiction clause 18 in the agreement is as follows:

18.0. Jurisdiction

The Agreement shall be subject to jurisdiction of the courts at Kolkata.

12. The contention of the learned counsel for the appellant is that even though clause 18 confers jurisdiction to entertain disputes inter se parties at Kolkata, it does not specifically bar jurisdiction of courts at Jaipur where also part of the cause of action has arisen. It is the submission of the learned counsel that except execution of the agreement, which was done at

Kolkata, though it was signed at Jaipur, all other necessary bundle of facts forming 'cause of action' have arisen at Jaipur. This is for the reason that: (i) The regional office of the respondent - company is situate at Jaipur; (ii) the agreement was signed at Jaipur; (iii) the consignment agency functioned from Jaipur; (iv) all stock of lubricants was delivered by the company to the appellant at Jaipur; (v) all sales transactions took place at Jaipur; (vi) the godown, showroom and office of the appellant were all situated in Jaipur; (vii) various meetings were held between the parties at Jaipur; (viii) the company agreed to lift the stock and make payment in lieu thereof at a meeting held at Jaipur and (ix) the disputes arose at Jaipur. The learned counsel for the appellant would submit that since part of the cause of action has arisen within the jurisdiction of the courts at Jaipur and clause 18 does not expressly oust the jurisdiction of other courts, Rajasthan High Court had territorial jurisdiction to try and entertain the petition under Section 11 of the 1996 Act. He vehemently contended that clause 18 of the agreement cannot be construed as an ouster clause because the words like, 'alone', 'only', 'exclusive' and 'exclusive jurisdiction' have not been used in the clause.

13. On the other hand, the learned Additional Solicitor General for the company stoutly defended the view of the designate Judge that from clause 18 of the agreement, it was apparent that the parties intended to exclude jurisdiction of all courts other than the courts at Kolkata.

14. *Hakam Singh*[3] is one of the earlier cases of this Court wherein this Court highlighted that where two Courts have territorial jurisdiction to try the dispute between the parties and the parties have agreed that dispute should be tried by only one of them, the court mentioned in the agreement shall have jurisdiction. This principle has been followed in many subsequent decisions.

3. *Hakam Singh v. M/s. Gammon (India) Ltd;* (1971) 1 SCC 286.

15. In *Globe Transport*[4] while dealing with the jurisdiction clause which read "the Court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of the goods entrusted for transportation", this Court held that the jurisdiction clause in the agreement was valid and effective and the courts at Jaipur only had jurisdiction and not the courts at Allahabad which had jurisdiction over Naini where goods were to be delivered and were in fact delivered.

16. In *A.B.C. Laminart*[1], this Court was concerned with clause 11 in the agreement which read, "any dispute arising out of this sale shall be subject to Kaira jurisdiction". The disputes having arisen out of the contract between the parties, the respondents therein filed a suit for recovery of amount against the appellants therein and also claimed damages in the court of subordinate judge at Salem. The appellants, inter alia, raised the preliminary objection that the subordinate judge at Salem had no jurisdiction to entertain the suit as parties by express contract had agreed to confer exclusive jurisdiction in regard to all disputes arising out of the contract on the civil court at Kaira. When the matter reached this Court, one of the questions for consideration was whether the court at Salem had jurisdiction to entertain or try the suit. While dealing with this question, it was stated by this Court that the jurisdiction of the court in the matter of contract would depend on the situs of the contract and the cause of action arising through connecting factors. The Court referred to Sections 23 and 28 of the Indian Contract Act, 1872 (for short, 'Contract Act') and Section 20(c) of the Civil Procedure Code (for short 'Code') and also referred to Hakam Singh3 and in paragraph 21 (pgs. 175-176) of the Report held as under:

> ".....When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and

4. *Globe Transport Corporation v. Triveni Engineering Works and Another;* (1983) 4 SCC 707.

unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

Then, in paragraph 22(pg. 176) of the Report, this Court held as under:

".....We have already seen that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place where it was made. Thus Kaira Court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by clause 11 it would not absolutely oust the jurisdiction of the court and, therefore, would not be void against public policy and would not violate Sections 23 and 28 of the Contract Act. The question then is whether it can be construed to have excluded the jurisdiction of the court at Salem. In the clause 'any dispute arising out of this sale shall be subject to Kaira jurisdiction' ex facie we do not find exclusionary words like 'exclusive', 'alone', 'only' and the like. Can the maxim *'expressio unius est exclusio alterius'* be applied under the facts and circumstances of the case? The order of confirmation is of no assistance. The other general terms and conditions are also not

indicative of exclusion of other jurisdictions. Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the court at Salem which court otherwise had jurisdiction under law through connecting factor of delivery of goods thereat was expressly excluded....."

17. In *R.S.D.V. Finance*[5] the question that fell for consideration in the appeal was, in light of the endorsement on the deposit receipt "subject to Anand jurisdiction", whether the Bombay High Court had jurisdiction to entertain the suit filed by the appellant therein. Following *A.B.C. Laminart*[1], this Court in paragraph 9 (pgs. 136-137) of the Report held as under :

"We may also consider the effect of the endorsement 'Subject to Anand jurisdiction' made on the deposit receipt issued by the defendant. In the facts and circumstances of this case it cannot be disputed that the cause of action had arisen at Bombay as the amount of Rs 10,00,000 itself was paid through a cheque of the bank at Bombay and the same was deposited in the bank account of the defendant in the Bank of Baroda at Nariman Point, Bombay. The five post-dated cheques were also issued by the defendant being payable to the plaintiff at Bombay. The endorsement 'Subject to Anand jurisdiction' has been made unilaterally by the defendant while issuing the deposit receipt. The endorsement 'Subject to Anand jurisdiction' does not contain the ouster clause using the words like 'alone', 'only', 'exclusive' and the like. Thus the maxim *'expressio unius est exclusio alterius'* cannot be applied under the facts and circumstances of the case and it cannot be held that

5. *R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd.;* (1993) 2 SCC 130.

merely because the deposit receipt contained the endorsement 'Subject to Anand jurisdiction' it excluded the jurisdiction of all other courts who were otherwise competent to entertain the suit. The view taken by us finds support from a decision of this Court in *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies,* Salem."

18. The question under consideration in *Angile Insulations*[6] was whether the court of subordinate judge, Dhanbad possessed the jurisdiction to entertain and hear the suit filed by the appellant for recovery of certain amounts due from the first respondent. Clause 21 of the agreement therein read, "This work order is issued subject to the jurisdiction of the High Court situated in Banglaore in the State of Karnataka…..". This Court relied upon *A.B.C. Laminart*[1] and held that having regard to clause 21 of the work order which was legal and valid, the parties had agreed to vest the jurisdiction of the court situated within the territorial limit of High Court of Karnataka and, therefore, the court of subordinate judge, Dhanbad in Bihar did not have jurisdiction to entertain the suit filed by the appellant therein.

19. Likewise, in *Shriram City*[7], the legal position stated in *Hakam Singh*[3] was reiterated. In that case, clause 34 of the lease agreement read "subject to the provisions of clause 32 above it is expressly agreed by and between the parties hereinabove that any suit, application and/or any other legal proceedings with regard to any matter, claims, differences and for disputes arising out of this agreement shall be filed and referred to the courts in Calcutta for the purpose of jurisdiction". This Court held that clause 34 left no room for doubt that the parties had expressly agreed between themselves that any suit, application or any other legal proceedings with regard to any

6. *Angile Insulations v. Davy Ashore India Ltd. and Another;* (1995) 4 SCC 153.

7. *Shriram City Union Finance Corporation Limited v. Rama Mishra;* (2002) 9 SCC 613.

matter, claim, differences and disputes arising out of this claim shall only be filed in the courts in Calcutta. Whilst drawing difference between inherent lack of jurisdiction of a court on account of some statute and the other where parties through agreement bind themselves to have their dispute decided by any one of the courts having jurisdiction, the Court said :

"9……..It is open for a party for his convenience to fix the jurisdiction of any competent court to have their dispute adjudicated by that court alone. In other words, if one or more courts have the jurisdiction to try any suit, it is open for the parties to choose any one of the two competent courts to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the parties can only file the suit in that court alone to which they have so agreed. In the present case, as we have said, through clause 34 of the agreement, the parties have bound themselves that in any matter arising between them under the said contract, it is the courts in Calcutta alone which will have jurisdiction. Once parties bound themselves as such it is not open for them to choose a different jurisdiction as in the present case by filing the suit at Bhubaneshwar. Such a suit would be in violation of the said agreement."

20. In *Hanil Era Textiles*[8], this Court was concerned with the question of jurisdiction of court of District Judge, Delhi. Condition 17 in the purchase order in respect of jurisdiction read, "….. legal proceeding arising out of the order shall be subject to the jurisdiction of the courts in Mumbai." Following *Hakam Singh*[3], *A.B.C. Laminart*[1] and *Angile Insulations*[6], it was held in paragraph 9 (pg. 676) of the Report as under:

"Clause 17 says - any legal proceedings arising out of the order shall be subject to the jurisdiction of the courts in Mumbai. This clause is no doubt not qualified by the words

8. *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd;* (2004) 4 SCC 671.

like "alone", "only" or "exclusively". Therefore, what is to be seen is whether in the facts and circumstances of the present case, it can be inferred that the jurisdiction of all other courts except courts in Mumbai is excluded. Having regard to the fact that the order was placed by the defendant at Bombay, the said order was accepted by the branch office of the plaintiff at Bombay, the advance payment was made by the defendant at Bombay, and as per the plaintiff's case the final payment was to be made at Bombay, there was a clear intention to confine the jurisdiction of the courts in Bombay to the exclusion of all other courts. The Court of Additional District Judge, Delhi had, therefore, no territorial jurisdiction to try the suit."

21. In New Moga Transport , the question that fell for consideration before this Court was whether the High Court's conclusion that the civil court at Barnala had jurisdiction to try the suit was correct or not? The clause in the consignment note read, "the court at head office city shall only be the jurisdiction in respect of all claims and matters arising under the consignment at the goods entrusted for transport." Additionally, at the top of the consignment note, the jurisdiction has been specified to be with Udaipur court. This Court considered Section 20 of the Code and following *Hakam Singh*[3] and *Shriram City*[7], in paragraph 19 (pg. 683) of the Report held as under :

"19. The intention of the parties can be culled out from use of the expressions "only", "alone", "exclusive" and the like with reference to a particular court. But the intention to exclude a court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. In such case only the accepted notions of contract would bind the parties. The first appellate court was justified in holding that it is only the court at Udaipur which had jurisdiction to try the

9. *New Moga Transport Co., through its Proprietor Krishanlal Jhanwar v. United India Insurance Co. Ltd. and Others;* (2004) 4 SCC 677.

suit. The High Court did not keep the relevant aspects in view while reversing the judgment of the trial court. Accordingly, we set aside the judgment of the High Court and restore that of the first appellate court. The court at Barnala shall return the plaint to Plaintiff 1 (Respondent 1) with appropriate endorsement under its seal which shall present it within a period of four weeks from the date of such endorsement of return before the proper court at Udaipur….."

22. The question for consideration in *Shree Subhlaxmi Fabrics*[10], was whether city civil court at Calcutta had territorial jurisdiction to deal with the dispute though condition 6 of the contract provided that the dispute under the contract would be decided by the court of Bombay and no other courts. This Court referred to *Hakam Singh*[3], *A.B.C. Laminart*[1] and *Angile Insulations*[6] and then in paragraph 18 (pg. 713) and paragraph 20 (pg. 714) of the Report held as under :

"18. In the case on hand the clause in the indent is very clear viz. "court of Bombay and no other court". The trial court on consideration of material on record held that the court at Calcutta had no jurisdiction to try the suit."

xxx xxx xxx

"20. In our opinion the approach of the High Court is not correct. The plea of the jurisdiction goes to the very root of the matter. The trial court having held that it had no territorial jurisdiction to try the suit, the High Court should have gone deeper into the matter and until a clear finding was recorded that the court had territorial jurisdiction to try the suit, no injunction could have been granted in favour of the plaintiff by making rather a general remark that the plaintiff has an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the court."

10. *Shree Sublaxmi Fabrics (P) Ltd. v. Chand Mal Baradia and Others;* (2005) 10 SCC 704.

23. In *Harshad Chiman Lal Modi*[11], the clause of the plot buyer agreement read, "Delhi High Court or courts subordinate to it, alone shall have jurisdiction in all matters arising out of, touching and/or concerning this transaction." This Court held that the suit related to specific performance of the contract and possession of immovable property and the only competent court to try such suit was the court where the property was situate and no other court. Since the property was not situated in Delhi, the Delhi Court had no jurisdiction though the agreement provided for jurisdiction of the court at Delhi. This Court found that the agreement conferring jurisdiction on a court not having jurisdiction was not legal, valid and enforceable.

24. In *Rajasthan State Electricity Board*[2], two clauses under consideration were clause 30 of the general conditions of the contract and clause 7 of the bank guarantee. Clause 30 of the general conditions of the contract stipulated, "the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only……" and clause 7 of the bank guarantee read, "all disputes arising in the said bank guarantee between the Bank and the Board or between the supplier or the Board pertaining to this guarantee shall be subject to the courts only at Jaipur in Rajasthan". In light of the above clauses, the question under consideration before this Court was whether Calcutta High Court where an application under Section 20 of the Arbitration Act, 1940 was made had territorial jurisdiction to entertain the petition or not. Following *Hakam Singh*[3], *A.B.C. Laminart*[1] and *Hanil Era Textiles*[8], this Court in paragraphs 27 and 28 (pgs. 114-115) of the Report held as under:

> "27. The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to the Arbitration Act is clear, unambiguous and explicit. The said position is binding on

11. *Harshad Chiman Lal Modi v. DLF Universal Ltd. and Another;* (2005) 7 SCC 791.

> both the parties who were contesting the present proceeding. Both the parties with their open eyes entered into the aforesaid purchase order and agreements thereon which categorically provide that all disputes arising between the parties out of the agreements would be adjudicated upon and decided through the process of arbitration and that no court other than the court at Jaipur shall have jurisdiction to entertain or try the same. In both the agreements in Clause 30 of the general conditions of the contract it was specifically mentioned that the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only and in addition in one of the purchase order the expression used was that the court at Jaipur only would have jurisdiction to entertain or try the same.
>
> 28. In the light of the aforesaid facts of the present case, the ratio of all the aforesaid decisions which are referred to hereinbefore would squarely govern and apply to the present case also. There is indeed an ouster clause used in the aforesaid stipulations stating that the courts at Jaipur alone would have jurisdiction to try and decide the said proceedings which could be initiated for adjudication and deciding the disputes arising between the parties with or in relation to the aforesaid agreements through the process of arbitration. In other words, even though otherwise the courts at Calcutta would have territorial jurisdiction to try and decide such disputes, but in view of the ouster clause it is only the courts at Jaipur which would have jurisdiction to entertain such proceeding."

Then, in paragraph 35 (pg. 116) of the Report, the Court held as under:

> "35. The parties have clearly stipulated and agreed that no other court, but only the court at Jaipur will have jurisdiction to try and decide the proceedings arising out

of the said agreements, and therefore, it is the civil court at Jaipur which would alone have jurisdiction to try and decide such issue and that is the court which is competent to entertain such proceedings. The said court being competent to entertain such proceedings, the said court at Jaipur alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of the reference. The arbitration proceedings have to be made at Jaipur Court and in no other court."

25. In *Balaji Coke*[12] the question was, notwithstanding the mutual agreement to make the high-seas sale agreement subject to Kolkata jurisdiction, whether it would be open to the respondent-company to contend that since a part of cause of action purportedly arose within the jurisdiction of Bhavnagar (Gujarat) Court, the application filed under Section 9 of the 1996 Act before the Principal Civil Judge (Senior Division), Bhavnagar (Gujarat) could still be maintainable. This question arose in light of clause 11 of the agreement which contained an arbitration clause and read as under :

"In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences or disputes shall be referred to an arbitrator in Kolkata, West Bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any other enactment or statutory modifications thereof for the time being in force. *The place of arbitration shall be Kolkata*."

26. This Court held in para 30 (pg. 409) of the Report, that

12. *Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited;* (2009) 9 SCC 403.

the parties had knowingly and voluntarily agreed that the contract arising out of the high-seas sale agreement would be subject to Kolkata jurisdiction and even if the courts in Gujarat also had the jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided in Kolkata by an arbitrator in Kolkata was valid and respondent had wrongly chosen to file its application under Section 9 of the 1996 Act before the Bhavnagar court (Gujarat).

27. The question in *Interglobe Aviation*[13], inter alia, was whether the Permanent Lok Adalat at Hyderabad had territorial jurisdiction to deal with the matter. The standard terms which governed the contract between the parties provided, "all disputes shall be subject to the jurisdiction of the courts of Delhi only". The contention on behalf of the appellant before this Court was that the ticket related to travel from Delhi to Hyderabad. The complaint was in regard to delay at Delhi and, therefore, the cause of action arose at Delhi and that as contract provided that the courts at Delhi only will have jurisdiction, the jurisdiction of other courts was ousted. This Court in paragraph 22 (pgs. 476-477) of the Report held as under :

"22. As per the principle laid down in A.B.C. Laminart [(1989) 2 SCC 163], any clause which ousts the jurisdiction of all courts having jurisdiction and conferring jurisdiction on a court not otherwise having jurisdiction would be invalid. It is now well settled that the parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction; and that only where two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall be tried in one of such courts is not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction. If the clause had been made to apply only

13. *Interglobe Aviation Limited v. N. Satchidanand;* (2011) 7 SCC 463.

where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law, having regard to the principle laid down in *A.B.C. Laminart* [(1989) 2 SCC 163]. The fact that in this case, the place of embarkation happened to be Delhi, would not validate a clause, which is invalid."

28. In a comparatively recent decision in *A.V.M. Sales*[14], the terms of the agreement contained the clause, "any dispute arising out of this agreement will be subject to Calcutta jurisdiction only". The respondent before this Court had filed a suit at Vijayawada for recovery of dues from the petitioner while the petitioner had filed a suit for recovery of its alleged dues from the respondent in Calcutta High Court. One of the questions under consideration before this Court was whether the court at Vijayawada had no jurisdiction to entertain the suit on account of exclusion clause in the agreement. Having regard to the facts obtaining in the case, this Court first held that both the courts within the jurisdiction of Calcutta and Vijayawada had jurisdiction to try the suit. Then it was held that in view of the exclusion clause in the agreement, the jurisdiction of courts at Vijayawada would stand ousted.

29. Section 11(12)(b) of the 1996 Act provides that where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an arbitration other than the international commercial arbitration, the reference to 'Chief Justice' in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the Principal Civil Court referred to in Section 2(1)(e) is situate, and where the High Court itself is the court referred to in clause (e) of sub-section (1) of Section 2, to the Chief Justice of that High Court. Clause (e) of sub-section (1) of Section 2 defines 'Court' which

14. *A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited;* (2012) 2 SCC 315.

means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

30. When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a Court within the local limits of whose jurisdiction (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part arises. The explanation appended to Section 20 clarifies that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section

2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement - is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

32. The above view finds support from the decisions of this Court in *Hakam Singh*[3], *A.B.C. Laminart*[1], *R.S.D.V. Finance*[5],

Angile Insulations[6], *Shriram City*[7], *Hanil Era Textiles*[8] and *Balaji Coke*[12].

33. In view of the above, we answer the question in the affirmative and hold that the impugned order does not suffer from any error of law.

34. Civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court.

MADAN B. LOKUR, J. 1. Leave granted.

2. While I agree with the conclusion arrived at by my learned Brother Justice Lodha, this judgment has been penned down to raise the question - is it really necessary for this Court to repeatedly affirm the legal position ad nauseam? I believe the law on the subject is well settled and it is to nobody's advantage if the same law is affirmed many times over.

3. The clause in the agreement that is sought to be interpreted reads as follows:

> "The agreement shall be subject to jurisdiction of the Courts at Kolkata."

4. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject matter of the proceedings vested, by agreement, only in the Courts in Kolkata.

5. The facts of the case have been detailed by my learned Brother and it is not necessary to repeat them.

6. Reference has been made to several decisions rendered by this Court and I propose to briefly advert to them.

One set of decisions:

7. There is really no difficulty in interpreting the exclusion clause in the first set of decisions. The clause in these decisions generally uses the word "alone" and, therefore, it is quite obvious that the parties have, by agreement, excluded the jurisdiction of courts other than those mentioned in the agreement. These decisions, along with the relevant clause, are as follows:

1. *Hakam Singh v. Gammon (India) Ltd.,* (1971) 1 SCC 286:

> "Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this Contract shall be deemed to have been entered into by the parties concerned in the city of Bombay and the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereon." (emphasis given)

It was held that only the courts in Bombay and not Varanasi had jurisdiction over the subject matter of dispute.

2. *Globe Transport Corpn. v. Triveni Engg. Works,* (1983) 4 SCC 707:

"The Court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of the goods entrusted for transportation." (emphasis given)

It was held that only the courts in Jaipur and not Allahabad had jurisdiction over the subject matter of dispute.

3. *Angile Insulations v. Davy Ashmore India Ltd.,* (1995)

4 SCC 153:

> "This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above court only." (emphasis given)

It was held that only the courts in Karnataka and not Dhanbad had jurisdiction over the subject matter of dispute.

4. *New Moga Transport Co. v. United India Insurance Co. Ltd.,* (2004) 4 SCC 677:

> "The court at head office city [Udaipur] shall only be the jurisdiction in respect of all claims and matters arising under the consignment at the goods entrusted for transport." (emphasis given)

It was held that only the courts in Udaipur and not Barnala had jurisdiction over the subject matter of dispute.

5. *Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia,* (2005) 10 SCC 704:

> "Dispute under this contract shall be decided by the court of Bombay and no other courts." (emphasis given)

It was held that only the courts in Bombay and not Calcutta had jurisdiction over the subject matter of dispute.

6. *Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited,* (2009) 3 SCC 107:

> "The contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only." (emphasis given)

It was held that only the courts in Jaipur and not Calcutta had jurisdiction over the subject matter of dispute.

7. *A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited,* (2012) 2 SCC 315:

"Any dispute arising out of this agreement will be subject to Calcutta jurisdiction only." (emphasis given)

It was held that only the courts in Calcutta and not Vijaywada had jurisdiction over the subject matter of dispute.

8. The exclusion clause in the above cases is explicit and presents no difficulty in understanding or appreciation.

Another set of decisions:

9. In the second set of decisions, the exclusion clause is not specific or explicit in as much as words like "only", "alone" or "exclusively" and so on have not been used. This has apparently presented some difficulty in appreciation.

10. In *A.B.C. Laminart v. A.P. Agencies,* (1989) 2 SCC 163 the relevant clause read as follows:

"Any dispute arising out of this sale shall be subject to Kaira jurisdiction."

11. Despite the aforesaid clause, proceedings were initiated by the respondent in Salem (Tamil Nadu). The appellant challenged the jurisdiction of the Court at Salem to entertain the proceedings since the parties had agreed that all disputes shall be subject to the jurisdiction of the Courts in Kaira (Gujarat). The Trial Court upheld the objection but that was set aside in appeal by the Madras High Court which held that the Courts in Salem had the jurisdiction to entertain the proceedings.

12. The Civil Appeal filed by the appellant challenging the decision of the Madras High Court was dismissed by this Court thereby affirming the jurisdiction of the Court in Salem notwithstanding the exclusion clause.

13. While doing so, this Court held that when a certain jurisdiction is specified in a contract, an intention to exclude all others from its operation may be inferred; the exclusion clause has to be properly construed and the maxim "expressio unius est exclusio alterius" (expression of one is the exclusion of another) may be applied.

14. Looking then to the facts and circumstances of the case, this Court held that the jurisdiction of Courts other than in Kaira were not clearly, unambiguously and explicitly excluded and therefore, the Court at Salem had jurisdiction to entertain the proceedings.

15. In *R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd.,* (1993) 2 SCC 130, the exclusion clause read as follows :

"Subject to Anand jurisdiction."

16. Proceedings were initiated by the appellant in the Ordinary Original Civil Jurisdiction of the Bombay High Court. The respondent questioned the jurisdiction of the Bombay High Court in view of the exclusion clause. The learned Single Judge held that the Bombay High Court had jurisdiction to entertain the proceedings. However, the Division Bench of the High Court took the view that the Bombay High Court had no jurisdiction in the matter and accordingly dismissed the proceedings.

17. In appeal, this Court noted in paragraph 9 of the Report that the endorsement "Subject to Anand jurisdiction" had been made unilaterally by the respondent. Accordingly, there was no agreement between the parties to exclude the jurisdiction of the Bombay High Court. Clearly, this decision turned on its own special facts.

18. In *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd.,* (2004) 4 SCC 671 the exclusion clause read as follows:

"Any legal proceeding arising out of the order shall be

subject to the jurisdiction of the courts in Mumbai."

19. On a dispute having arisen, proceedings were instituted by the respondent in the Courts in Delhi. This was objected to by the appellant but neither the Additional District Judge, Delhi nor the Delhi High Court accepted the contention of the appellant that the Courts in Delhi had no territorial jurisdiction in the matter.

20. In appeal, this Court referred to A.B.C. Laminart and after considering the facts and circumstances of the case inferred that the jurisdiction of all other Courts except the Courts in Mumbai was excluded. This inference was drawn from the fact that the purchase order was placed by the appellant at Mumbai and was accepted by the respondent at Mumbai. The advance payment was made by the respondent at Mumbai and as per the case of the respondent itself the final payment was to be made at Mumbai.

21. In *Balaji Coke Industry Private Limited v. Maa Bhagwati Coke Gujarat Private Limited,* (2009) 9 SCC 403, the exclusion clause read as follows:

> "In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences or disputes shall be referred to an arbitrator in Kolkata, West Bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any other enactment or statutory modifications thereof for the time being in force. The place of arbitration shall be Kolkata."

22. Notwithstanding the aforesaid clause, proceedings were instituted by the respondent against the appellant in Bhavnagar (Gujarat). The petitioner in this Court then moved a

Transfer Petition under Article 139-A(2) of the Constitution of India for transfer of the proceedings to Kolkata. While allowing the Transfer Petition, this Court drew an inference, as postulated in *A.B.C. Laminart* that the intention of the parties was to exclude the jurisdiction of Courts other than those in Kolkata.

23. Finally, in *Shriram City Union Finance Corporation Ltd. v. Rama Mishra,* (2002) 9 SCC 613, the exclusion clause read as follows:

> "Subject to the provisions of clause 32 above it is expressly agreed by and between the parties hereinabove that any suit, application and/or any other legal proceedings with regard to any matter, claims, differences and for disputes arising out of this agreement shall be filed and referred to the courts in Calcutta for the purpose of jurisdiction."

24. Proceedings were initiated by the respondent in Bhubaneswar (Odisha). An objection was taken by the appellant that the Court in Bhubaneswar had no jurisdiction to entertain the proceedings. However, the objection was not accepted by the Trial Judge, Bhubaneswar. In appeal, the District Judge accepted the contention of the appellant that only the Courts in Kolkata had jurisdiction in the matter. In a Civil Revision Petition filed before the Orissa High Court by the respondent, the order passed by the Trial Court was affirmed with the result that it was held that notwithstanding the exclusion clause, the Civil Judge, Bhubaneswar (Odisha) had jurisdiction to entertain the proceedings.

25. In the Civil Appeal filed by the appellant in this Court, it was held that the exclusion clause left no room for doubt that the parties expressly agreed that legal proceedings shall be instituted only in the Courts in Kolkata. It was also held that the parties had agreed that the Courts in Kolkata "alone" would have jurisdiction in the matter and therefore, the Civil Court, Bhubaneswar ought not to have entertained the proceedings.

A reading of the exclusion clause shows that it does not use the word "alone" but it was read into the clause by this Court as an inference drawn on the facts of the case, in line with the decision rendered in *A.B.C. Laminart* and the relief declined in *A.B.C. Laminart* was granted in this case.

26. It will be seen from the above decisions that except in *A.B.C. Laminart* where this Court declined to exclude the jurisdiction of the Courts in Salem, in all other similar cases an inference was drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words "only", "alone" or "exclusively" and the like. The reason for this is quite obvious. The parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of Courts other than those mentioned in the concerned clause. Conversely, if the parties had intended that all Courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties.

27. It is not necessary to refer to the decisions rendered by this Court in *Harshad Chimanlal Modi v. DLF Universal Limited,* (2005) 7 SCC 791 and *Inter Globe Aviation Limited v. N. Satchidanand,* (2011) 7 SCC 463 since they deal with an issue that does not at all arise in this case. In this context it may only be mentioned that the appellant in the present case did not dispute that a part of the cause of action arose in Kolkata, as observed by my learned Brother Justice Lodha.

Conclusion:

28. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any

material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the Courts in Kolkata had jurisdiction to entertain the disputes between the parties.

29. The Civil Appeal is dismissed, as proposed, leaving the appellant to pursue its remedy in Kolkata.

R.P. Appeal dismissed.

V. K. BANSAL

v.

STATE OF HARYANA AND ORS. ETC. ETC.

(Criminal Appeal Nos. 836-851 of 2013)

JULY 05, 2013

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

Negotiable Instruments Act, 1881:

s. 138 – Dishonour of Cheques – Conviction and sentence – Plea for concurrent running of sentences – Held: Applying the principle of single transaction, the substantive sentences awarded to the appellant in each case relevant to the transactions with each company ought to run concurrently — However, there is no reason to extend that concession to transactions in which the borrowing company is different, no matter the appellant before the court is the promoter/Director of the said other companies also — Direction regarding concurrent running of sentence shall be limited to the substantive sentences only because the provisions of s. 427, Cr.P.C. do not permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/ compensation – Code of Criminal Procedure, 1973 – s.427.

The instant appeals arose out of the conviction and sentences imposed upon the appellant, as a director of the borrowing companies, in several cases, for dishonour of cheques issued by the said companies. The question for consideration before the Court was: whether the High Court was right in declining the prayer made by the appellant for a direction in terms of s. 427 read with s. 482 of the Code of Criminal Procedure, 1973 for the sentences awarded to him in the cases u/s. 138 of the Negotiable Instruments Act, to run concurrently.

Allowing the appeals in part, the Court:

HELD: 1.1. Section 427 of the Code of Criminal Procedure, 1973 deals with situations where an offender who is already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life. It provides that such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. Section 427(1) of the Code, stipulates a general rule to be followed except in three situations, one falling under the proviso to sub-s (1) to s. 427 i.e. where the person concerned is sentenced to imprisonment by an order u/s. 122 in default of furnishing security which is not the position in the case at hand; the second falling under sub-s (2) where a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life; it provides that the subsequent sentence shall in such a case run concurrently with such previous sentence; and the third where the court directs that the sentences shall run concurrently. It is manifest from s. 427(1) that the court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the court the discretionary power shall have to be exercised along judicial lines and not in a mechanical, wooden or pedantic manner. It is difficult to lay down any strait jacket approach in the matter of exercise of such discretion by the courts. Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence(s) committed, and the fact situation in which the question of concurrent running of the sentences arises. High Courts in this country have, therefore, invoked and exercised their discretion to issue

directions for concurrent running of sentence* as much as they have declined such benefit to the prisoners. [Para 8-10] [623-F-H; 624-E-H; 625-A-E]**

***State of Punjab v. Madan Lal* 2009 (3) SCR 1175 = (2009) 5 SCC 238; *Mohd. Akhtar Hussain v. Assistant Collector of Customs* 1988 (2) Suppl. SCR 747 = (1988) 4 SCC 183 and *Mulaim Singh v. State* 1974 Crl. L.J. 1397 – referred to.**

***Sumlo @ Sumla Himla Bhuriya and Ors. v. State of Gujarat and Ors.* 2007 Crl.L.J. 612 and *State of Gujarat v. Zaverbhai Kababhai* 1996 Crl.L.J. 1296 – referred to.**

1.2. The legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction, no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor. [Para 15] [627-E-F; 628-E-H]

1.3. The 15 cases at hand against the appellant fall in three distinct categories. The transactions forming the basis of the prosecution relate to three different corporate entities who had either entered into loan transactions with the State Financial Corporation or taken some other financial benefit like purchase of a cheque from the appellant that was on presentation dishonoured. Applying the principle of single transaction, each one of the loan transactions/financial arrangements was a separate and distinct transaction between the complainant on the one hand and the borrowing company/appellant on the other. If different cheques which are subsequently dishonoured on presentation, are issued by the borrowing company acting through the appellant, the same could be said to be arising out of a single loan transaction so as to justify a direction for

concurrent running of the sentences awarded in relation to dishonour of cheques relevant to each such transaction. That being so, the substantive sentence awarded to the appellant in each case relevant to the transaction with each company ought to run concurrently. However, there is no reason to extend that concession to transactions in which the borrowing company is different no matter the appellant before the Court is the promoter/Director of the said other companies also. Similarly, there is no reason to direct running of the sentence concurrently in the case filed by the State Bank of Patiala which transaction is also independent of any loan or financial assistance between the State Financial Corporation and the borrowing companies. Ordered accordingly. [Para 17] [627-G-H; 628-E-H; 629-A-C]

1.4. It is made clear that the direction regarding concurrent running of sentence shall be limited to the substantive sentence only. The sentence which the appellant has been directed to undergo in default of payment of fine/compensation shall not be affected by this direction, because the provisions of s. 427 of the Cr.P.C. do not, permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/compensation. [Para 17] [629-B-D]

Case Law Reference:

2009 (3) SCR 1175	referred to	para 7
2007 Crl.L.J. 612	referred to	para 10
1996 Crl.L.J. 1296	referred to	para 11
1974 Crl. L.J. 1397	referred to	para 12
1988 (2) Suppl. SCR 747	referred to	para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 836-851 of 2013.

From the Judgment and Order dated 07.08.2009 of the High Court of Punjab and Haryana at Chandigarh in Crl. Revision Nos. 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543 of 2009, order dated 11.08.2009 in Crl. Revision Nos. 2081, 2082, 2083 & 2084 of 2009, order dated 15.11.2010 in Crl. Revisions Nos. 241, 242 & 299 of 2009 and order dated 30.04.2009 in Crl. Misc. No. 11367 of 2009.

D.N. Ray, Subodh Patil, Sumita Ray for the Appellant.

Jitendra Kumar, Dushyant Parashar, Surya Kant, Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

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

2. The short question that falls for determination in these appeals by special leave is whether the High Court was right in declining the prayer made by the appellant for a direction in terms of Section 427 read with Section 482 of the Code of Criminal Procedure for the sentences awarded to the appellant in connection with the cases under Section 138 of the Negotiable Instruments Act filed against him to run concurrently.

3. The material facts are not in dispute. The appellant is a Director in a group of companies including Arawali Tubes Ltd., Arawali Alloys Ltd., Arawali Pipes Ltd. and Sabhyata Plastics Pvt. Ltd. The appellant's case before us in that in connection with his business conducted in the name of the above companies, he had approached the respondent, Haryana Financial Corporation for financial assistance and facilities. The Corporation had accepted the requests made by the Companies and granted financial assistance to the first three of the four companies mentioned above. Several cheques towards repayment of the amount borrowed by the appellant in

the name of the above companies were issued in favour of the Haryana Financial Corporation which on presentation were dishonoured by the banks concerned for insufficiency of funds. Consequently, the Corporation instituted complaints under Section 138 of the Negotiable Instruments Act against the appellant in his capacity as the Director of the borrowing companies. These complaints were tried by Judicial Magistrates at Hissar culminating in the conviction of the appellant and sentence of imprisonment which ranged between 6 months in some cases to one year in some others besides imposition of different amounts of fine levied in each complaint case and a default sentence in the event of non payment of amount awarded in each one of those cases.

4. Aggrieved by his conviction and the sentence in the cases filed against him the appellant preferred appeals which were heard and dismissed by the Additional Sessions Judge, Hissar in terms of separate orders passed in each case. In some of the cases the Appellate Court reduced the sentence from one year to nine months.

5. The appellant then approached the High Court by way of revision petitions. The High Court dismissed 15 out of 17 revisions petitions in which the appellant was convicted. The remaining two revision petitions are still pending before the High Court. The High Court noticed that the appellant had not questioned the correctness of the conviction before the appellate Court which disentitled him to do so in revision. That position was, it appears, not disputed even by the appellant, the only contention urged before the High Court being that instead of the sentences awarded to him running consecutively they ought to run concurrently. That contention was turned down by the High Court holding that the sentence of imprisonment awarded to the appellant was not excessive so as to warrant its reduction or a direction for concurrent running of the same. The High Court noted:

"As regards sentence, keeping in view the amount of

cheques, sentence of simple imprisonment for six months in each case cannot be said to be excessive so as warrant reduction or direction for concurrent running of the sentences in all the 8 cases. Even sentence in default of payment of fine, which is huge amount, also cannot be said to be excessive".

6. The revision petitions filed by the appellant along with the criminal miscellaneous applications moved under Section 482 of the Cr.P.C. were accordingly dismissed. The present appeals assail the correctness of the orders passed by the High Court which are no doubt separate but in similar terms.

7. Learned counsel appearing for the appellant strenuously argued that the High Court has committed an error in declining the prayer made by the appellant for an appropriate direction to the effect that the sentences awarded to the appellant in the cases in which he was found guilty ought to run concurrently and not consecutively. It was urged that the trial Court and so also the appellate and the revisional Courts were competent to direct that the sentences awarded to the appellant should run concurrently. The power vested in them to issue such a direction has not been properly exercised, contended the learned counsel. Reliance in support was placed upon the decision of this Court in *State of Punjab v. Madan Lal* (2009) 5 SCC 238.

8. Section 427 of the Code of Criminal Procedure deals with situations where an offender who is already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life. It provides that such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. Section 427 may at this stage be extracted:

"427. Sentence on offender already sentenced for another offence - (1) when an person already undergoing

sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.

Provided that where a person who has been sentenced to imprisonment by an order under Section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

9. That upon a subsequent conviction the imprisonment or imprisonment for life shall commence at the expiration of the imprisonment which has been previously awarded is manifest from a plain reading of the above. The only contingency in which this position will not hold good is where the Court directs otherwise. Proviso to sub-section (1) to Section 427 is not for the present relevant as the same deals with cases where the person concerned is sentenced to imprisonment by an order under Section 122 in default of furnishing security which is not the position in the case at hand. Similarly sub-section (2) to Section 427 deals with situations where a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life. Sub-section (2) provides that the subsequent sentence shall in such a case run concurrently with such previous sentence.

10. We are in the case at hand concerned more with the nature of power available to the Court under Section 427(1) of the Code, which in our opinion stipulates a general rule to be followed except in three situations, one falling under the proviso to sub-section (1) to Section 427, the second falling under sub-section (2) thereof and the third where the Court directs that the sentences shall run concurrently. It is manifest from Section 427(1) that the Court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the Court the discretionary power shall have to be exercised along judicial lines and not in a mechanical, wooden or pedantic manner. It is difficult to lay down any strait jacket approach in the matter of exercise of such discretion by the Courts. There is no cut and dried formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section 427(1). Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence or offences committed, and the fact situation in which the question of concurrent running of the sentences arises. High Courts in this country have, therefore, invoked and exercised their discretion to issue directions for concurrent running of sentence as much as they have declined such benefit to the prisoners. For instance a direction for concurrent running of the sentence has been declined by the Gujarat High Court in *Sumlo @ Sumla Himla Bhuriya and Ors. v. State of Gujarat and Ors.* 2007 Crl.L.J. 612 that related to commission of offences at three different places resulting in three different prosecutions before three different Courts. The High Court observed:

> "The rule of 'single transaction' even if stretched to any extent will not bring the cases aforesaid under the umbrella of 'single transaction' rule and therefore, this application fails. The application is rejected."

11. Similarly a direction for concurrent running of sentence has been declined by the same High Court in *State of Gujarat*

v. Zaverbhai Kababhai 1996 Crl.L.J. 1296 which related to an offence of rape committed at different places resulting in conviction in each one of those offences in different prosecutions. The High Court observed:

> "….It is true that it is left to the discretion of the Court while ordering the sentence to run either consecutively or concurrently. However, such discretion has to be exercised judicially, having regard to the facts and circumstances of the case. As observed by the Supreme Court, the rule with regard to sentencing concurrently will have no application, if the transaction relating to offence is not the same and the facts constituting the two offences are quite different. The respondent-accused is found to be guilty for the offence punishable under Section 376 of the Indian Penal Code in two different and distinct occurrences on two different dates, and the transactions relating to the commission of the offences have no nexus with each other…

12. There are also cases where the High Courts have depending upon whether facts forming the basis of prosecution arise out of a single transaction or transactions that are akin to each other directed that the sentences awarded should run concurrently. As for instance the High Court of Allahabad has in *Mulaim Singh v. State* 1974 Crl. L.J. 1397 directed the sentence to run concurrently since the nature of the offence and the transactions thereto were akin to each other. Suffice it to say that the discretion vested in the Court for a direction in terms of Section 427 can and ought to be exercised having regard to the nature of the offence committed and the facts situation, in which the question arises.

13. We may at this stage refer to the decision of this Court in *Mohd. Akhtar Hussain v. Assistant Collector of Customs* (1988) 4 SCC 183 in which this Court recognised the basic rule of convictions arising out of a single transaction justifying

concurrent running of the sentences. The following passage is in this regard apposite:

> "The basic rule of thumb over the years has been the so called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different."

14. In. *Madan Lal's* case (supra) this Court relied upon the decision in *Akhtar Hussain's* case (supra) and affirmed the direction of the High Court for the sentences to run concurrently. That too was a case under Section 138 of the Negotiable Instruments Act. The State was aggrieved of the direction that the sentences shall run concurrently and had appealed to this Court against the same. This Court, however, declined interference with the order passed by the High Court and upheld the direction issued by the High Court.

15. In conclusion, we may say that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor.

16. Applying the above test to the 15 cases at hand we find that the cases against the appellant fall in three distinct categories. The transactions forming the basis of the prosecution relate to three different corporate entities who had either entered into loan transactions with the State Financial Corporation or taken some other financial benefit like purchase of a cheque from the appellant that was on presentation dishonoured. The 15 cases that have culminated in the

conviction of the appellant and the award of sentences of imprisonment and fine imposed upon him may be categorised as under:

1) Cases in which complainant-Haryana State Financial Corporation advanced a loan/banking facility to M/s Arawali Tubes Ltd. acting through the appellant as its Director viz. No.269-II/97; No.549-II/97; No.393-II/97; No.371-II/97; No.372-II/97; No.373-II/97; No.877-II/96; No.880-II/96; No.878-II/96; No.876-II/96; No.879-II/96; No.485-II/96

2) Cases in which complainant-Haryana State Financial Corporation advanced a loan/banking facility to the appellant to M/s Arawali Alloys Ltd. acting through the appellant as its Director viz. No.156-II/1997 and No.396-II/1998

3) Criminal complaint No. 331-II/97 in which complainant- State Bank of Patiala purchased/ discounted the cheque offered by Sabhyata Plastics acting through the appellant as its Director.

17. Applying the principle of single transaction referred to above to the above fact situations we are of the view that each one of the loan transactions/financial arrangements was a separate and distinct transaction between the complainant on the one hand and the borrowing company/appellant on the other. If different cheques which are subsequently dishonoured on presentation, are issued by the borrowing company acting through the appellant, the same could be said to be arising out of a single loan transaction so as to justify a direction for concurrent running of the sentences awarded in relation to dishonour of cheques relevant to each such transaction. That being so, the substantive sentence awarded to the appellant in each case relevant to the transactions with each company referred to above ought to run concurrently. We, however, see no reason to extend that concession to transactions in which

the borrowing company is different no matter the appellant before us is the promoter/Director of the said other companies also. Similarly we see no reason to direct running of the sentence concurrently in the case filed by the State Bank of Patiala against M/s Sabhyata Plastics and M/s Rahul Plastics which transaction is also independent of any loan or financial assistance between the State Financial Corporation and the borrowing companies. We make it clear that the direction regarding concurrent running of sentence shall be limited to the substantive sentence only. The sentence which the appellant has been directed to undergo in default of payment of fine/ compensation shall not be affected by this direction. We do so because the provisions of Section 427 of the Cr.P.C. do not, in our opinion, permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/compensation.

18. In the result, these appeals succeed but only in part and to the following extent:

1) Substantive sentences awarded to the appellant by the Courts of Judicial Magistrate, First Class, Hissar and Additional Chief Judicial Magistrate, Hissar, in Criminal complaint cases No.269-II/97; No.549-II/97; No.393-II/97; No.371-II/97; No.372-II/97; No.373-II/97; No.877-II/96; No.880-II/96; No.878-II/96; No.876-II/96; No.879-II/96; No.485-II/96 relevant to the loan transaction between Haryana Financial Corporation and Arawali Tubes shall run concurrently.

2) Substantive sentences awarded to the appellant by the Court of Judicial Magistrate, First Class, Hissar in Criminal complaint cases No.156-II/1997 and No.396-II/1998 between Haryana Financial Corporation and Arawali Alloys relevant to the transactions shall also run concurrently;

3) Substantive sentences inter se by the Court of Judicial Magistrate, First Class, Hissar in the above two categories and that awarded in complaint case No.331-II/97 shall run consecutively in terms of Section 427 of the Code of Criminal Procedure.

4) No costs.

R.P. Appeals partly allowed.

RAMANLAL DEOCHAND SHAH
v.
THE STATE OF MAHARASHTRA & ANR.
(Civil Appeal No. 5160 of 2013)

JULY 5, 2013

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

LAND ACQUISITION ACT, 1894:

s.18 – Reference to civil court – Scope of – Held: A reference to civil court is not in the nature of an appeal where appellate forum takes a view based on the evidence before the forum below – In a reference, on the question of adequacy of compensation determined by the Collector, the burden to prove that his award does not correctly determine the amount of compensation and that it needs enhancement is upon the landowner – To that extent the claimant is in the position of a plaintiff before the court – In the absence of any evidence to prove that the amount awarded by Collector does not represent the true market value of the property as on the date of the preliminary notification, the reference court will not be justified in granting any enhancement – Order of reference court set aside and matter remitted to it for disposal afresh after giving opportunity to landowners to lead evidence in support of their claim – Evidence.

EVIDENCE:

Documentary evidence – Held: The documents that have not been relied upon before the court by defendant cannot be referred to or treated as evidence without proper proof of contents thereof.

The lands of the appellants in C. A. No. 5160 of 2013

were compulsorily acquired for setting up of a Polytechnic Engineering College. The Land Acquisition Officer awarded compensation @ Rs. 26.25 sq. mtr. and the reference court enhanced in to Rs. 85 pr. sq. mtr. However, the High Court set aside the order passed by the reference court holding that the enhancement was not justified in the absence of any evidence to show that the market value of the property in question was higher than what was assessed by the Special Land Acquisition Officer.

Allowing the appeals in part, the Court

HELD: 1.1. A reference to a civil court is not in the nature of an appeal where the appellate forum takes a view based on the evidence before the forum below. In a reference u/s 18 of the Land Acquisition Act, 1894, on the question of adequacy of compensation determined by the Collector, the burden to prove that his award does not correctly determine the amount of compensation is upon the landowner. It is for the claimant to prove that the amount awarded by the Collector needs enhancement by adducing evidence, whether oral or documentary which the reference court would evaluate having regard to the provisions of ss. 23 and 24 of the Land Acquisition Act. To that extent the claimant is in the position of a plaintiff before the court. In the absence of any evidence to prove that the amount of award by the Collector does not represent the true market value of the property as on the date of the preliminary notification, the reference court will not be justified in granting any enhancement. [para 7] [637-B-F]

Chimanlal Hargovinddas v. Spcl. Land Acquisition Officer & Anr. **1988 (1) Suppl. SCR 531= (1988) 3 SCC 75;** *Spcl. Land Acquisition Officer & Anr. etc. etc. v. Siddappa Omanna Tumari & Ors. etc.* **1994 (5) Suppl. SCR 207 =1995**

Supp (2) SCC 168*;* *Major Pakhar Singh Atwal and Ors. v. State of Punjab and Ors.* **1995 (1) SCR 535 = 1995 Supp (2) SCC 401 – relied on.**

1.2. The landowners-appellants in the instant case, did not lead any evidence in support of their claim before the reference court. The High Court was, in that view, justified in holding that the enhancement granted in the absence of any evidence was unjustified. [para 10] [642-C, E]

1.3. While it is true that the plaintiff can always place reliance upon the evidence that may be adduced by a defendant in a suit to the extent the same helps the plaintiff, but the documents that have not been relied upon before the court by the defendants cannot be referred to or treated as evidence without proper proof of the contents thereof. In the instant case, the defendants-respondents did not produce any documents before the reference court in support of its case. Even if the documents had been produced by the defendants, unless the same were either admitted by the plaintiff or properly proved and exhibited at the trial, the same could not by themselves constitute evidence except where such documents were public documents admissible by themselves under any provision. Sale Deeds executed between third parties do not qualify for such admission. Merely because some documents were referred to in the Draft Award by the Collector, did not make the said documents admissible by themselves to enable the claimants to refer to or rely upon the same in support of a possible enhancement. Therefore, they were not entitled to claim any enhancement. [para 11, 12] [642-G-H; 643-A-B; C-D, F-G]

2.1. The failure or the omission to lead evidence to prove the claim appears to be a case of some kind of misconception about the legal requirement as to evidence needed to prove cases of enhancement of compensation.

In that view, there is no reason to deny another opportunity to the landowners to prove their cases by adducing evidence in support of their claim for enhancement. Since, however, this opportunity is being granted *ex debito justitiae,* it is directed that if the reference court eventually comes to the conclusion that a higher amount was due and payable to the appellant-owners, such higher amount including solatium due thereon would not earn interest for the period between the date of the judgment of the reference court and the date of this order. [para 14] [644-F-H; 645-A]

2.2. The judgments and orders impugned are modified to the extent that while the enhancement order of the reference court shall stand set aside, the matters shall stand remanded to the reference court for disposal afresh in accordance with law after giving to the landowners opportunity to lead evidence in support of their claims for higher compensation. [para 14] [645-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5160 of 2013.

From the Judgment and Order dated 14.06.2011 of the High Court of Judicature at Bombay in First Appeal No. 179 of 1992.

WITH

C.A. No. 5161 of 2013.

Siddharth Bhatnagar, T. Mahipal for the Appellant.

Shankar Chillarge, AGA, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals arise out of two separate but similar

orders dated 14th June, 2011 and 16th March, 2011 passed by the High Court of Judicature at Bombay whereby First Appeal Nos.179 of 1992 and 751 of 1992 filed by the respondent-State of Maharashtra have been allowed and the judgment and order passed by the Reference Court enhancing the amount of compensation payable to the appellants-land owners to Rs.85/- per square meter set aside.

3. In SLP (C) No.354 of 2012 the appellants prayed for enhancement of compensation payable towards compulsory acquisition of plots no.33, 34, 45 and 46 measuring 1366 square meters each, situated at village Saidapur, Taluq-Karad, District Satara, Maharashtra. The public purpose underlying the acquisition was the setting up of a Polytechnic Engineering College at Karad. The appellant-land owners claimed compensation @ Rs.25/- per sq. ft. The Special Land Acquisition Officer, Satara, however, made an Award dated 14th March, 1988 determining the compensation @ Rs.26.25 per sq. mtr. only. Dissatisfied with the award made by the Collector the appellant-land owners got the matter referred to the Civil Court for determination of the market value of the land under Section 18 of the Land Acquisition Act besides solatium and interest payable on the same. A similar reference was also made in SLP (C) No.395 of 2012 for plot no. 47 admeasuring 1366 sq. mtrs. of the same village.

4. The claim made by the appellant-land owners was contested by the respondent-State giving rise to the following issues in Reference No.12 of 1988 relevant to SLP (C) No.354 of 2012:

(i) Is the claimant entitled to Rs.9,27,064/- in addition to Rs.2,31,716/- from the opponent-referee by way of compensation as claimed?

(ii) Is the claimant entitled for interest at the rate of 15% p.a. on the amount of compensation as claimed?

(iii) Is the claimant entitled to solatium as claimed?

(iv) What order?

5. Similar issues were framed in the connected Reference No.4 of 1988 relevant to SLP (C) No.395 of 2012, save and except that the total amount claimed in the same was lower having regard to the lesser number of plots acquired in that case.

6. The Reference Court answered the issues in favour of the appellants and enhanced the compensation payable to them to Rs.85/- per sq. mtr. besides interest at the stipulated rates by similar but separate Awards both dated 31st January, 1991. While doing so, the Reference Court relied entirely upon certain observations made by Special Land Acquisition Officer and the Draft Award prepared by him. The Reference Court held that from the discussion contained in the Draft Award it was not clear as to how the Special Land Acquisition Officer had awarded compensation @ Rs.26.25 per sq. mtr. Relying upon the discussion in the Draft Award and taking advantage of an apparent conflict between the discussion contained therein and the amount actually awarded by the Special Land Acquisition Officer the Reference Court enhanced the compensation to Rs.85/- per sq. mtr. as already noticed above. The High Court has, in the appeals filed by the State Government against the enhancement of compensation, reversed the view taken by the Reference Court on the ground that the enhancement was not justified in the absence of any evidence to show that the market value of the property in question was higher than what was awarded by the Special Land Acquisition Officer. The High Court declared that claimants were in the position of plaintiffs and the burden to prove that the amount of compensation awarded by the Special Land Acquisition Officer was not adequate lay upon them. It was only if that burden was satisfactorily discharged by cogent and reliable evidence that the Reference Court could direct enhancement. No such evidence having been adduced by the landowners, the High

Court set aside the order passed by the Reference Court and answered the reference in the negative thereby dismissing the claim made by the landowners.

7. We have heard learned counsel for the parties at some length. It is trite that in a reference under Section 18 of the Land Acquisition Act on the question of adequacy of compensation determined by the collector, the burden to prove that the collector's award does not correctly determine the amount of compensation payable to the landowner is upon the owner concerned. It is for the claimant to prove that the amount awarded by the Collector needs enhancement, and if so, to what extent. The claimant can do so by adducing evidence, whether oral or documentary which the Reference Court would evaluate having regard to the provisions of Sections 23 and 24 of the Land Acquisition Act while determining the compensation payable to the owners. To that extent the claimant is in the position of a plaintiff before the Court. In the absence of any evidence to prove that the amount of award by the Collector does not represent the true market value of the property as on the date of the preliminary notification, the Reference Court will be helpless and will not be justified in granting any enhancement. The Court cannot go by surmises and conjectures while answering the reference nor can it assume the role of an Appellate Court and enhance the amount awarded by reappraising the material that was collected and considered by the Collector. What is important to remember is that a reference to a Civil Court is not in the nature of an appeal from one forum to the other where the appellate forum takes a view based on the evidence before the forum below. The legal position is settled by the decisions of this Court to which we may at this stage refer. In *Chimanlal Hargovinddas v. Spcl. Land Acquisition Officer & Anr.* (1988) 3 SCC 751, the controversy related to a correct valuation of a piece of land that was under acquisition. This Court found that the Reference Court had virtually treated the award to be a judgment under appeal hence fallen in error on the fundamental question of the

approach to be adopted while answering a reference. The Court observed:

(1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the court cannot take into account the material relied upon by the Land Acquisition Officer in his award unless the same material is produced and proved before the court.

(2) So also the award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the court unless produced and proved before it. It is not the function of the court to sit in appeal against the award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate court.

(3) The court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in court. Of course the materials placed and proved by the other side can also be taken into account for this purpose."

(emphasis supplied)

8. In the *Spcl. Land Acquisition Officer & Anr. etc. etc. v. Siddappa Omanna Tumari & Ors. etc.,* 1995 Supp (2) SCC

168, a three Judge Bench was dealing with a case where the question that fell for determination was whether it was open to a Reference Court to determine the amount of compensation exceeding the amount of compensation determined in the award without recording a finding on consideration of the relevant material therein, that the amount of compensation determined in the award under Section 11 was inadequate. Answering the question this Court considered the entire legislative scheme underlying the Act and clarified that a claimant was in the position of a plaintiff on whom lay the burden of proving his case that the compensation awarded by the Collector was inadequate. The following passage in this regard is apposite:

> "When the Collector makes the reference to the Court, he is enjoined by Section 19 to state the grounds on which he had determined the amount of compensation if the objection raised as to the acceptance of award of the Collector under Section 11 by the claimant was as regards the amount of compensation awarded for the land thereunder. The Collector has to state the grounds on which he had determined the amount of compensation where the objection raised by the claimant in his application for reference under Section 18 was as to inadequacy of compensation allowed by the award under Section 11, as required by Sub-section (2) of Section 18 itself. Therefore, the legislative scheme contained in Sections 12, 18 and 19 while on the one hand entitles the claimant not to accept the award made under Section 11 as to the amount of compensation determined as payable for his acquired land and seek a reference to the court for determination of the amount of compensation payable for his land, on the other hand requires him to make good before the Court the objection raised by him as regards the inadequacy of the amount of compensation allowed for his land under the award made under Section 11, with a view to enable the Court to determine the amount of compensation exceeding

> the amount of compensation allowed by the award under Section 11, be it by reference to the improbabilities inherent in the award itself or on the evidence aliunde adduced by him to that effect. **That is why, the position of a claimant in a reference before the Court, is considered to be that of the +plaintiff in a suit requiring him to discharge the initial burden of proving that the amount of compensation determined in the award under Section 11 was inadequate,** the same having not been determined on the basis of relevant material and by application of correct principles of valuation, either with reference to the contents of the award itself or with reference to other evidence aliunde adduced before the Court. Therefore, if the initial burden of proving the amount of compensation allowed in the award of the Collector was inadequate, is not discharged, the award of the Collector which is made final and conclusive evidence under Section 12, as regards matters contained therein will stand unaffected. But if the claimant succeeds in proving that the amount determined under the award of the Collector was inadequate, the burden of proving the correctness of the award shifts on to the Collector who has to adduce sufficient evidence in that behalf to sustain such award. Hence, the Court which is required to decide the reference made to it under Section 18 of the Act, cannot determine the amount of compensation payable to the claimant for his land exceeding the amount determined in the award of the Collector made under Section 11 for the same land, unless it gets over the finality and conclusive evidentiary value attributed to it under Section 12, by recording a finding on consideration of relevant material therein that the amount of compensation determined under the award was inadequate for the reasons that weighed with it."
>
> (emphasis supplied)

9. In *Major Pakhar Singh Atwal and Ors. v. State of Punjab and Ors.,* 1995 Supp (2) SCC 401 also this Court reiterated the position that a reference under section 18 of the Land Acquisition Act is not an appeal against the award of the LAO. It merely is an offer. The proceeding before the Reference Court is of such nature that it places the claimant in the position of a plaintiff and the Reference Court is akin to a court of original jurisdiction. The Court observed:

"… … It is now settled law that the award is an offer and whatever amount was determined by the Collector is an offer and binds the Improvement Trust. However, the Collector also is required to collect the relevant material and award compensation on the basis of settled principles of determination of the market value of an acquired land. The Improvement Trust, therefore, cannot go behind the award made by the Collector. Reference is not an appeal. It is an original proceeding. It is for the claimants to seek the determination of proper compensation by producing sale deeds and examining the vendors or the vendees as to passing of consideration among them, the nearness of the lands sold to the acquired lands, similarly of the lands sold and acquired and also by adduction of other relevant and acceptable evidence. In this case, for the Court under Section 18 of the Act, the Tribunal is constituted. Therefore, if the claimants intend to seek higher compensation to the acquired land, the burden is on them to establish by proof that the compensation granted by the Land Acquisition Officer is inadequate and they are entitled to higher compensation. That could be established only by adduction of evidence of the comparable sale transactions of the land acquired or the lands in the neighbourhood possessed of similar potentiality or advantages. … … … No doubt, in the award itself, the Land Acquisition Officer referred to the sale transactions. Since the Land Acquisition Officer is an authority under the Act, he collected the evidence to determine the compensation as an offer. Though that award may be a material evidence to be looked into, but the sale transactions referred to therein cannot be relied upon implicitly, if the party seeking enhancement resists the claim by adducing evidence independently before the Court or the Tribunal. In this case, since no steps were taken to place the sale transaction referred in the award, they cannot be evidence. So they can neither be relied upon nor can be looked into as evidence." (emphasis supplied)

10. It is not in dispute that the landowners, appellants before us, did not lead any evidence in support of their claim before the Reference Court to prove that the market value of the land acquired from the ownership was more than what was awarded as compensation by the Collector. Neither the order passed by the Reference Court nor that passed by the High Court make any reference to such evidence. Absence of any such evidence was, therefore, bound to go against the appellants. So long as the appellants failed to discharge the burden cast on them, there was no question of the Reference Court granting any enhancement. The High Court was, in that view, justified in holding that the enhancement granted in the absence of any evidence was unjustified.

11. It was argued by learned counsel for the appellants that although no evidence was adduced by the claimants to prove that the market value of the acquired land was higher than what was awarded by the Land Acquisition Collector, the claimants could rely on the documents produced by the respondent-State before the Collector. If that be so, the Sale Deeds to which the Draft Award made a reference, could be referred to and relied upon. There is, in our opinion, no merit in that contention. While it is true that the claimant can always place reliance upon the evidence that may be adduced by a defendant in a suit to the extent the same helps the plaintiff, but the documents that have not been relied upon before the Court by the defendants cannot be referred to or treated as evidence without proper proof of

the contents thereof. In the present case the defendants-respondents did not produce any documents before the Reference Court in support of its case. There was indeed no occasion for them to do so in the absence of affirmative evidence from the claimants. We specifically asked learned counsel for the respondents whether copies of any Sale Deeds had been produced by the defendants before the Reference Court. The answer was in the negative. That being so, it is difficult to appreciate how the appellants could have referred to a document not produced or relied upon by the defendants before the Reference Court. Even if the documents had been produced by the defendants, unless the same were either admitted by the plaintiff or properly proved and exhibited at the trial, the same could not by themselves constitute evidence except where such documents were public documents admissible by themselves under any provision. Sale Deeds executed between third parties do not qualify for such admission. The same had, therefore, to be formally proved unless the opposite party admitted the execution and contents, thereby, in which event no proof may have been necessary for what is admitted, need not be proved.

12. Suffice it to say that in the facts and circumstances of the present case no evidence having been adduced by the defendants-respondents, whether documentary or otherwise, there was no question of the appellant relying upon such non-existent evidence. Merely because some documents were referred to in the Draft Award by the Collector, did not make the said documents admissible by them to enable the plaintiffs to refer to or rely upon the same in support of a possible enhancement. If a document upon which the plaintiffs placed reliance was available, there was no reason why the same should not have been produced or relied upon. Inasmuch as no such attempt was made by the plaintiffs, they were not entitled to claim any enhancement.

13. The next question then is whether the appellants-

landowners can be given another opportunity to adduce evidence at this stage and if so on what terms. The Reference Court, it is noteworthy, was of the opinion that the Special Land Acquisition Officer had in the cases at hand relied upon two sale deeds to record a finding that the true market price of the land under acquisition was Rs.85/- per square meter. Having said that the S.L.A.O had for no reason awarded an amount of Rs.26.25 per square meter only. This was according to the Reference Court inexplicable. The Reference Court observed:

> "According to the S.L.A.O. the said rate is fair and reasonable but actually he has not awarded the compensation accordingly. He has awarded it at the rate of Rs.26.25 ps. per sq. mtrs. This abstruse to understand as to how the S.L.A.O has awarded the compensation accordingly, when he had already arrived at the conclusion in respect of reasonable rate of the compensation. Considering all these things, I hold that the compensation ought to have been awarded at least at the rate of Rs.85/- per sq. mtrs. for the lands under acquisition. For the same reason, I also hold that the claimant is entitled for compensation at the rate of Rs.85/- per sq. mtrs. for the lands under acquisition."

14. The failure or the omission to lead evidence to prove the claim appears in the above context to be a case of some kind of misconception about the legal requirement as to evidence needed to prove cases of enhancement of compensation. We do not in that view see any reason to deny another opportunity to the landowners to prove their cases by adducing evidence in support of their claim for enhancement. Since, however, this opportunity is being granted ex debito justitiae, we deem it fit to direct that if the Reference Court eventually comes to the conclusion that a higher amount was due and payable to the appellant-owners, such higher amount including solatium due thereon would not earn interest for the period between the date of the judgment of the Reference Court

and the date of this order. These appeals are with that direction allowed, the judgments and orders impugned in the same modified to the extent that while the enhancement order by the Reference Court shall stand set aside, the matters shall stand remanded to the Reference Court for a fresh disposal in accordance with law after giving to the landowners opportunity to lead evidence in support of their claims for higher compensation. No costs.

R.P. Appeals partly allowed.

DILIP SUDHAKAR PENDSE & ANR.

v.

CENTRAL BUREAU OF INVESTIGATION

(Criminal Appeal No. 966 of 2013)

JULY 16, 2013

[H.L. GOKHALE AND MADAN B.LOKUR, JJ.]

Code of Criminal Procedure, 1973:

s.306(5)(b) – Tender of pardon to accomplice and committal of case to Court of Session – Offences punishable u/ss 420, 468, 471 and 477-A read with s.120-B IPC – Additional Chief Metropolitan Magistrate granting pardon to one of accused on his turning approver, and committing the case to Court of Session – Held: Charges leveled against appellants are all triable by Magistrate's Court, and cognizance is taken by Additional Chief Metropolitan Magistrate and not by Chief Metropolitan Magistrate – Further, it was also not an offence triable by Special Judge under Criminal Law Amendment Act, 1952 — It was, thus, a case falling in the category of 'any other case' under sub-s. (5)(b) of s.306 CrPC and had to be made over to Chief metropolitan Magistrate for trial – Order of High Court directing the case to be tried by Court of Session is set aside – Proceedings will stand restored to file of Chief Metropolitan Magistrate who shall proceed with trial — As regards cancellation of order granting pardon, it would be for appellants to apply before the Magistrate concerned.

A charge-sheet against the appellants and others for offences punishable u/ss 420, 468, 471 and 477-A read with s.120-B IPC, was filed in the Court of Addl. Chief Metropolitan Magistrate. One of the accused turned approver and the Magistrate by order dated 10.9.2008, granted him pardon and committed the case to the Court

of Session for trial. The Sessions Judge held that the offences were not exclusively triable by the Court of Session, and sent the case to Chief Metropolitan Magistrate for trial. However, the High Court, in the writ petition, directed the matter to be tried by the Court of Session.

Allowing the appeal, the Court

HELD: 1.1. In the instant case, the offences were triable by the Magistrate's Court and not exclusively triable by the Court of Session: and the Magistrate taking cognizance was Additional Chief Metropolitan Magistrate and not the Chief Metropolitan Magistrate. It was also not an offence triable by the Special Judge under the Criminal Law Amendment Act, 1952. That being so, it was a case falling in the category of 'any other case' under sub-s. (5)(b) of s.306 CrPC and, therefore, had to be made over to the Chief Metropolitan Magistrate for trial. Therefore, the order passed by the High Court is set aside. The proceeding will now stand restored to the file of Chief Metropolitan Magistrate who shall proceed with the trial. [para 10, 12 and 13] [652-D-F; 653-B-D]

1.2 As regards cancellation of order granting pardon, it would be for the appellants to apply before the Magistrate and it is for him to take appropriate decision if any such application is filed. [para 14] [653-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 966 of 2013.

From the Judgment & Order dated 7.7.2011 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 1737 of 2009.

P.R. Namjoshi, Vivek Gore, Shankar Narayanan, Gaurav Agrawal for the Appellants.

Rakesh K. Khanna, Priyanka Gupta, Prakriti Purnima, H. Prabhakar, B.V. Balram Das, Rajiv Nanda, Arvind Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

PER GOKHALE, J. Leave granted.

1. Heard Mr. P.R. Namjoshi, learned counsel appearing for the appellants and Mr. Rakesh K. Khanna, learned Additional Solicitor General appearing on behalf of the respondent.

2. The appellants seek to challenge the order passed by the Bombay High Court allowing the Criminal Writ Petition filed by the respondent-C.B.I. The C.B.I. had sought to challenge the order passed by the Special Judge, C.B.I., Greater Mumbai, which had allowed the Miscellaneous Application filed by the appellants and set aside the order passed by the Additional Chief Metropolitan Magistrate.

3. The facts leading to this appeal are as under:

The appellants herein along with one Rajendraprasad K. Jhunjhunwala and others are being prosecuted for the alleged offences punishable under Sections 420, 468, 471 and 477-A read with Section 120-B of I.P.C. A charge-sheet has been filed by the C.B.I. against the appellants and the said Jhunjhunwala and others in the Additional Chief Metropolitan Magistrate's 19th Court, Esplanade, Mumbai, which has been numbered as CC No. 113/CPW/2006. It so transpired that during the course of that proceeding the aforesaid Jhunjhunwala turned approver, and his statement was recorded by the Economic Offence wing of C.B.I. under Section 306(4) of the Code of Criminal Procedure ('Cr.P.C.' for short) for grant of pardon. The C.B.I. moved an application dated 7.8.2008 for recording his statement before the learned Additional Chief Metropolitan Magistrate, and the learned Magistrate passed order on

10.9.2008 granting him pardon. The learned Magistrate has thereafter passed an order committing the proceeding to the Court of Sessions for trial. The operative order of the learned Magistrate dated 10.11.2008 reads as follows:

> "1. The case is committed to the Hon'ble Court of Sessions for trial as provided under Section 306(4) of the Cr.P.C."

4. This order of the Learned Magistrate was challenged by the appellants by filing a Miscellaneous application in the Special Case No.783 of 2008 before the Court of Special Judge, C.B.I., Greater Mumbai.

5. The Learned Sessions Judge allowed that application by the order dated 7.3.2009. As seen from paragraph 2 of that order, it was contended before the learned Sessions Judge that the Additional Chief Metropolitan Magistrate cannot impose jurisdiction on the superior Court. The alleged offences against the appellants are triable before a Metropolitan Magistrate, and the Sessions Court had no jurisdiction to try or entertain and decide the said offences. This submission came to be accepted by the learned Sessions Judge. It is specifically stated in paragraph 8 of his order that admittedly the offences alleged against the appellants-accused were not exclusively triable by the Court of Sessions, and therefore the matter was required to be transferred back to the Court of Chief Metropolitan Magistrate for disposal in accordance with law. Learned Sessions Judge, therefore, allowed that Miscellaneous application and directed his Registrar to send the papers of the Special case No. 783 of 2008 to Chief Metropolitan Magistrate for trial in accordance with law.

6. This order of the Court of Sessions was challenged by the respondent in the High Court of Bombay by filing Crl.W.P. No. 1737 of 2009 and a Learned Single Judge of the High Court has allowed that writ petition by his order dated 7.7.2011. It was held that the order passed by the Additional

Chief Metropolitan Magistrate was not an order of transfer, but was the order of committal to the Court of Sessions. The Learned Single Judge therefore allowed the petition in terms of prayer 'B' and 'C' whereby the matter would be now tried by the Court of Sessions.

7. Being aggrieved by this judgment and order the present Special Leave Petition (now converted into criminal Appeal) has been filed.

8. Learned counsel for the appellants Mr. Namjoshi has raised the issue of hierarchy of Courts. His principal submission has been that since the offences were triable by a Court of Magistrate, the prosecution thereof could not have been transferred to the Court of Sessions. Admittedly, the offences were not at all exclusively triable by the Court of Sessions. Section 306 of Cr.P.C. is relevant for our purpose. It reads as follows:-

> 306. Tender of pardon to Accomplice (1)With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.
>
> 2. This section applies to:-
>
> > (a) any offence triable exclusively by the Court of Session or by the Court of a Special judge appointed under the Criminal Law Amendment Act,

1952 (46 of 1952)

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

3. Every Magistrate who tenders a pardon under sub-section (1) shall record:-

(a) his reasons for so doing;

(b) Whether the tender was or was not accepted by the person to whom it was made,

4. Every person accepting a tender of pardon made under sub-section(1):-

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

5. Where a person has accepted a tender of pardon made under sub-section(1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case:-

(a) commit it for trial;

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952, (46 of 1952) if the offence is triable exclusively by that Court;

(b) In any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself."

9. Sub-section (5) thus lays down as to whom the case is to be committed for trial;

(i) If the case is exclusively triable by the Court of Sessions, or if the Magistrate taking cognizance is Chief Judicial Magistrate in which cases it is provided that those cases will be committed for trial to the Court of Session,

(ii) If the offence is exclusively triable by a Special Judge appointed under the Criminal Law Amendment Act, 1952, then to that Court and

(iii) In any other case to the Chief Judicial Magistrate.

10. In the present case, the offences were not exclusively triable by the Court of Sessions, and the Magistrate taking cognizance was not the Chief Judicial Magistrate. It was also not an offence triable by the Special Judge under the Criminal Law Amendment Act, 1952. That being so, it was a case falling in category of 'any other case' under sub-sectio (5)(b) and therefore had to be made over to the Chief Judicial Magistrate for trial.

11. It is, therefore, submitted that the High Court was in error in committing the case to the Court of Sessions. It was further submitted that even if the Court of Sessions framed the charges, the matter will again have to go back to the Chief Judicial Magistrate for the trial. That being so, the order of the High Court suffered a patent error of law.

12. Mr. Rakesh K. Khanna, learned Additional Solicitor General appearing for the respondent, on the other hand, contended that under sub-section 5(a)(i) two options were available. He submitted that the matter has to be committed to

the Court of Sessions undisputedly if the offence was triable exclusively by that Court. He, however, maintained that even if the matter was not exclusively triable by the Court of Sessions, it could still be committed to that Court, if the cognizance is taken by the Chief Metropolitan Magistrate. In the facts of the present case, the charges which are levelled against the appellants are all triable by the Magistrate's Court, and there is no dispute about that, the cognizance is taken by the Additional Chief Magistrate and not by the Chief Metropolitan Magistrate. That being so, it is not possible to accept this submission of Mr. Khanna.

13. In the circumstances, we allow this appeal, and set aside the order passed by the High Court. The proceeding will now stand restored to the file of Chief Metropolitan Magistrate who shall proceed with the trial.

14. Mr. Namjoshi submits that the appellants are aggrieved by the pardon granted to the aforesaid Jhunjhunwala, and they intend to apply for cancellation of that order. It would be for them to apply before the Magistrate and it is for the Magistrate concerned to take appropriate decision on such application.

15. The appeal is allowed accordingly.

R.P. Appeal allowed.

STATE OF MAHARASHTRA & ANR.

v.

INDIAN HOTEL & RESTAURANTS ASSN. & ORS.

(Civil Appeal No. 2705 of 2006)

JULY 16, 2013.

[ALTAMAS KABIR, CJI. AND SURINDER SINGH NIJJAR, J.]

BOMBAY POLICE ACT, 1951:

ss. 33A and 33B – Prohibition on bar dancing in State of Maharashtra – s.33-A prohibiting to hold performance of dance of any kind or type in any eating house, permit room or bear bar, but exempting the establishments covered u/s 33-B from any such restriction – Held: A distinction, the foundation of which is the classes of establishments and the classes/kind of persons, who frequent the establishments and those who own the establishments, cannot be supported under the Constitutional philosophy — The classification of establishments covered u/ss 33A and 33B would not satisfy the test of equality — The distinction is made on the grounds of "classes of establishments" or "classes of persons, who frequent the establishments" and not on the form of dance — ss. 33A and 33B introduce an invidious discrimination which cannot be justified under Art. 14 of the Constitution — Yet at the same time, both kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions – It would be more appropriate that the State Government re-examines the recommendations made by the Committee and the suggestions made in para 123 of the judgment to bring about measures which should ensure the safety and improve the working conditions of the persons working as bar girls — Constitution of India, 1950 — Arts. 14, 19(i)(a), 19(1)(g) and 21.

CONSTITUTION OF INDIA, 1950:

Art. 19(1)(g) read with Art. 14 – Prohibition on dance – s.33-A of Bombay Police Act prohibiting dance of any kind of type in any eating house, permit room or bear bar – Held: State has failed to establish that the restriction is reasonable or that it is in the interest of general public – Insertion of s.33-A in the Bombay Police Act has led to closure of a large number of establishments and unemployment of over seventy five thousand woman workers — The impugned legislation has proved to be totally counterproductive and being ultra vires Art.19(1)(g), cannot be sustained — Bombay Police Act, 1951 – ss. 33A — Convention on the Elimination of All Forms of Discrimination Against Women (CEADAW) – Doctrine of severability – Doctrine of reading down.

By amendment Act No. 35 of 2005, ss. 33-A and 33-B were introduced into the Bombay Police Act, 1951. By s.33-A, holding of a performance of dance, of any kind or type, in any eating house, permit room or beer bar was prohibited; and by ss.33-B it was provided that the prohibition laid by s.33-A would not apply to the holding of a dance performance in a drama theatre, cinema theatre and auditorium; or sports club or gymkhana, where entry is restricted to its members only, or a three starred or above hotel or in any other establishment or class of establishments, which, having regard to: (a) the tourism policy of the Central or State Government for promoting the tourism activities in the State; or (b) cultural activities, the State Government may, by special or general order, specify in this behalf. Further, violation of s.33-A(1) was made punishable with a sentence of imprisonment up to 3 years and a fine of Rs. 2 lacs. This led to closure of a large number of establishments and loss of employment for about seventy-five thousand women employed in the dance bars in various capacities in the State. Writ petitions were filed in the High Court

contending that ss.33-A and 33-B were violative of, *inter alia*, Arts. 14 and 19(1)(a), 19(1)(g) and 21 of the Constitution. The High Court declared s.33-A as *ultra vires* Arts. 14 and 19(1)(g) of the Constitution of India.

Dismissing the appeal, the Court

HELD:

Per Surinder Singh Nijjar, J. (for CJI and for himself):

1.1. A distinction, the *foundation* of which is classes of the establishments and classes/kind of persons, who frequent the establishments and those who own the establishments cannot be supported under the Constitutional philosophy so clearly stated in the Preamble to the Constitution of India and the individual Articles prohibiting discrimination on the basis of caste, colour, creed, religion or gender. The Preamble to the Constitution of India as also Arts. 14 to 21, as observed in *I.R. Coelho form the heart and soul of the Constitution. Taking away of these rights of equality by any legislation would require clear proof of the justification for such abridgment. [para 100] [738-E-H]**

***I.R. Coelho (Dead) by LRs. Vs. State of T.N. 2007 (1) SCR 706 = 2007 (2) SCC 1– relied on.**

1.2. Section 33A(1)(a) of the Bombay Police Act, 1951 prohibits holding of a performance of dance, *of any kind or type,* in any eating house, permit room or beer bar. This is a complete embargo on performance of dances in the establishment covered u/s 33A(1). Section 33A contains a non-obstante clause which makes the section stand alone and absolutely independent of the Act and the rules. Contravention of s. 33A(1) makes it a criminal offence and on conviction offender is liable to punishment of 3 years. On the other hand, the establishments covered u/s 33B

enjoy complete exemption from any such restrictions and dance performances are permitted provided the establishments comply with the applicable statutory provisions, Bye-Laws, Rules and Regulations. [para 98] [736-F-H; 737-B-C]

1.3. The classification of the establishments covered u/ss 33A and 33B would not satisfy the test of equality. The distinction is made on the grounds of *"classes of establishments"* or "*classes of persons, who frequent the establishments"* and not on the form of dance. There is no justification that a dance permitted in exempted institutions u/s 33B, if permitted in the banned establishment, would be derogatory, exploitative or corrupting of public morality. Rather it is evident that the same dancer can perform the same dance in the exempted institution u/s 33-B but is prohibited of doing so in the establishments covered u/s 33A. There is no rationale which would justify the conclusion that a dance that leads to depravity in one place would get converted to an acceptable performance by a mere change of venue. The discriminatory attitude of the State is illustrated by the fact that an infringement of s. 33A(1) by an establishment covered under the said provision would entail the owner being liable to be imprisoned for three years by virtue of s. 33A(2). On the other hand, no such punishment is prescribed for establishments covered u/s 33B. Such an establishment would merely lose the licence. Such blatant discrimination cannot possibly be justified on the criteria of reasonable classification under Art. 14 of the Constitution. [para 100-101] [738-D-E, H; 739-A; 740-A-D]

State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa & Ors. **1974 (1) SCR 771 = 1974 (1) SCC 19;** *E.V. Chinnaiah Vs. State of A.P. & Ors.* **2004 (5) Suppl. SCR 972 = 2005 (1) SCC 394;** *Budhan Choudhry Vs. State of Bihar* **1955 SCR 1045 = AIR 1955 SC 191;** *Laxmi Khandsari & Ors. Vs.*

State of U.P. & Ors. **1981 (3) SCR 92 = 1981 (2) SCC 600 – relied on.**

Radice Vs. People of the State of New York **264 U.S. 292 (1924) – cited.**

1.4. Once the respondents had given prima facie proof of the arbitrary classification of the establishments u/ss 33A and 33B, it was duty of the State to justify the reasonableness of the classification. The appellants have failed to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction, whether partial or complete, is in public interest and contains the quality of reasonableness. There was little or no material on the basis of which the State could have concluded that dancing in the prohibited establishments was likely to deprave, corrupt or injure the public morality or morals. [para 100-101 and 104] [738-H; 739-A, B-C, D-E; 743-E]

1.5. The so called distinction is based purely on the basis of the class of the performer and the so called *superior class* of audience. It cannot be presumed that the class to which an individual or the audience belongs brings with him as a necessary concomitant a particular kind of morality or decency. The presumption which runs through ss. 33A and 33B that the enjoyment of same kind of entertainment by the upper classes leads only to mere enjoyment and in the case of poor classes it would lead to immorality, decadence and depravity, cannot be accepted. Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience. The said presumption is also perplexing on the ground that in the banned establishments even a non-obscene dance would be treated as vulgar. On the other hand, it would be presumed that in the exempted establishments any dance is non-obscene. The underlying presumption at once puts the prohibited establishments in a

precarious position, in comparison to the exempted class for the grant of a licence to hold a dance performance. The presumption is *elitist*, which cannot be countenanced under the egalitarian philosophy of the Constitution. Thus, ss. 33A and 33B introduce an invidious discrimination which cannot be justified under Art. 14 of the Constitution. Yet at the same time, both kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions. [para 102-103] [741-F-H; 742-A-C, E-F]

Charanjit Lal Chowdhury Vs. Union of India & Ors. **1950 SCR 869 =AIR 1951 SC 41;** *Ram Krishna Dalmia Vs. Justice S.R. Tendolkar* **1959 SCR 279 =AIR 1958 SC 538;** *State of Uttar Pradesh Vs. Kaushailiya & Ors.* **1964 SCR 1002 = AIR 1964 SC 416; and** *Shashikant Laxman Kale & Anr. Vs. Union of India & Anr.* **1990 (3) SCR 441 =1990 (4) SCC 366 – referred to.**

1.6. A perusal of the Objects and the Reasons would show that the impugned legislation proceeds on a hypothesis that different dance bars are being used as meeting points of criminals and pick up points of the girls. But the Objects and Reasons say nothing about any evidence having been presented to the Government that these dance bars are actively involved in trafficking of women. Isolated examples would not be sufficient to establish the connection of the dance bars covered u/s 33A with trafficking. Therefore, it cannot be said that the ban has been placed for the protection of the vulnerable women. [para 105] [743-G-H; 744-B-C]

1.7. The Legislature is free to recognize the degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest. Further, the State may direct its law against what it deems the evil as it actually exists without covering the whole field of

possible abuses, but such conclusion have to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. The State neither had the empirical data to conclude that dancing in the prohibited establishment necessarily leads to depravity and corruption of public morals nor was there general consensus that such was the situation. The three reports presented before the High Court in fact have presented divergent view points. In the instant case, the appellant has failed to give any details of any experience which would justify such blatant discrimination, based purely on the class or location of an establishment. [para 106] [744-D-G; 745-A]

Ram Krishna Dalmia Vs. Justice S.R. Tendolkar **1959 SCR 279 =AIR 1958 SC 538;** *Mohd. Hanif Quareshi Vs. State of Bihar* **1959 SCR 629 =AIR 1958 SC 731 – referred to.**

Joseph Patsone Vs. Commonwealth of Pennsylvania **232 U.S. 138 (1914) – cited.**

1.8. The State has failed to justify the classification between the exempted establishments and prohibited establishments on the basis of surrounding circumstances; or vulnerability. Undoubtedly, the legislature is the best judge to measure the degree of harm and make reasonable classification but when such a classification is challenged the State is duty bound to disclose the reasons for the ostensible conclusions. In the instant case, the legislation is based on an unacceptable presumption that the so called elite i.e. rich and the famous would have higher standards of decency, morality or strength of character than their counter parts who have to content themselves with lesser facilities of inferior quality dance bars. Such a presumption is abhorrent to the resolve in the Preamble

to the Constitution to secure the citizens of India, "Equality of status and opportunity and *dignity* of the individual". The State Government presumed that the performance of an identical dance item in the establishments having facilities less than 3 stars would be derogative to the dignity of women and would be likely to deprave, corrupt or injure public morality or morals; but would not be so in the exempted establishments. These are misconceived notions of a bygone era which ought not to be resurrected. [para 107] [745-B-F]

1.9. The activities which are obscene or which are likely to deprave and corrupt those whose minds are open to such immoral influences, cannot be distinguished on the basis as to whether they are performing in 5 star hotels or in dance bars. The judicial conscience of this Court would not give credence to a notion that high morals and decent behaviour is the exclusive domain of the upper classes; whereas vulgarity and depravity is limited to the lower classes. Any classification made on the basis of such invidious presumption is liable to be struck down being wholly unconstitutional and particularly contrary to Art. 14 of the Constitution of India. [para 108] [746-E-G]

Gaurav Jain Vs. Union of India **1997 (2) Suppl. SCR 105 = 1997 (8) SCC 114 – referred to.**

2.1. Upon analyzing the entire fact situation, the High Court has rightly held that dancing would be a fundamental right and cannot be excluded by dubbing the same as *res extra commercium*. The State has failed to establish that the restriction is reasonable or that it is in the interest of general public. The High Court noticed that in the guise of regulation, the legislation has imposed a total ban on dancing in the establishments covered u/s 33A. [para 110] [747-E-G]

Narendra Kumar & Ors. Vs. Union of India & Ors. **(1960) 2 SCR 375; and** *Maneka Gandhi Vs. Union of India & Anr.* **1978 (2) SCR 621 = 1978 (1) SCC 248 — referred to.**

2.2. There are already sufficient rules and regulations and legislation in place which, if efficiently applied, would control if not eradicate all the dangers to the society enumerated in the Preamble and Objects and Reasons of the impugned legislation. There is no material placed on record by the State to show that it was not possible to deal with the situation within the framework of the existing laws except for the unfounded conclusions recorded in the Preamble as well the Objects and Reasons. Sufficient power is vested with the Licensing Authority to safeguard any perceived violation of the dignity of women through obscene dances. [para 110 and 116] [747-H; 748-A; 751-F-G; 752-B-C]

State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat & Ors. **2005 (4) Suppl. SCR 582 = AIR 2006 SC 212 - referred to.**

2.3. From the Objects of the impugned legislation and amendment itself, it is crystal clear that the legislation was brought about on the admission of the police that it is unable to effectively control the situation in spite of the existence of all the necessary legislation, rules and regulations. It cannot be said that the impugned enactment is a form of additional regulation, as it was felt that the existing system of licence and permits were insufficient to deal with problem of ever increasing dance bars. [para 117 and 119] [752-C-D; 753-F-G]

State of Bombay Vs. R.M.D. Chamarbaugwala & Anr. **1957 SCR 874 =AIR 1957 SC 699;** *Khoday Distilleries Ltd. & Ors. Vs. State of Karnataka & Ors.* **1994 (4) Suppl. SCR 477 = 1995 (1) SCC 574 ; and** *State of Punjab & Anr. Vs.*

Devans Modern Breweries Ltd. & Anr. **2003 (5) Suppl. SCR 930 = 2004 (11) SCC 26 – held inapplicable**

New York State Liquor Authority Vs. Dennis BELLANCA, DBA The Main Event, Et Al. **452 U.S. 714 (1981);** *Regina Vs. Bloom* **1961 3 W.L.R. 611 – cited.**

2.4. The end result of the prohibition of *any form* of dancing in the establishments covered u/s 33A leads to the only conclusion that these establishments have to shut down. This is evident from the fact that since 2005, most if not all the dance bar establishments have literally closed down. This has led to the unemployment of over 75,000 women workers. It has been brought on the record that many of them have been compelled to take up prostitution out of necessity for maintenance of their families. The impugned legislation has proved to be totally counterproductive and being *ultra vires* Art.19(1)(g), cannot be sustained. [para 120] [754-B-D]

2.5. It is not possible to read down the expression "any kind or type" of dance by any person to mean dances which are obscene and derogatory to the dignity of women. Such reading down cannot be permitted so long as any kind of dance is permitted in establishments covered u/s 33B. [para 121] [754-F-G]

Government of Andhra Pradesh & Ors. Vs. P. Laxmi Devi (Smt.) **2008 (3) SCR 330 = 2008 (4) SCC 720 — referred to.**

2.6. By applying the doctrine of severability, even if s.33B is declared unconstitutional, the statute would still retain the provision contained in s.33A which prohibits any kind of dance by any person in the establishments covered u/s 33A. [para 122] [754-H; 755-A]

3.1. The Committee comprising of the Chairman of AHAR, Public and Police Officials and chaired by the Principal Secretary (E.I.), Home Department, had

prepared a report and submitted the same to the State Government. The State Government had in fact sent a communication dated 16th July, 2004 to all Judicial Magistrates and Police Commissioner to amend the rules for exercising control on hotel establishments presenting dance programmes. It would be more appropriate that the State Government re-examines the recommendations made by the Committee and the suggestions made in para 123 of the judgment to bring about measures which should ensure the safety and improve the working conditions of the persons working as bar girls. As has been observed by this Court in the case of Anuj Garg **instead of putting curbs on women's freedom, empowerment would be more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modeling done in this behalf. In the instant case, the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance. In fact, a large number of alternative steps could be taken instead of completely prohibiting dancing, *if the real concern of the State is the safety of women.* [para 123-124] [755-B-D; 756-E-H; 757-A]**

Welfare Association, A.R.P., Maharashtra & Anr. Vs. Ranjit P. Gohil & Ors. **2003 (2) SCR 139 = 2003 (9) SCC 358;** *S.P. Mittal Vs. Union of India & Ors.* **1983 (1) SCR729 = (1983) 1 SCC 51;** *Kedar Nath Bajoria & Anr. Vs. The State of West Bengal* **1954 SCR 30;** *Municipal Corporation of the City of Ahmedabad & Ors. Vs. Jan Mohammed Usmanbhai & Anr.* **1986 (2) SCR 700 =1986 (3) SCC 20;** *T.B. Ibrahim Vs. Regional Transport Authority, Tanjore* **[1953] 4 SCR 290;** *Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. Vs. Union of India & Ors.* **1981 (2) SCR 52 = AIR 1981 SC 344;** *State of Madras Vs. V.G. Row* **1952 SCR 597 = AIR 1952 SC**

196, *B.P. Sharma Vs. Union of India & Ors.* **2003 (2) Suppl. SCR 684 = 2003 (7) SCC 309,** *M.R.F. Ltd. Vs. Inspector Kerala Govt. & Ors.* **1998 (2) Suppl. SCR 632 = 1998 (8) SCC 227;** *M.J. Sivani & Ors. Vs. State of' Karnataka & Ors.* **(1995) 6 SCC 289;** *State of Bihar & Ors. Vs. Bihar Distillery Ltd. & Ors*. **1996 (9) Suppl. SCR 479 =1997 (2) SCC 453;** *Kedar Nath Singh Vs. State of Bihar* **1962 Suppl. SCR 769 = AIR 1962 SC 955;** *Sakal Papers (P) Ltd. & Ors. Vs. The Union of India* **(1962) 3 SCR 842;** *Anuj Garg & Ors. Vs. Hotel Association of India & Ors.* **2007 (12) SCR 991 = 2008 (3) SCC 1;** *Government of A.P. Vs. P.B. Vijayakumar & Anr.* **1995 (1) Suppl. SCR 462 = 1995 (4) SCC 520;** *M/s. Laxmi Khandsari & Ors. Vs. State of U.P. & Ors.* **1981 (3) SCR 92 = 1981 (2) SCC 600** *Rustom Cavasjee Cooper Vs. Union of India* **1970 (3) SCR 530 = 1970 (1) SCC 248** *Bharat Bhawan Trust Vs. Bharat Bhawan Artists' Association & Anr.* **2001 (2) Suppl. SCR 27 = 2001 (7) SCC 630;** *D.S. Nakara & Ors. Vs. Union of India* **1983 (2) SCR 165 = 1983 (1) SCC 305 ;** *Sanjeev Coke Manufacturing Company Vs. M/s Bharat Coking Coal Limited & Anr*. **1983 (1) SCR 1000 = 1983 (1) SCC 147;** *Sodan Singh & Ors. Vs. New Delhi Municipal Committee & Ors.* **1989 (3) SCR 1038 = 1989 (4) SCC 155 - cited**

Consolidated Coke Co. Vs. Taylor **234 U.S.224 (1913);** *Paris Adult Theatre I Et. Al Vs. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Et. **Al*** **413 U.S. 49 [1973] – cited.**

Per Altamas Kabir, CJI. (Supplementing):

1. The right to practise a trade or profession and the right to life guaranteed under Art. 21 are, by their very nature, intermingled with each other. It would be better to treat the cause than to blame the effect and to completely discontinue the livelihood of a large section of women, eking out an existence by dancing in bars, who will be left to the mercy of other forms of exploitation.

Instead of generating unemployment, it may be wiser for the State to look into ways and means in which reasonable restrictions may be imposed on bar dancing, but without completely prohibiting or stopping the same, as suggested in para 123 of the main judgment. [para 4 and 6] [757-G-H; 758-A-B; 759-A-B]

2. The State has to provide alternative means of support and shelter to persons engaged in such trades or professions, some of whom are trafficked from different parts of the country and have nowhere to go or earn a living after coming out of their unfortunate circumstances. A strong and effective support system may provide a solution to the problem. [para 7] [759-B-C]

Case Law Reference:

Per Nijjar,J.

1990 (3) SCR 441	**cited**	**para 25**
2003 (2) SCR 139	**cited**	**para 26**
1964 SCR 1002	**held inapplicable**	**para 30**
1959 SCR 279	**referred to**	**para 35**
232 U.S. 138(1914)	**referred to**	**para 35**
234 U.S.224 (1913)	**cited**	**para 36**
264 U.S. 292 (1924)	**cited**	**para 37**
1959 SCR 629	**referred to**	**para 38**
1983 (1) SCR 729	**cited**	**para 40**
413 U.S. 49	**cited**	**para 44**
1954 SCR 30	**cited**	**para 46**
2005 (4) Suppl. SCR 582	**referred to**	**para 49**
1986 (2) SCR 700	**cited**	**para 49**

[1953] 4 SCR 290	**cited**	**para 54**
1957 SCR 874	**held inapplicable**	**para 55**
1994 (4) Suppl. SCR 477	**held inapplicable**	**para 55**
2003 (5) Suppl. SCR 930	**held inapplicable**	**para 56**
452 U.S. 714 (1981)	**held inapplicable**	**para 56**
1961 3 W.L.R. 611	**cited**	**para 57**
1981 (2) SCR 52	**cited**	**para 58**
1952 SCR 597	**cited**	**para 61**
2003 (2) Suppl. SCR 684	**cited**	**para 61**
1998 (2) Suppl. SCR 632	**cited**	**para 61**
(1995) 6 SCC 289	**cited**	**para 63**
1950 SCR 869	**cited**	**para 65**
1996 (9) Suppl. SCR 479	**cited**	**para 66**
2008 (3) SCR 330	**cited**	**para 68**
1962 Suppl. SCR 769	**cited**	**para 69**
2007 (1) SCR 706	**relied on**	**para 72**
(1962) 3 SCR 842	**cited**	**para 72**
2007 (12) SCR 991	**cited**	**para 72**
1981 (3) SCR 92	**cited**	**para 73**
1995 (1) Suppl. SCR 462	**cited**	**para 74**
1981 (3) SCR 92	**relied on**	**para 76**
(1960) 2 SCR 375	**cited**	**para 77**
1970 (3) SCR 530	**cited**	**para 79**
1978 (2) SCR 621	**cited**	**para 79**
2001 (2) Suppl. SCR 27	**cited**	**para 79**

1983 (2) SCR 165	**cited**	**para 81**
1983 (1) SCR 1000	**cited**	**para 83**
1989 (3) SCR 1038	**cited**	**para 88**
1955 SCR 1045	**cited**	**para 92**
1974 (1) SCR 771	**cited**	**para 98**
2004 (5) Suppl. SCR 972	**cited**	**para 99**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2705 of 2006.

From the Judgment & Order dated 12.04.2006 of the High Court of Judicature at Bombay in W.P. Nos. 2450, 2052, 2338 & 2587 of 2005.

WITH

C.A. Nos. 2704 of 2006 & 5504 of 2013

Shekhar Naphade, Mukul Rohatgi, Anand Grover, Dr. Rajeev Dhawan, Ravindra Adsure, Subhangi Tuli, Asha Gopalan Nair, Sanjay Kharde, Preshit V. Surshe, Veena Thadani, Satyajit Saha, Prasenjit Keswani, Vishal Thadani, Sourabh Kripal, V.D. Khanna, Meenakshi Arora, Aparna Bhat, Rajkumari B., Upasana G., Nikhil Nayyar, Tripti Tandon, Amritananda Ch., Naveen R. Nath, Manoj K. Mishra, Sanjay K. Visen, Shiv Pati B. Pandey, Venkateswara Rao Anumolu, Vishwajit Singh, Satyajit A. Desai, Somanath Padhan, Anagha S. Desai, Kamini Jaiswal, Sunil Kumar Verma, Chander Shekhar Ashri for the Appearing parties.

The Judgments of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted in SLP (C) No.14534 of 2006.

2. These civil appeals seek to challenge common

judgment and final order dated 12th April, 2006 in Writ Petition No.2450 of 2005, W.P. No.2052 of 2005, W.P.No.2338 of 2005 and W.P.No.2587 of 2005 passed by the High Court of Judicature at Bombay, whereby Section 33A of the Bombay Police Act, 1951 as inserted by the Bombay Police (Amendment) Act, 2005 has been declared to be *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India.

Summary of Facts –

3. Brief facts leading to the filing of the aforesaid writ petitions are –

The Bombay Police Act, 1951 (hereinafter 'the Act') was enacted in the year 1951 with the object of consolidating and amending the law relating to the regulation of the exercise of powers and performance of the functions by the State Government for maintenance of public order. Section 33 of the Act authorises the State Government to frame rules regulating places of public amusement and entertainment. By virtue of Section 33 of the Act, the *"Rules for Licensing and Controlling Places of Public Amusement (other than Cinemas) and Performances for Public Amusement including Melas & Tamashas, 1960"* (hereinafter 'the Rules') were enacted to regulate and maintain discipline in places of public amusement, melas etc.

4. In 1986, orchestra and dance in hotels was permitted to be performed pursuant to the Rules and such institutions functioned under terms and conditions laid down therein. However, several cases relating to violation of the terms and conditions of performance licences came to be registered. It is claimed that 20,196 cases were registered under Section 33(w), 110 and 117 of the Act from the year 2000 till 2005. Also, various cases of minor girls being rescued from dance bars were reported during the said period 2002-2005. The appellants have referred to the case histories from the

Government Special Rehabilitation Centre for Girls (Special Home) of 10 girl children rescued from such establishments under Immoral Traffic (Prevention) Act, 1956 by Mumbai Police, which according to the appellants, correctly depict the prevailing situation.

The Government of Maharashtra, Home Department, on 10th December, 2002 passed resolution No. REH 012002/ 153/SE-5, noting therein :

> "It has come to notice that prostitution rackets are being run through pick up points in hotel establishments in which dance programmes are being conducted (Dance Bars) and that dance forms being presented therein are horrid and obscene and that criminals are being sheltered in such hotels. Such undesirable practices going on in hotel establishments have an adverse effect on society."

It was resolved to form a committee to make suggestions for amending the rules to deal with:

(a) Remedial measures to check other undesirable practices going on in hotel establishments presenting dance programmes.

(b) To prevent prostitution in hotel establishments

(c) Remedial measures to see that criminals are not sheltered in hotel establishments;

(d) To frame a code specifying what type of dance forms should be presented in hotel establishments.

(e) Creating a roving squad to check undesirable practices in hotel establishments and take strict action against owner of those establishments.

5. Pursuant to the aforesaid resolution, the Committee submitted its recommendations which were incorporated and

circulated to all the concerned authorities through the letter of the Home Department No. REH 012002/153/SB-5 dated 16th July, 2004. In this letter, the suggested regulations were summarized as follows:

a. There should be restrictions on the attire of the dancers.

b. Dancing area must have a railing 3 feet high around it, and customer seats should be at least 5 feet away from the railing.

c. Dance floor to be of dimension of 10 x 12 ft so not more than 8 dancers can dance simultaneously.

d. Customer rewards for dancing are to be routed through management of the establishment and customers are banned from going near the dancers or "showering money".

e. Names of dancers are to be registered with the establishment, a record kept of their employment, including details of identity/citizenship and place of residence.

6. This letter instructed all Judicial Magistrates and Police Commissioners to implement these recommendations with immediate effect.

7. On 6th August, 2004 the Chairperson of the Maharashtra State Commission for Women wrote to the State Government about the ongoing racketeering to lure girls to work in dance bars and their consequent acts of prostitution and immoral trafficking stating:

> "Number of rackets indulging into physical and financial exploitation of girls working in dance bars by forcibly bringing them into this profession are found to be increasing alarmingly. In the metropolis of Mumbai, the

> problems of the bar girls have acquired grave dimensions and have resulted even into death of many bar girls. These women are forcibly induced into prostitution leading to total destruction of their life."….

Further

> "Most of the girls working in Dance Bars of Maharashtra State do not hail from State of Maharashtra, but come from other States."

….

> "In the future this problem in all the probability would spoil our social health by acquiring increasingly grave dimensions, not confined only to Mumbai but extending to the National and even International levels."

8. The letter went on to recommend a ban on such establishments by stating:

> "I therefore, request you that the system of issuing permits to the Bar Girls by various departments of Government should be stopped forthwith, thereby relieving the women from their physical, sexual and financial exploitation in the future."

9. According to the appellant, the seriousness of the issues involved is well documented of which the Home Department was fully aware. The material available before the Home Department was as under:

a. Copies of case history of 10 girl children rescued from dance bar(s) under Immoral Traffic (Prevention) Act, 1956.

b. Copies of complaints of victims' families against illicit relations with bar dancers.

c. Copies of complaints of Social Organizations

against dance bars.

d. Copies of FIRs of cases registered in relation to dance bars.

e. Summary of cases registered under the Immoral Traffic (Prevention) Act, 1956, u/s 294 IPC, u/s 33(w) & 110 of Bombay Police Act, 1951 during the period 2000-2005 regarding dance bars.

10. Apart from this, a study of the socio-economic situation and rehabilitation needs of the women in dance bars was conducted by PRAYAS (a field action project of the Tata Institute of Social Sciences) in 2005. This study pointed out the relevant facts regarding exploitation of minor girls in dance bars. The study also pointed out that there was presence of the *element* of human trafficking in the entire process; and that the *environment* of the dance bars was found to have *negative impact* on the physical and mental health of the minor girls. The study also pointed out that the atmosphere in the dance bars increased the vulnerability of the minor children to sexual exploitation. It is also the case of the appellants that independent of registration of offences under Bombay Police Act and PITA Act as well as IPC, several complaints had been received from various segments of society urging the State Government to take steps for closure of the dance bars by legislative action.

11. Taking into consideration the aforesaid material, the members of the Maharashtra Legislative Assembly expressed deep concern over the ill effects of dance bars on youth and dignity of women. The Assembly further felt that the existing measures were insufficient to tackle the subject. Just at that time, a 'Call Attention Motion' was tabled by Shri Vivek Patil in the State Legislative Assembly on 30th March, 2005. A detailed reply was given by Shri R.R. Patil, Hon'ble Dy. Chief Minster to the same, on 21st July, 2005. Taking stock of the entire situation, the State Government came to a tentative opinion that performance of dances in eating houses, permit

rooms or beer bars in an indecent manner is derogatory to the dignity of women and is likely to deprave, corrupt and/or injure public morality. It was evident on the basis of the material available to the Government that permit rooms or beer bars licensed under the relevant rules, were indulging in exploitation of women by permitting the performance of dances in an indecent obscene or vulgar manner. The Government, therefore, considered it expedient to prohibit such dance performances in eating houses or permit rooms or beer bars.

12. It was emphasised that even prior to the aforesaid decision, the attention of the Government had been invited to mushrooming growth of illegal dance bars and their ill- effects on the society in general, including ruining of some families. The dance bars were also used as meeting points by criminals and pick up joints of girls indulging in immoral activities. Young girls desirous of earning easy money were being attracted to such dance bars and getting involved in immoral activities. The decision was, therefore, taken by the State Government to prohibit performance of dance in eating houses or permit rooms or beer bars by suitably amending the Bombay Police Act, 1951.

13. The State Government took a conscious decision upon consideration of the various factors to add Sections 33A and 33B to the Bombay Police Act. The necessary amendment was introduced in Maharashtra Legislative Assembly on 14th July, 2005. The Bill was passed by the Legislative Assembly on 21st July, 2005 and by the Legislative Council on 23rd July, 2005. The amended Act No. 35 of 2005, incorporating Sections 33A & 33B in the Bombay Police Act, 1951, came into force after receiving the assent of the Governor of the Maharashtra by publishing in the Maharashtra Gazette on 14th August, 2005.

Writ Petitions before the High Court of Bombay

14. The Amendment to the Bombay Police Act of 1951, introducing Sections 33A and 33B, was challenged as being

unconstitutional in several writ petitions before the High Court of Bombay, which are tabulated as under:

Writ Petition Number	Party
WP 2450/2005	Indian Hotel and Restaurants Owners Association, an Association of various hotel owners and bar owners and/or conductors of the same, who carry on business of running restaurants and bars in Mumbai.
WP 2052/2005	Bharatiya Bar Girls Union, a registered trade union claiming a membership of 5000, whose members work as bar girls in different parts of Maharashtra.
WP 2338/2005	The Parties in this petition are a group of six petitioners, who are women's organizations working in the field of women's development.
WP 2587/2005	The 1st petitioner is a trust registered under the Public Trust Act, working with sex workers in the Malvani area of Malad in Mumbai. The 2nd petitioner is the Ekta Self Group which consists of 10 bar dancers.
WP 1971/2005	Criminal WP The petitioner is the Association of Dance Bar owners duly registered under the Trade Unions Act, and have as their members 344 dance bars.
WP 6930-6931/2005	Proprietors of two establishments who are affected by the amendments to the Police Act.

WP 5503-5504/2005	Proprietors of two establishments who are affected by the amendments to the Police Act.

It was contended:

- That the State of Maharashtra does not have the legislative competence to enact the impugned law as 'morality' does not fall within the ambit of List II of Schedule 7 and that the impugned enactment falls in the concurrent list.
- That the impugned amendment was not reserved for the assent of the President and therefore is unconstitutional under Article 254 of the Constitution and also that the State does not have the power to implement international conventions and hence this enactment amounts to fraud on the Constitution.
- That the enactment results in interference with the independence of judiciary as no reasons are provided under S. 33A(2) of the Act for awarding lesser punishments.
- That the affidavit filed by Youraj Laxman Waghmare was not in compliance with Order 19 Rule 3 of the Civil Procedure Code as no verification clause was provided.
- That the establishment of the petitioners is a place of public entertainment and public amusement as defined under S. 2(10) and 2(9) respectively and not an "eating place" under S.2(5A) of the Bombay Prohibition Act, 1951 and hence the provisions do not bind the petitioners.
- That S. 33A and 33B are arbitrary under Article 14 as they provide for different standards of morality

to institutions with similar activities and that the activities in S. 33A establishments are less obscene but nonetheless the classification bears no nexus to the object of the Amendment.

- That S. 33A is violative of Article 15 on the basis of gender discrimination as the dancers are mainly women.

- That there is violation of Article 19 (1)(a) as dance is a form of expression and that the impugned enactment is an unreasonable restriction and it is not by protected by Article 19(2).

- That there is an unreasonable restriction on right to freedom of profession as the State Government permitted and granted licenses for running such establishments being *Res Commercium* and that it deprives the bar owners of their right to carry on business and bar dancers the right to carry on their profession.

- That right to life under Article 21 is infringed as right to life includes right to livelihood and that the State has not provided for any rehabilitation.

15. The State of Maharashtra defended the challenge to enactment as follows:

- That the impugned enactment is covered by the List II. Entries 1- Public Order, 2- Police, 6- Public Order, 8- Intoxicants, 33- Entertainment or Amusement, 64- Offences against laws.

- That the 'eating houses' are covered in the impugned enactment as they would fall in public entertainment places, as license is issued to an eating house, which enjoys an additional facility to serve liquor, wine and beer.

- That there is no violation of Article 19(1)(a) as the dance being conducted is not an expression but a profession where restrictions can be imposed.

- That there is no violation of Article 15 as the ban on obscene dance applies to men and women.

- That the several minor girls danced to get rewarded with cash by enticing customers, that led to a competition between performers leading to greatest rewards reserved for the greatest indignities which escalated prostitution which lead to registration of several cases under Prevention of Immoral Trafficking Act and under Bombay Police Act. That this led the legislatures to make an independent classification of these establishments to safeguard the dignity of women, and public morality. That there are only six exempted establishments and that obscene performances are not permitted in such exempted establishments. Hence there is no violation of Article 14.

- That with regard to Article 19(I) (g) there is no absolute right to conduct trade or profession and that the same is subject to public order, decency and morality and hence the restriction is reasonable and justified.

- That there is no violation of Article 21 as special cell has been constituted by Women and Child Welfare Department to train and assist the "bar girls" in availing benefits of the various Government Schemes for employment and providing alternative dignified vocations.

16. After considering the aforesaid arguments of both the sides, the High Court has, *inter alia*, held that the type of dancing in both categories of establishments differs and while

the difference is not capable of precise legislative definition, it is sufficient to constitute intelligible differentia. However, the fact of different types of dancing being performed bears no nexus with the object sought to be achieved, which, as understood by the Bombay High Court, was limited to the exploitation of women dancers. Consequently, the operation of the impugned enactment is discriminatory.

17. With these observations, the High Court declared that Sections 33A and 33B of the Bombay Police Act, 1951 are *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India.

18. We have heard the learned counsel for the parties at some length. But before we notice the submissions at this stage it would be appropriate to reproduce the provisions in Sections 33A and 33B of the Bombay Police Act, 1951.

Sections 33A and 33B of the Bombay Police Act:

19. The provisions read as under:

"33A(1) Notwithstanding anything contained in this Act or the rules made by the Commissioner of Police or the District Magistrate under sub-section (1) of Section 33 for the area under their respective charges, on and from the date of commencement of the Bombay Police (Amendment) Act, 2005,-

(a) holding of a performance of dance, of any kind or type, in any eating house, permit room or beer bar is prohibited;

(b) all performance licences, issued under the aforesaid rules by the Commissioner of Police or the District Magistrate or any other officer, as the case may be, being the Licensing Authority, to hold a dance performance, of any kind or type, in an eating house, performance, of any kind or type, in an eating house, permit room or beer bar shall stand cancelled.

(2) Notwithstanding anything contained in Section 131, any person who holds or causes or permits to be held a dance performance of any kind or type, in an eating house, permit room or beer bar in contravention of Sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to rupees two lakhs:

Provided that, in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than rupees fifty thousand.

(3) If it is, noticed by the Licensing Authority that any person, whose performance licence has been cancelled under Sub-section (1), holds or causes to be held or permits to hold a dance performance of any kind or type in his eating house, permit room or beer bar, the Licensing Authority shall, notwithstanding anything contained in the rules framed under section 33, suspend the Certificate of Registration as an eating house and the licence to keep a Place of Public Entertainment (PPEL) issued to a permit room or a beer bar and within a period of 30 days from the date of suspension of the Certificate of Registration and licence, after giving the licensee a reasonable opportunity of being heard, either withdraw the order of suspending the Certificate of Registration and the licence or cancel the Certificate of Registration and the licence.

(4) ……

(5)……..

(6) The offence punishable under this section shall be cognizable and non-bailable.

33B. Subject to the other provisions of this Act, or any other law for the time being in force, nothing in section 33A

shall apply to the holding of a dance performance in a drama theatre, cinema theatre and auditorium; or sports club or gymkhana, where entry is restricted to its members only, or a three starred or above hotel or in any other establishment or class of establishments, which, having regard to (a) the tourism policy of the Central or State Government for promoting the tourism activities in the State; or (b) cultural activities, the State Government may, by special or general order, specify in this behalf.

Explanation.—For the purposes of this section, "sports club" or "gymkhana" means an establishment registered as such under the provisions of the Bombay Public Trusts Act, 1950, or the Societies Registration Act, 1860 or the Companies Act, 1956, or any other law for the time being in force."

Statement of Objects and Reasons

20. The Statement of Objects and Reasons clause appended to Bill No. LX of 2005 as introduced in the Maharashtra Legislative Assembly on 14th June, 2005 reads as under:

(1) The Commissioner of Police, District Magistrates or other officers, being Licensing Authorities under the Rules framed in exercise of the powers of Sub-section (1) of Section 33 of the Bombay Police Act, 1951 have granted licences for holding dance performance in the area under their respective charges in the State. The object of granting such performance licence is to hold such dance performance for public amusement. It is brought to the notice of the State Government that the eating houses or permit rooms or beer bars to whom licences to hold dance performance, have been granted are permitting the performance of dances in an indecent, obscene or vulgar manner. It has

also been brought to the notice of the Government that such performance of dances are giving rise to exploitation of women. The Government has received several complaints regarding the manner of holding such dance performances. The Government considers that the performance of dances in eating houses, permit rooms or beer bars in an indecent manner is derogatory to the dignity of women and is likely to deprave, corrupt or injure the public morality or morals. The Government considers it expedient to prohibit the holding of such dance performances in eating houses or permit rooms or beer bars.

(2) In the last Budget Session of the State Legislature, by way of a Calling Attention Motion, the attention of the Government was invited to mushroom growth of illegal dance bars and their ill-effects on the society in general including ruining of families. The members of the State Legislature, from ruling and opposition sides, pointed out that such dance bars are used as meeting points by criminals and pick-up joints of girls Page 1267 for indulging in immoral activities and demanded that such dance bars should, therefore, be closed down. These dance bars are attracting young girls desirous of earning easy money and thereby such girls are involved in immoral activities. Having considered the complaints received from general public including the peoples' representatives, the Government considers it expedient to prohibit the performance of dance, of any kind or type, in an eating house or permit room or beer bar, throughout the State by suitably amending the Bombay Police Act, 1951. However, a provision is also made to the effect that holding of a dance performance in a drama theatre or cinema theatre or auditorium; registered sports

club or gymkhana; or three starred or above hotel; or in any other establishment or class establishments which the State Government may specify having regard to tourism policy for promotion of tourism in the State or cultural activities, are not barred but all such establishments shall be required to obtain performance licence in accordance with the said rules, for holding a dance performance.

3. The Bill is intended to achieve the following objectives."

Preamble

"Whereas the Commissioners of Police, District Magistrates and certain other Officers, have granted performance licences for holding dance performance;

And whereas the object of granting such performance licences is to hold such dance performance for public amusement;

And whereas it is brought to the notice of the State Government that the eating houses, permit rooms or beer bars to whom licences to hold a dance performance have been granted are permitting performance of dances in an indecent, obscene or vulgar manner;

And whereas it has also been brought to the notice of the Government that such performance of dances are giving rise to exploitation of women;

And whereas the Government has received several complaints regarding the manner of holding of such dance performance;

And whereas the Government considers that such performance of dances in eating houses, permit rooms or

beer bars are derogatory to the dignity of woken and are likely to deprave, corrupt or injure the public morality or morals.

And whereas the Government considered it expedient to prohibit such holding of performance of dances in eating houses, permit rooms and beer bars."

Legal Submissions:

21. Mr. Harish N. Salve, Mr. Gopal Subramanium and Mr. Shekhar Naphade, learned senior counsel, have on different occasions made submissions on behalf of the appellants. Mr. Gopal Subramanium has supplemented the oral submissions by written submissions. The common submissions are noted with the appellation of learned senior counsel, referring to all the aforesaid learned senior counsel.

22. Learned senior counsel have made submissions confined only to the issue as to whether Sections 33A and 33B of the Bombay Police Act infringe Article 14 and with regard to the provisions being *ultra vires* Article 19(1)(g) of the Constitution as all the other issues raised by the respondents were rejected by the High Court. The High Court had specifically rejected the challenge to the *vires* of the provisions under Article 15(1), 19(1)(a) and Article 21.

23. Learned counsel for the appellants submitted that the classification made by the impugned enactment is based on intelligible differentia, having a nexus with the object sought to be achieved. It is submitted that the impugned order suffers from flawed reasoning. The classification made between establishments under Sections 33A and 33B is not solely on the basis of the different kinds of dance performances but also on differing social impact such establishments have, by virtue of having differing dance performances and surrounding circumstances including the customers. Therefore according to Mr. Gopal Subramanium, the establishments must be

understood in broader terms than is understood by the High Court. According to Mr. Harish Salve and Mr. Gopal Subramanium, the judgment of the High Court is too restrictive.

24. It was emphasised by the learned senior counsel that the High Court has failed to understand the distinction between the two provisions and the object sought to be achieved. Mr. Gopal Subramanium has listed the differences factored into the classification made by the impugned enactment. According to the learned senior counsel, the impugned enactment is based on intelligible differentia which could be categorized under the following broad heads:

(i) Type of dance; (ii) Form of remuneration; (iii) Demand for vulnerable women; (iv) Degree of Harm; (v) Regulatory feasibility.

25. It was submitted that in the banned establishments, the women who dance are not professional dancers. In fact, they are majorly trafficked into this profession or have taken this profession when they had no other option. Further, the dance is vulgar and obscene. Women are showered with money when they are dancing, which does not happen in the exempted establishments. Learned senior counsel further submitted that the classification based on type of dance need not be scientifically perfect but ought not to be palpably arbitrary. According to the learned senior counsel, in the present case, it is not just that the type of dance performed is different but the surrounding circumstances are also different. In the exempted establishments, the distance between the dancing platform and the audience is greater than at the banned establishments. This, according to the learned senior counsel, is sufficient to justify the classification between the exempted establishments and the banned establishments. Therefore, it cannot be said that the classification is *palpably arbitrary*. In support of the submissions, the learned senior counsel relied on the observations made by this Court in *Shashikant Laxman*

Kale & Anr. Vs. Union of India & Anr.[1] wherein this Court observed as follows :-

> "We must, therefore, look beyond the ostensible classification and to the purpose of the law and apply the test of 'palpable arbitrariness' in the context of the felt needs of the times and societal exigencies informed by experience to determine reasonableness of the classification.

26. Reliance was also placed *Welfare Association, A.R.P., Maharashtra & Anr. Vs. Ranjit P. Gohil & Ors.,*[2] wherein this Court observed that:

> "……..It is difficult to expect the legislature carving out a classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned, still the court would respect the classification dictated by the wisdom of the legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14."

27. With regard to the form of remuneration, learned senior counsel submitted that remuneration to dancers in banned establishments is generally made out of the money which is showered on them. This creates an unhealthy competition between the dancers to attract the attention of the customers. Therefore, each dancer tries to outdo her competitors in terms of sexual suggestion through dance. This, in turn, creates an unsafe atmosphere not just for the dancers, but also for the other female employees of such establishments.

28. Relying on the report by *Shubhada Chaukhar,* learned senior counsel submitted that 84% of the bar dancers are from

1. (1990) 4 SCC 366.
2. (2003) 9 SCC 358.

outside the State of Maharashtra. These girls are lured into bar dancing on false pretext. Supporting this submission, the following observations are pointed out in the same report:

> "Some unmarried girls have entered the world of bars just because of its glamour. Not a few have come of their own free will. Many less educated girls are attracted to a livelihood that makes them quick money".

29. On the basis of the aforesaid, learned senior counsel submitted that the activities that are carried out in establishments covered under Section 33A i.e. not just the dance itself but the surrounding circumstances of the dance are calculated to raise the illusion of access to women, irrespective of the consent or dignity of women, in men who are often in an inebriated condition. In this context, learned senior counsel relied on the case history of girl children rescued from the dance bar(s) under Immoral Traffic (Prevention) Act, 1956; complaints of victims family against illicit relations with bar dancers; complaints of social organizations against dance bars; copies of First Information Reports of cases registered in relation to dance bars; summary of cases registered under PITA Act, 1956, under Section 294 IPC, under Section 33(w) & 110 of Bombay Police Act, 1951 during the period 2000-2005 regarding dance bars.

30. It is submitted by the learned senior counsel for the appellants that by comparison such complaints have been minimal in the case of exempted establishments. The same kind of behaviour is not seen as a norm. Learned senior counsel submitted that undesirable, anti social and immoral traffic is directly relatable to certain kind of dancing activities performed in prohibited establishments which are not performed in exempted establishments. Therefore, there is a rational distinction between the exempted establishments and the prohibited establishments. In support of the submissions, reliance was placed on the judgment of this Court in the case

of *State of Uttar Pradesh Vs. Kaushailiya & Ors.,*[3] wherein the constitutional validity of Immoral Traffic in Women and Girls Act, 1956 was called in question. This Court upheld the validity of the classification between a prostitute who is a public nuisance and one who is not.

31. Taking up the next head on which the classification has been sought to be justified as intelligible differentia, i.e. "the demand for vulnerable women," learned senior counsel relied on certain observations made by one *Cathatine Mackinnon* (1993) in an article entitled "*Prostitution and Civil Rights"* which appeared in Michigan Journal of Gender & Law, Volume I : 13-31. The argument given by the author therein was that:

> "If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?... The money thus acts as a form of force, not as a measure of consent. It acts like physical force does in rape."

32. Taking cue from the aforesaid comments, learned senior counsel submitted that the dancing that takes place in the banned establishments has a similar effect on the psyche of the woman involved, and functions within the same parameters of the understanding of consent. It was emphasised that as a general rule, dancing in a dance bar is not a profession of choice, but of necessity, and consequently, there is a demand not for women of means and options, but *vulnerable women,* who may not have families and communities to turn to and are completely dependent on their employers. In support of the aforesaid submissions, reliance was placed upon *Prayas* and *Shubhada Chaukar* Reports.

33. It was submitted that the High Court erroneously ignored the contents of the reports extracted above.

34. Now coming to the next head: "Justifying the

3. AIR 1964 SC 416.

classification on the criterion of "Degree of Harm." The appellants emphasised that the characteristics of the dancing that is sought to be prohibited have, to a greater degree than the activities that may be comparable at first blush, created an atmosphere where physical and emotional violence to women was both profitable and normalized. It is, therefore, rational to classify these establishments as a separate class based on the degree of harm that they trigger. Support for this submission is sought from the observations made by this Court in *Ram Krishna Dalmia Vs. Justice S.R. Tendolkar*[4] wherein it was observed as follows:

> "The decisions of this Court further establish – (d) that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest."

35. Reliance was also placed on the observations made in the case of *Joseph Patsone Vs. Commonwealth of Pennsylvania*[5]. This was a case whereby an Act in Pennsylvania made it unlawful for unnaturalised foreign born residents to kill wild game, except in defence of person or property. The possession of shot guns and rifles by such persons was made unlawful. The Act was challenged as being unconstitutional under due process and equal protection provisions of the 14th Amendment of the United States Constitution. The Court upheld the Act as constitutional and observed as follows:

> "The discrimination undoubtedly presents a more difficult question, but we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be

4. AIR 1958 SC 538.

5. 232 U.S. 138 (1914).

> picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if as a matter of fact, it is found that the danger is characteristic of the class named. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61,80,81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses'…….. The question therefore narrows itself to whether this court can say that legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalised aliens were the peculiar source of the evil that it desired to prevent. Barrett v Indiana, 229 U.S. 26, 29.
>
> Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the stale legislature was wrong in its facts. *Adams v Milwaukee, 228 US. 572, 583.* If we might trust popular speech in some states it was right - but it is enough that this Court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."

36. Reliance was also placed on the observations made in *Keokee Consolidated Coke Co. Vs. Taylor*[6], which are as follows:

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by

6. 234 U.S.224 (1913).

thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear."

37. The next judgment relied upon by the appellants is *Radice Vs. People of the State of New York,*[7] in which the New York Statute was challenged, as it prohibited employment of women in restaurants in cities of first and second class between hours of 10 p.m. and 6 a.m. The Court upheld the legislation in the following words :

"Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (a) that the act discriminates between cities of the first and second class and other cities and communities; and (b) excludes from its operation women employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as in lunch rooms or restaurants conducted by employees solely for the benefit of their employees.

The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. *Packard v Banton, ante, 140; Hayes v Missouri*, *120 U.S. 68*. Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms renders the statute obnoxious to the Constitution. *The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (Connolly v Union Sewer Pipe Co., 184 U.S. 540, 564); but a case where all in the same class of work are included in the restraint.* Of course, the mere fact of classification is not enough to put a statute beyond reach

7. 264 U.S. 292 (1924).

of equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious". *American Sugar Refining Co. V Louisiana, 179 U.S. 89, 92*. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, order to counter the challenge of the constitution must "actually and palpably unreasonable and arbitrary." ……

The U.S. Court then relied upon the observations made in *Joseph Patsone's* case (supra), *Keokee Consolidated Coke Co.* case (supra) which we have already noticed.

38. Further, learned counsel supported the submissions by relying upon the case of *Mohd. Hanif Quareshi Vs. State of Bihar,*[8] wherein the court held as under:

"……The Courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of Constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

39. On the basis of the aforesaid extracts, learned counsel submitted that the classification between the exempted establishments and prohibited establishment is also based on

8. AIR 1958 SC 731.

"Degree of Harm". The legislature is the best judge to measure the degree of harm and make reasonable classification.

40. Coming to the next factor– *Regulatory Feasibility,* which, according to the learned senior counsel, supports the validity of the classification. It was submitted that the import of the impugned enactment is not that, what is prohibited in establishments under Section 33A is to be permitted in establishments under Section 33B. It is submitted by the appellants that the acts which are degrading, dehumanising and facilitating of gender violence in society do not cease to be so simply by virtue of it being made exclusively available to an economically stronger sections of society. It is the submission of the appellants that the State has already made extensive regulatory provisions under various enactments. This relates to the grant of nature of license, terms and conditions of such licence, performance permits. All these regulatory measures are with a view to cure social evils. The impugned enactment, according to the appellants, is a form of an *additional* regulation. It is justified on the ground that the existing system of licenses and permits is not sufficient to deal with the problem of ever increasing "dance bars". Relying on the observations made by this Court in *S.P. Mittal Vs. Union of India & Ors.*[9] it was submitted by the appellants that it is the prerogative of the Government to decide if certain forms of regulation are insufficient, to provide for additional regulation. Reliance was also placed on the observations made in the case of *Radice Vs. People of the State of New York* (supra) which are as under:-

> "The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two adult persons to make a contract of employment for themselves. The answer of the state is that night work of kind prohibited, so injuriously threatens to impair their peculiar and natural functions, and so exposes them to the dangers and

9. (1983) 1 SCC 51.

> menaces incident to night life in large cities, that a statute prohibiting such work falls within the police power of the state to preserve and promote the public health and welfare.
>
> The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant…… The injurious consequences were thought by the legislature to bear more heavily against women than men and considering their delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. Testimony was given upon the trial to the effect that the night work in question was not harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that the night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination".

41. Relying on the aforesaid, it is submitted that exempted establishments as understood by Section 33B are gymkhanas, three starred or above hotels. In order to be considered three stars or above establishments, such establishments have to meet greater degrees of scrutiny, both from Government and from private associations (hoteliers, reviewers etc). *In fact, such establishments generally maintain standards higher than*

the standards expected of them under the regulation. Therefore, the regulation of such establishments is significantly easier, as opposed to the prohibited establishments. These establishments function, according to the appellants, to a greater degree, outside the constant scrutiny of the law. It is also pointed out that it is significantly easier to police the exempted establishments, which at present are six in number, than attempting to police the much greater number of prohibited establishments. It is also pointed out that in cases where an exempted establishment is found carrying out activities prohibited in S.33A, it is incumbent on the relevant authority to revoke the permission for such acts. Therefore, it was submitted that the significant difference in feasibility of regulation is another basis for classifying prohibited establishments. The High Court, according to the counsel, failed to examine the two provisions in a proper perspective.

42. The next submission of the appellants is that "the objective of the Act is an expression of the Obligation on the State to secure safety, social order, public order and dignity of women." It is submitted that a bare perusal of the Preamble of the amending Act and the Statement of Objects and Reasons would make it clear that the State enacted the legislation only after receipt of complaints from various social organizations as well as from various individuals. The Preamble makes it clear that the legislature had enough material to show that the performance of dance in the said bars gives rise to exploitation of women, and further that the performance of dances in eating houses, permit rooms or beer bars are derogatory to the dignity of women and are likely to deprave, corrupt or injure the public morality or morals. The High Court ought to have considered the Statement of Objects and Reasons and Preamble of the Act to discern the true intention of the legislature. In support of the submission that the Court ought to have looked at the objects and reasons, reliance is placed on the observations of this Court in *Shashikant Laxman Kale* (supra)**,** wherein it is observed as follows:

> "It is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification…."

43. It was reiterated that the High Court has given a very restrictive interpretation to the phrase "exploitation of women". The expression would include not only the women who dance in the prohibited establishments but also the waitresses who work in the same establishments. It would also include the effect of the dance bar on gender relations of not just the bar dancer, but for the women around the area. The High Court, according to the appellants, failed to take into account the object that the statutory provisions are in respect of an activity of exploitation of women conducted for financial gain by bar owners and their intermediaries. It is emphasised that the issue involved in this matter is not merely about dancing in the bars, but involves larger issues of dignity of women, the destruction of environments and circumstances where it is profitable to keep women vulnerable. In such circumstances, the law is being used as a tool for dealing with the evils of human trafficking and prostitution, rather than simply prohibiting such activity without the administrative resources to effectively implement such prohibition. It is further submitted that the State is bound by this duty to protect the interest of its citizens especially its weaker sections under the Constitution. The legislation is sought to be justified on the touchstone of Article 23, Article 39(e) and Article 51A(e) of the Constitution. The action of' the Government is also justified on the ground that it is necessary to emancipate women from male dominance as women in dance bars are looked upon as objects of commerce. It is emphasised that the bar dancing is obscene, vulgar and casts considerable amount of negative influence on institutions like family, society, youth etc.

44. Mr. Gopal Subramanium also emphasised that the State cannot shut its eyes to the larger social problems arising out of bar dancing which is uncontrolled and impossible to regulate. He sought to justify the aforesaid submission by taking support from some observations made in *Paris Adult Theatre I Et. Al Vs. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Et. Al.*[10] This case provides, according to the learned senior counsel, a discussion on relation with obscenity and pornography and the duty of the state to regulate obscenity. Reliance is placed on the following observations at pp 58, 60, 63, 64 and 69.

> "It is not for us to resolve empirical uncertainties underlying state legislation, save in exceptional Case where that legislation plainly impinges upon rights protected by the Constitution itself."
>
> …….
>
> "Although there is no conclusive proof of a connection between anti social behaviour and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect the social interest in order and morality." Roth v. United States, 354 U.S.., at 485, quoting *Chaplinsky v New Hampshire,* 315 US. 568, 572 (1942)."
>
> …….
>
> "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and

10. 413 U.S. 49 [1973].

> distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and action on it legislatively simply because there is no conclusive evidence or empirical data."
>
> …….
>
> "The states have the power to make a morally neutral judgment that public exhibition of obscene material or commerce in such material has a tendency to injure community as a whole, to endanger the public safety or to jeopardise in Mr. Chief Justice Warren's words, the States' "right ... to maintain a decent society". *Jacobellis v Ohio* 378 US at 199 (dissenting opinion)"

45. It is further pointed out that the decision to ban obscene dancing is also in consonance with Convention on the Elimination of All Forms of Discrimination Against Women (CEADAW). Learned senior counsel further submitted that establishments covered by Section 33A have a greater direct and indirect effect on the exploitation of women, and the resultant and causative violence against women. It is submitted that the degree of effect on the subjects covered by the objects of the enactment are greater than any effect that might be attributable to exempted establishments.

46. In any event, *exempted establishments will also not be permitted to carry out such performances,* but are left to the operation of parallel regulation simply because they are significantly fewer in number and their very nature facilitates effective regulation. Therefore, according to the learned senior counsel, the impugned enactment is not discriminatory as it makes a reasonable legislative classification which has a direct nexus with the object sought to be achieved by the Act. In support of the proposition that there is a reasonable classification and that the State has the power to make such classification, reliance is placed on the observations made by this Court in *Kedar Nath Bajoria & Anr. Vs. The State of West*

Bengal[11] which are as follows:

> "Now it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purpose of legislation. To put it simply all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentia which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the intelligible differentia having a reasonable relation to the legislative purpose."

47. Reliance is also placed on the observations of this Court in *Ram Krishna Dalmia Vs. Justice S.R. Tendolkar* (supra) for outlining the scope and ambit of Article 14 of the Constitution of India.

48. Finally, it is submitted that the Government had various documents and reports based on which they felt it important to regulate the menace of trafficking and to uphold the dignity of women. On the basis of the aforesaid material, it is submitted that the Government of Maharashtra enacted the amendment in good faith and knowledge of existing conditions after recognizing harm, confined the restrictions to cases where harm to women, public morality etc. was the highest. The High Court has failed to appreciate all the documentary evidence placed and gave a narrow meaning to the object of the Act which is in the larger interest of the women and society.

11. 1954 SCR 30.

Article 19(1)(g) -

49. With regard to whether there is any infringement of rights under Article 19(1)(g), it is submitted by the learned senior counsel that the fundamental right under Article 19(1)(g) to practice any profession, trade or occupation is subject to restrictions in Article 19(6). Therefore, by prohibiting dancing under Section 33A, no right of the bar owners are being infringed. The curbs imposed by Sections 33A and 33B only restrict the owners of the prohibited establishments from permitting dances to be conducted in the interest of general public. The term "interest of general public" is a wide concept and embraces public order and public morality. The reliance in support of this proposition was placed on *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat & Ors.*[12] Reference was also made to *Municipal Corporation of the City of Ahmedabad & Ors. Vs. Jan Mohammed Usmanbhai & Anr.,*[13] wherein this Court gave a wide meaning to "interest of general public" and observed as follows :

> "The expression in the interest of general public' is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution."

50. Factually, it was emphasised that the history of the dance bars and the activities performed within the dance bars show that they are not set up with an intention to propagate art, exchange ideas or spread knowledge. It is submitted that the dance performances in these prohibited establishments were conducted in obscene and objectionable manner to promote the sale of liquor. Therefore, the main activity conducted in these prohibited establishments is not a fundamental right. There is no fundamental right in carrying business or sale in liquor and Government has power to regulate the same. There is also

12. AIR 2006 SC 212.

13. (1986) 3 SCC 20.

overwhelming evidence on record to show that girls have not opted for this profession out of choice but have been brought into this by middle men or other exploitative factors. There is no free and informed choice being made by the bar dancers. This is sought to be supported by the observations in the *Prayas* Report where it is stated :

> "In conclusion, the study has shown that most women did not know the nature of their employment at the time of getting into dance bars for work, and they were brought into this work through middle men. The basic elements of trafficking were found to be present in the process of entry, though it may not have been in its overt form. Having come here and seeing no other options, they had no choice but to continue in this sector……".

51. The SNDT Report also shows that only 17.40% of the bar girls are from State of Maharashtra. The bar owners have been exploiting the girls by sharing the tips received and also capitalizing on their performance to serve liquor and improve the sales and business. Again reliance is placed on the observations made in *Prayas* Report at page 47 which is as under :

> "The women working as either dancers or waiters were not paid any salary, but were dependant on tips given by customers in the bar, which varies from day-to-day and from women to another. This money is often shared with the bar owner as per a fixed ratio ranging from 30 to 60 percent."

52. The same conclusion is also found in *Shubadha Chaukar Report* where it is stated that :

> "Tips given by enamoured customers are the main income of girls working in the bars. Normally dancers do not get a salary as such. The bar owner makes it look like he is doing a favour by allowing them to make money by dancing. So

> he does not give them a salary. On the contrary a dancer has to hand over to the owner 30 to 40 per cent of what she earns. This varies from bar to bar."

53. On the basis of the above, it was submitted that the bar owners with a view to attract customers introduced dance shows where extremely young girls dance in an indecent, obscene and vulgar manner which is detrimental to the dignity of women and depraves and corrupt the morality.

54. The second limb of the submission is that the prohibition does not bar the restaurant owners or the beer parlour owners from running their respective establishments i.e. restaurant business, beer parlours etc. What is being prohibited is only the dancing as a form of entertainment in such establishments. The bar owners can still conduct entertainment programmes like music, orchestras etc which are not prohibited. It is submitted that loss of income cannot be a reason for the bar owners to claim that their right to trade and profession is being infringed. This submission is sought to be supported by the observations of this Court in *T.B. Ibrahim Vs. Regional Transport Authority, Tanjore.*[14] In this case it is observed by this Court as follows:

> "……..There is no fundamental right in a citizen to carry on business wherever he chooses and his right must he subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. The restriction may have the effect of eliminating the use to which the stand has been put hitherto but the restriction cannot be regarded as being unreasonable if the authority imposing such restriction has power to do so. Whether the abolition of stand was conducive to public convenience or not is a matter entirely for the transport authority to judge, and it is not open to the court to substitute its own opinion for the opinion of the Authority, which is in the best position,

14. [1953] 4 SCR 290.

having regard to its knowledge of local conditions to appraise the situation".

55. It was next submitted that the High Court wrongly concluded that the activity of young girls/women being introduced as bar dancers is not *Res Extra Commercium*. Such activity by the young girls is a dehumanising process. In any event, trafficking the girls into bar dancing completely lacks the element of conscious selection of profession. An activity which has harmful effects on the society cannot be classified as a profession or trade for protection under Article 19(1)(g) of the Constitution. Such dances which are obscene and immoral would have to be considered as an activity which is '*Res Extra Commercium*'. The High Court has wrongly concluded otherwise. Reliance is also placed on the observations made by this Court in the case of *State of Bombay Vs. R.M.D. Chamarbaugwala & Anr.*[15] In this case, it was observed by this Court that activity of gambling could not be raised to the status of trade, commerce or intercourse and to be made subject matter of a fundamental right guaranteed by Article 19(1)(g). Similarly, in this case the dance bars having negative impact on family, women, youth and has been augmenting the crime rate as well as trafficking and exploitation of women. Reference was again made to the various reports and studies to show the disruptive opinion of the dance bars in the families of the persons employed in such dance bars. Reliance was placed on the judgment of this Court in *Khoday Distilleries Ltd. & Ors. Vs. State of Karnataka & Ors.,*[16] in support of the submission that the trading in liquor is not a fundamental right. This Court further observed that trafficking in women or in slaves or in counterfeit coins or to carry on business of exhibiting or publishing pornographic or obscene films and literature is not a fundamental right as such activities are vicious and pernicious. Reliance was placed on the following observations:

15. AIR 1957 SC 699.

16. (1995) 1 SCC 574.

> "The correct interpretation to be placed on the expression "the right to practice any profession, or to carry on any occupation, trade or business" is to interpret it to mean the right to practice any profession or to carry on any occupation, trade or business which can be legitimately pursued in a civilised society being not abhorrent to the generally accepted standards of its morality. ……This is apart from the fact that under our Constitution the implied restrictions on the right to practice any profession or to carry on any occupation, trade or business are made explicit in clauses (2) to (6) of Article 19 of the Constitution and the State is permitted to make law for imposing the said restrictions."
>
> "It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium,* (outside commerce). There cannot be a business in crime. (c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited."

56. The aforesaid observations were reiterated in *State of Punjab & Anr. Vs. Devans Modern Breweries Ltd. & Anr.*[17] Relying on the aforesaid observations, it was submitted that in the banned establishments, the dance is performed amidst consumption of liquor and the State has every right and duty to regulate the consequence emanating from such circumstances. In support of this submission, the appellants relied on the judgment of the United States Supreme Court in *New York State Liquor Authority Vs. Dennis BELLANCA, DBA The*

17. (2004) 11 SCC 26.

Main Event, Et Al.[18]. In this case, the question raised was about the power of a State to prohibit topless dancing in an establishment licensed by State to serve liquor. It was claimed that the prohibition was violative of United States Constitution. U.S. Supreme Court, upon consideration of the issue, observed as follows:

> "In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favour of the validity of the state regulation" conferred by Twenty first Amendment, California v LaRue, 409 U. S., at 118, we cannot agree with the New York Court of Appeals that statute violates United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty first Amendment makes that a policy judgment fin- the state legislature, not the courts."

57. It was also submitted that in the present case the dance is conducted in an obscene manner and further the dance bars eventually happen to be pick up locations that also propagate prostitution in the area, which is sought to be prevented by the legislation. The appellants also relied on the judgment in *Regina Vs. Bloom*.[19] In this case, the appellants were proprietors of the clubs who were charged with keeping a disorderly house, which arose out of matters that occurred in course of strip tease performances. The Court of Criminal Appeal (England) held that as regards the cases in which indecent performances or exhibition are alleged, a disorderly

18. 452 U.S. 714 (1981).

19. 1961 3 W.L.R. 611.

house is a house conducted contrary to law and good order in that matters performed or exhibited are of such a character that their performance or exhibition in a place of common resort amounts to an outrage of public decency or tends to corrupt or deprave the dignity of women and public morality. Therefore in the present circumstances, the State, in the interest of dignity of women, maintenance of public order and morality has banned dances in such establishments where regulation is virtually impossible. Since the obscene and vulgar dancing is a *res extra commercium*, the establishments cannot claim a fundamental right to conduct dance therein.

58. It is further submitted that the legislation also does not infringe any fundamental right of the bar dancers. The prohibition contained under Section 33A is not absolute and the dancers can perform in exempted establishments. This apart, the dancers are also free to dance in auditoriums, at parties, functions, musical concerts, etc. According to the appellants, another important facet of the same submission is that the rights of the bar girls to dance are subject to the right of the bar owners to run the establishment. In other words, the right of the bar girls are derivative and they do not have absolute right to dance as a vocation or profession in the dance bars. This right would be automatically curtailed in case the dance bar is closed for economic reasons or as a result of licence being cancelled. In support of the submission, the appellants relied on a judgment of this Court in *Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. Vs. Union of India & Ors.*[20] in which it is held as under :-

> "14. The right of the petitioners to carry on the occupation of industrial workers is not, in any manner, affected by the impugned sale. The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the workers are retrenched consequent upon and on account

20. AIR 1981 SC 344.

of sale, it will be open to them to pursue their rights and remedies under the industrial laws. But the point to be noted is that the closure of an establishment in which a workman is for the time being employed does not by itself infringe his fundamental right to carry on an occupation which is guaranteed under article 19(1)(g) of the constitution."

59. Relying on the above, it is submitted that there is no absolute right for the bar girls to be employed in the dance bars and that the right to work would be subject to the continuation of the establishment. Hence, it is a derivative right emanating from the right of the dance bar owners to run the establishments subject to restrictions imposed.

60. It is next submitted that the right to trade and profession is subject to reasonable restriction under Article 19(6) of the Constitution. The decision to impose the ban was to defend the weaker sections from social injustice and all forms of exploitation. In the instant case, the moral justification is accompanied with additional legitimate state interest in matters like safety, public health, crimes traceable to evils, material welfare, disruption of cultural pattern, fostering of prostitution, problems of daily life and multiplicity of crimes. Learned senior counsel for the appellants strongly relied upon the Statement of Objects and Reasons and the Preamble of the amending Act to reiterate that the State is enjoined with the duty to protect larger interest of the society when weaker sections are being exploited as objects of commerce and when there is issue of public order and morality involved.

61. The appellants have relied on a number of judgments of this Court to illustrate the concept of "reasonable restriction" and the parameters within which the court will examine a particular restriction as to whether it falls within the ambit of Article 19(6). Reference was made to the *State of Madras Vs. V.G. Row*[21], *B.P. Sharma Vs. Union of India & Ors.,*[22] *M.R.F.*

21. AIR 1952 SC 196.

22. (2003) 7 SCC 309.

Ltd. Vs. Inspector Kerala Govt. & Ors..[23] Since the principles are all succinctly defined, we may notice the observations made by this Court in *B.P. Sharma's* case (supra).

"The main purpose of restricting the exercise of the right is to strike a balance between individual freedom and social control. The freedom, however, as guaranteed under article 19(1)(g) is valuable and cannot be violated on grounds which are not established to be in public interest or just on the basis that it is permissible to do so. For placing a complete prohibition on any professional activity there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition, it may result in jeopardizing or seriously affecting the interest of the people in general. If it is not so, it would not be a reasonable restriction if placed on exercise of the right guaranteed under article 19 (1)(g). The phrase ''in the interest of the general public" has come to be considered in several decisions and it has been held that it would comprise within its ambit interests like public health and morals (refer to *State of Maharashtra v. Himmatbhai Narbheram Rao* (AIR 1970 SC 1157), economic stability On consideration of a catena of decisions on the point, this Court, in a case reported in *'IMF Ltd v. Inspector, Kerala Government* (1998) 8 SCC 227 has laid certain tests on the basis of which reasonableness of the restriction imposed on exercise of the right guaranteed under Article 19 (1)(g) can be tested. Speaking for the Court, Saghir Ahmad (as he then was), laid down such considerations as follows:

"(1) While considering the reasonableness of the restrictions, the court has to keep in mind the directive principles of State policy.

23. (1998) 8 SCC 227.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to the changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (see *State of U.P. v Kaushailiya*)

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of constitutionality of the Act will naturally arise."

62. Thereafter, Mr. Subramanium has cited *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat* (supra) in support of the submission that Statement of Objects and Reasons would be relevant for considering as to whether it is permissible to place a total ban under Article 19(6). After considering the principles laid down earlier, this court concluded as under:-

"We hold that though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being

reasonable in the interest of general public, yet, in the present case banning slaughter of cow progeny is not a prohibition but only a restriction."

63. Relying on the aforesaid, it was submitted that while considering the reasonableness, the court should consider the purpose of restriction imposed, extent of urgency, prevailing conditions at the time when the restriction was imposed. According to the appellants, in the instant case, the social order problems in and around the dance bars had reached such heights which were beyond the tolerable point. The tests laid down earlier were reiterated in *M.J. Sivani & Ors. Vs. State of' Karnataka & Ors.*[24] In this case, it is observed as follows :

"18……. In applying the rest of reasonableness, the broad criterion is whether the law strikes a proper balance between social control on the one hand and the right of individual on the other hand. The court must take into account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied by the law, its extent and urgency, how far the restriction is or is not proportionate to the evil and the prevailing conditions at that time."

64. Relying on the aforesaid, it was submitted that the larger issue involved was the trafficking of young women and minors into dance bars and also incidentally leading to prostitution which could have been prevented to a large extent only by imposing the ban. In support of this, learned counsel have relied on the *Prayas* Report which shows that 6% of the women working in dance bars are minors and 87% are between the age of 18-30 years. Similarly, SNDT report states that minors constitute upto 6.80 % and those between 19 to 30 years of age constitute 88.20%. *Prayas* Report further states that "It was found that the women respondents did not find any dignity in this work. This is borne out by the fact that

24. (1995) 6 SCC 289.

47% of women did not reveal their work to family members and outsiders. They are often exposed to the sexual overtures of overenthusiastic customers and are aware of their vulnerability to get exploited". The appellants also relied on a number of complaints and the various cases of minor girls being rescued from dance bars during the period 2002-05 to buttress their submission that the young girls were subjected to human trafficking. Learned senior counsel also submitted that the High Court has erroneously concluded that if the women can safely work as waitress in the Restaurants why can they not work as dancers. The learned senior counsel also submitted that the High Court wrongly proceeded on the basis that there was no evidence before the State or the Court in support of the legislation. On the basis of the above, it is submitted that the restrictions imposed are reasonable and the legislation deserves to be declared *intra vires* the constitutional provisions.

65. Further, it was submitted that the legislative wisdom cannot be gone into by the court. The Court can only invalidate the enactment if it transgresses the constitutional mandate. It is submitted that invalidation of a statute is a grave step and that the legislature is the best judge of what is good for the community. The legislation can only be declared void when it is totally absurd, palpably arbitrary, and cannot be saved by the court. It is reiterated that the principle of "Presumption of Constitutionality" has to be firmly rebutted by the person challenging the constitutionality of legislation. The United States Supreme Court had enunciated the principle of constitutionality in favour of a statute and that the burden is upon the person who attacks it to show that there has been a clear transgression of any Constitutional provision. The appellants relied on the observations made in *Charanjit Lal Chowdhury Vs. Union of India & Ors*.[25] wherein this Court observed as follows :

> "It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds"

25. AIR 1951 SC 41.

66. The same principle was reiterated by this Court in *State of Bihar & Ors. Vs. Bihar Distillery Ltd. & Ors.*[26] in the following words :

> "The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as a part of attempt to sustain the validity/constitutionality of the enactment. After all, an act by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void."

67. On the basis of the above, it was submitted that the burden of proof is upon the Respondents herein to prove that the enactment/amendment is unconstitutional. Once the respondents prima facie convince the Court that the enactment is unconstitutional then the burden shifts upon the State to satisfy that the restrictions imposed on the fundamental rights satisfy the test of or reasonableness. The High Court, according to the appellants, failed to apply the aforesaid tests.

68. Finally, it was submitted that in the event this Court is not inclined to uphold the constitutionality of the impugned provisions, it ought to make every effort to give the provision a strained meaning than what appears to be on the face of it. This

26. (1997) 2 SCC 453.

is based on the principle that it is only when all efforts to do so fail, the court ought to declare a statute to be unconstitutional. The principle has been noticed by this Court in *Government of Andhra Pradesh & Ors. Vs. P. Laxmi Devi (Smt.)*[27] wherein it is observed as follows :

> "46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no two views that are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving strained construction or narrowing down its scope vide *Rt. Rev. Msgr. Mark Netto v State of Kerala* (1979) 1 SCC 23 para 6.

69. The same principle was reiterated in *Kedar Nath Singh Vs. State of Bihar*[28] which is as follows :

> "It is well settled that if certain provisions of law, construed in one way, would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction."

70. On the basis of the above, it was submitted that this Court ought to read down the provision in the following manner:

> "All dance" found in Section 33A of the Police Act may be read down to mean that "dances which are obscene and derogatory to the dignity of women". This would ensure that there is no violation of any of the rights of the girls who dance as well as that of the owners of the establishments. Still further, it was submitted that even if the reading of the provisions as mentioned above is not accepted, Section 33A can still be saved by applying the doctrine of severability. It is submitted that the intention of the legislature being to prohibit and ban obscene dance in the interest of society and to uphold the dignity of women, by severing the exempting section, namely, Section 33B and the provision which is contained in Section 33A can be declared to be in accordance with the object of legislature. This would remove the vice of discrimination, as declared by the High Court.

27. (2008) 4 SCC 720.

28. AIR 1962 SC 955.

Respondents' Submissions:

71. In response to the aforesaid elaborate submissions, learned senior counsel appearing for the respondents have also submitted written submissions. Mr. Mukul Rohatgi, learned senior counsel appeared for respondent – Indian Hotel and Restaurants Association in C.A.No.2705 of 2006, whereas Dr. Rajeev Dhawan, learned senior counsel, appeared on behalf of Bhartiya Bar Girls Union in C.A.No.2705 of 2006. Mr. Anand Grover, learned senior counsel, appeared for respondent Nos. 1 to 6 in W.P.No.2338/2005 and respondent No. 1 and 2 in W.P. No.2587 of 2005.

72. Since the High Court has accepted the submissions made on behalf of the respondents (writ petitioners in the High Court), it shall not be necessary to note the submissions of the learned senior counsel as elaborately as the submissions of the appellants herein. Mr. Mukul Rohatgi submitted that, at the heart of the present case, the controversy revolved around the right to earn a livelihood more so than the right of a person to choose the vocation of their calling. It was submitted that apart from the reasoning given in the judgment of the High Court, the challenge to the impugned legislation can be sustained on

other grounds also. He submits that a classification of the establishments into three stars and above, and below is not based on any intelligible differentia and is *per se* discriminatory and arbitrary. Bar dancers have a right to livelihood under Article 21 and the ban practically takes away their right to livelihood. He therefore, submits that the ban is violative of Articles 14, 19(1)(a) and 19(1)(g) and 21 of the Constitution. Relying on the observations made by this Court in the case of *I.R. Coelho (Dead) by LRs. Vs. State of T.N.,*[29] he submits that these articles are the very heart and soul of the Constitution and are entitled to greater protection by the Court than any other right. Mr. Rohatgi submits that the submissions made by the appellants with regard to the protecting the dignity of women and preventing trafficking in women are misconceived. There are adequate measures in the existing provisions, licensing conditions which would safeguard the dignity of women. Relying on Sections 370 and 370A of the IPC, he submits that there are adequate alternate mechanisms for preventing trafficking in women. Elaborating on the submissions that dance is protected by Article 19(1)(a) of the Constitution being a part of fundamental right of speech and expression, he relied upon the observations made by this Court in *Sakal Papers (P) Ltd. & Ors. Vs. The Union of India.*[30] He has also made a reference to some decisions of the High Court recognizing that dancing and cabaret are protected rights under Article 19(1)(a). He points out that it is always open to a citizen to commercially benefit from the exercise of the fundamental right. Such commercial benefit could be by a bar owner having dance performance or by the dancers themselves using their creative talent to carry on an occupation or profession. The impugned amendment prohibits the bar owners from carrying on any business or trade associated with dancing in these establishments and the bar girls from dancing in those premises. He then submits that the amendment violates Article

29. (2007) 2 SCC 1.

30. (1962) 3 SCR 842.

19(1)(g), by imposing restrictions by way of total prohibition of dance. Even though the freedom under Article 19(1)(g) of the Constitution is not absolute, any restriction imposed upon the same have to fall within the purview of clause 6 of Article 19. Therefore, the restriction imposed by law must be reasonable and in the interest of general public. It was also submitted that while such restriction may incidentally touch upon other subjects mentioned above, such as morality or decency, the same cannot be imposed only in the interest of morality or decency. Mr. Rohatgi then submitted that the reasons set out in the objects and reasons of the amendment are not supported by any evidence which would demonstrate that there was any threat to public order. There is also no material to show that the members of the Indian Hotel and Restaurants Association were indulging in human trafficking or flesh trade. Therefore, according to Mr. Rohatgi, the ban was not for the protection of any interests of the general public. In fact, Mr. Rohatgi emphasised that the Statement of Objects and Reasons does not refer to trafficking. The compilation of 600 pages given to the respondents by the appellants does not contain a single complaint about trafficking. All allegations relating to trafficking have been introduced only to justify the ban on dancing. He, therefore, submits that the total ban imposed on dancing violates the fundamental right guaranteed under Article 19(1)(g). Learned senior counsel further submitted that dancing is not *res extra commercium*. He emphasised that if the dancing of similar nature in establishments, mentioned in Section 33B is permissible, the prohibition of similar dance performance in establishments covered under Section 33 cannot be termed as reasonable and or "in the interest of general public". Therefore, according to Mr. Rohatgi, the restrictions do not fall within the scope of Article 19(6). He relied on the judgment of this Court in *Anuj Garg & Ors. Vs. Hotel Association of India & Ors.,*[31] wherein a ban on employment of women in establishment where liquor was served, was declared discriminatory and

31. (2008) 3 SCC 1.

violative of Articles 14, 15, 19 and 21. In this case, it was held as under :

> ".....Women would be as vulnerable without State protection as by the loss of freedom because of the impugned Act. The present law ends up victimising its subject in the name of protection. In that regard the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.
>
> Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf.
>
> Also with the advent of modern State, new models of security must be developed. There can be a setting where the cost of security in the establishment can be distributed between the State and the employer."

73. Relying on the *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat* (supra), Mr. Rohatgi submitted that the standard for judging reasonability of restriction or restrictions which amounts to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate. The State has failed to even examine the possibility of the alternative steps that could have been taken. He has also relied on the judgments with regard to the violation of Article 14 to which reference has already been made in the earlier part of the judgment. Therefore, it is not necessary to reiterate the same. However, coming back to Section 33B, Mr. Rohatgi submitted that dancing that is banned in the establishments covered under Section 33A is permitted under the exempted establishments under Section

33B. According to learned senior counsel, the differentia in Section 33A and 33B does not satisfy the requirement that it must be intelligible and have a rational nexus sought to be achieved by the statute. He submits that the purported "immorality" gets converted to "virtue" where the dancer who is prohibited from dancing in an establishment covered under Section 33A, dances in an establishment covered under Section 33B. The discrimination, according to Mr. Rohatgi, is accentuated by the fact that for a breach committed by the licensees in the category of Section 33B only their licenses will be cancelled but the licensees of establishments covered under Section 33A would have to close down their business. He further submits that the provision contained in Section 33A is based on the presumption of the State Government that the performance of dance in prohibited establishments having lesser facilities than three star establishments would be derogatory to the dignity of women. The State also presumed that dancing in such establishments is likely to deprave, corrupt or injure public morality. The presumption is without any factual basis. The entry of women in such establishments is not banned. There is also no prohibition for women to take up alternative jobs within such establishments. They can serve liquor and beer to persons but this does not lead to the presumption that it would arouse lust in the male customers. On the other hand, when women start dancing it is presumed that it would arouse lust in the male customers. He emphasised the categorization of establishments under Sections 33A and 33B does not specify the twin criteria: (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational nexus or relation to the object sought to be achieved by the legislation. He submits that there is a clear discrimination between the prohibited establishments and the exempted establishments. He points out that the only basis for the differentiation between the exempted and prohibited establishments is the investment and the paying capacity of

patrons. Such a differentiation, according to Mr. Rohatgi, is not permissible under the Constitution.

74. The next submission of Mr. Rohatgi is that Article 21 guarantees the right to life which would include the right to secure a livelihood and to make life meaningful. Article 15(1) of the Constitution of India guarantees the fundamental right that prohibits discrimination against any citizen, *inter alia*, on the ground only of sex. Similarly Article 15(2) lays down that no citizen shall, on grounds only of, inter alia, sex, be subject to any disability, liability, restriction or condition with regard, *inter alia*, to "access to shops, public restaurants, hotels and places of public entertainment." The provision in Article 15(3) is meant for protective discrimination or a benign discrimination or an affirmative action in favour of women and its purpose is not to curtail the fundamental rights of women. He relied on the observations made by this Court in *Government of A.P. Vs. P.B. Vijayakumar & Anr.*[32] :-

> "The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women……''
>
> (Emphasis supplied)

75. He submits that the impugned legislation has achieved the opposite result. Instead of creating fresh job opportunities

32. (1995) 4 SCC 520.

for women it takes away whatever job opportunities are already available to them. He emphasised that the ban also has an adverse social impact. The loss of livelihood of bar dancers has put them in a very precarious situation to earn the livelihood. Mr. Rohatgi submitted that the dancers merely imitate the dance steps and movements of Hindi movie actresses. They wear traditional clothes such as *ghagra cholis, sarees and salwar kameez*. On the other hand, the actresses in movies wear revealing clothes: shorts, swimming costumes and revealing dresses. Reverting to the reliance placed by the appellants on the Prayas Report and Shubhada Chaukar Report, Mr. Rohatgi submitted that both the reports are of no value, especially in the case of Prayas Report which is based on interviews conducted with only few girls. The SNDT Report actually indicates that there is no organized racket that brings women to the dance bars. The girls' interview, in fact, indicated that they came to the dance bars through family, community, neighbors and street knowledge. Therefore, according to the Mr. Rohatgi, the allegations with regard to trafficking to the dance bars by middlemen are without any basis. Most of the girls who performed dance are generally illiterate and do not have any formal education. They also do not have any training or skills in dancing. This clearly rendered them virtually unemployable in any other job. He, therefore, submits that the SNDT Report is contradictory to the Prayas Report. Thus, the State had no reliable data on the basis of which the impugned legislation was enacted. Mr. Rohatgi further submitted that there are sufficient provisions in various statutes which empowered the Licensing Authority to frame rules and regulations for licensing/controlling places of public amusement or entertainment. By making a reference to Rules 120 and 123 framed under the Amusement Rules, 1960; he submits that no performers are permitted to commit on the stage or any part of the auditorium any profanity or impropriety of language. These dancers are also not permitted to wear any indecent dress. They are also not permitted to make any indecent movement or gesture whilst dancing. Similar provisions are contained under the

Performance License. Although learned senior counsel has listed all the regulatory provisions contained under the Bombay Police Act, it is not necessary to notice the same. The submission based on this regulation is that there is wide amplitude of power available to the appellants for controlling any perceived violation of dignity of women through obscene dances. He submits that the respondents are being made a scapegoat for lethargy and failure of police to implement the provisions of law which are already in place and are valid and subsisting. Failure of the appellants in not implementing the necessary rules and regulations would not justify the impugned legislation. Learned senior counsel has also submitted that the State Government, in its effort to regulate the conduct of dances, had formed a Committee to make suggestions for amendment of the existing Rules. The Committee had prepared its report and submitted the same to the State Government. However, the State Government did not take any steps for implementation of the recommendation which was supported by the Indian Hotel and Restaurant Association. He submits that the judgment of the High Court does not call for any interference.

76. Dr. Rajeev Dhawan, learned senior counsel, has also highlighted the same issues. He has submitted that the provisions contained in Section 33A(1) prohibit performance of dance of any kind or type. Since the Section contained the Non Obstante Clause, it is a stand alone provision absolutely independent of the Act and the Rules. He submits that the provisions are absolutely arbitrary and discriminatory. Under Section 33A(1), there is an absolute provision which is totally prohibiting dance in eating houses, permit rooms or beer bars. On the other hand, Section 33B introduced the discriminatory provision which allows such an activity in establishments where entry is restricted to members only and three starred or above hotels. He also emphasised that the consequence of violation of Section 33A is punishment up to 3 years imprisonment or Rs. 2 lakhs fine or both and with a minimum 3 months and

Rs.50,000/- fine unless reasons are recorded. The Section further contemplates that the licence shall stand cancelled. Section 33A(6) makes the offence cognizable and non-bailable. According to Dr. Rajeev Dhawan, the provision is absolute and arbitrary. He reiterates that the non obstante clause virtually makes Section 33A stand alone. Further Section 33A(1) is discretion less. It applied to all the establishments and covers all the activities, including holding of performance of dance of any kind or type in any eating house, permit room or beer bar. There is total prohibition in the aforesaid establishments. The breach of any condition would entail cancellation of licence. According to Dr. Dhawan, Section 33A is a draconian code which is discretion less overbroad, arbitrary with mandatory punishment for offences which are cognizable and non-bailable. He then emphasised that the exemption granted to the establishment under Section 33B introduces blatant discrimination. He submits that the classification of two kinds of establishment is unreasonable. According to Dr. Dhawan, it is clear that Section 33B makes distinction on the grounds of "class of establishments" or "class of persons who frequent the establishment" and not on the form of dance. He reiterates the submission that if dance can be permitted in exempted institutions it cannot be banned in the prohibited establishments. He submitted that treating establishments entitled to a performance licence differently, even though they constitute two distinct classes would be discriminatory as also arbitrary, considering the object of the Act and the same being violative of Article 14 of the Constitution of India. Answering the submission on burden of proof with regard to the reasonableness of the restriction, Dr. Dhawan submits that the burden of showing that the recourse to Article 19(6) is permissible lies upon the State and not on the citizen, he relies on the judgment of this Court in *M/s. Laxmi Khandsari & Ors. Vs. State of U.P. & Ors.*[33]

77. Relying on the *Narendra Kumar & Ors. Vs. Union of*

33. (1981) 2 SCC 600.

India & Ors.,[34] he submitted that the total prohibition in Section 33A must satisfy the test of Article 19(6) of the Constitution. Reliance is placed on a number of judgments to which we have made a reference earlier. Dr. Dhawan further emphasised that the reports relied upon by the State would not give a justification for enacting the impugned legislation. He points out that the study conducted by Shubhada Chaukar for Vasantrao Bhagwat Memorial Fellowship entitled "Problems of Mumbai Bar girls" is based on conversations with 50 girls. According to Dr. Dhawan, this report is thoroughly unreliable. The report itself indicates that there are about one lakh bar girls in Mumbai-Thane Region, therefore, interview of 50 girls would not be sufficient to generate any reliable data. The report also states that there are about 1000-1200 bars, but it is based on interaction with seven bar owners. Even then the report does not suggest complete prohibition but suggests a framework which "regulates" the functioning of bars, performances by singers, dancers etc. Similarly, the Prayas Report cannot be relied upon. The study was, in fact, done after the ban was imposed by the State Government. Even this report indicates that after the ban there was urgent need to find alternate source of livelihood for these girls. There was no facility of education for the children. Even this report finds that the families from which these girls come are economically weak. Six percent of minor children comprise the dancing population. They are not provided any specialized training to be bar dancers. They do not live in self owned houses. The SNDT Report clearly states that the study is based on interaction with 500 girls from 50 bars. The report indicates that there are a number of prevalent myths which are without any basis. It is pointed out that, according to the report, the following are the myths :-

1. It is an issue of trafficking from other States and countries.

2. 75% dancers are from Bangladesh.

34. (1960) 2 SCR 375.

3. Only 3% are dancers from Maharashtra.

4. Bar culture is against the tradition of Maharashtra.

5. Girls who dance are minors.

6. Bar Dancers hide their faces.

7. Girls don't work hard.

8. Bar Girls can be rehabilitated in Call Centers.

9. Dancing in Bars is sexual exploitation.

10. Girls are forced into sex work.

11. Dance bars are vulgar and obscene.

12. Ban will solve all these problems.

78. The study, in fact, recommends that the dance bars should not be banned. There should be regularization of working conditions of bar dancers. There should be monitoring and prevention of entry of children into these establishments. There should be protection against forced sexual relations and harassments. There should be security of earning, medical benefits and protection from unfair trade practices. The report recommends that there is a need for development that increases rather than reduces options for women. The report also indicates that the ban had an adverse impact in that respect. It will lead to women becoming forced sex workers. The second report of SNDT is based on empirical interviews. It recommends that the ban imposed should be lifted immediately. Dr. Dhawan has further elaborated the shortcomings of the Prayas Report. He has also emphasised that both the SNDT and Prayas Report substantiate the fact that dancers were the sole bread winners in their families earning approximately Rs.5,000/- to Rs.20,000/- per month. They were supporting large families in Mumbai as well as in their native places. After the ban, these families are left without a source

of income and have since then been rendered destitute. He also points out that the SNDT study indicates that many dancers came from environments/employments where they had been exploited (maid servants, factory workers, etc.). Most of these women had taken employment as dancers in view of the fact that it afforded them financial independence and security. The SNDT Report points out that not a single bar dancer has ever made any complaint about being trafficked. The reports, according to Dr. Dhawan, clearly indicate that complete prohibition is not the solution and regulation is the answer.

79. Dr. Dhawan then submitted that the conclusions recorded by the High Court on equality and exploitation need to be affirmed by this Court. He has submitted that to determine the reasonableness of the restriction, the High Court has correctly applied the direct and inevitable effect test. He seeks support for the submission, by making a reference to the observations made by this Court in *Rustom Cavasjee Cooper Vs. Union of India*[35] and *Maneka Gandhi Vs. Union of India & Anr.,*[36] he emphasised that the direct operation of the Act upon the rights forms the real test. The principle has been described as the doctrine of intended and real effect or the direct and inevitable effect, in the case of *Maneka Gandhi* (supra). Dr. Dhawan also emphasised that dancing is covered by Article 19(1)(a) even though it has been held by the High Court that it is not an expression of dancers but their profession. He relied on the observations of this Court in *Bharat Bhawan Trust Vs. Bharat Bhawan Artists' Association & Anr.*[37] wherein it is held that the acting done by an artist is not done for the business. It is an expression of creative talent, which is a part of expression.

80. Illustrations submitted by Dr. Dhawan are that the legislation cannot be saved even by adopting the doctrine of

35. (1970) 1 SCC 248.

36. (1978) 1 SCC 248.

37. (2001) 7 SCC 630.

proportionality which requires adoption of the least invasive approach. Dr. Dhawan has reiterated that the suggestions made by the Committee pursuant to the resolution dated 19th December, 2002 ought to be accepted. According to Dr. Dhawan, acceptance of such suggestions would lead to substantial improvement. If the State really seeks to control obscene bar dancing, he submitted that the solution can be based on ensuring that:- bar girls are unionized; there is adequate protection to the girls and more involvement of the workers in self improvement and self regulation. Dr. Dhawan does not agree with Mr. Gopal Subramanium that this should be treated as a case of trafficking with complicated crisis centric approach.

81. Mr. Anand Grover, learned senior counsel has rebutted the factual submissions made by the appellants. He submits that the State has wrongly mentioned before the court that women who dance in the bar are trafficked or compelled to dance against their will and that the significant number of dancers are minor or under the age of 18 years; that the majority of dancers are from states outside Maharashtra which confirms the allegation of inter-state trafficking; that dancing in bars is a gateway to prostitution; that bar dancing is associated with crime and breeds criminality; that the conditions of dance bars are exploitative and dehumanizing for the women. Lastly, that bar dancing contributes to social-ills and illicit affairs between dancers and the male visitors break up of family and domestic violence against wives of men visiting the dance bars. According to Mr. Grover, the aforesaid assertions are founded on incorrect, exaggerated or overstated claims. Learned senior counsel has also indicated that there is great deal of fudging of figures by police with regard to complaints and cases registered under the dance bars to substantiate their contentions. He has relied on the official data on the incidence of trafficking crimes from the National Crime Records Bureau report for the year 2004-2011 to show that there is no nexus between dance bars and trafficking in women. Learned senior

counsel has reiterated the submission that Section 33A and Section 33B of the Bombay Police Act violate Article 14 of the Constitution. He has relied on the judgment of this Court in *D.S. Nakara & Ors. Vs. Union of India*[38]*.* Learned senior counsel also reiterated that the classification between the establishment under Section 33A and Section 33B is unreasonable.

82. The High Court, according to the learned senior counsel, has wrongly accepted the explanation given by the appellants in their affidavits that the classification is based on the type of dance performed in the establishments. This, according to learned senior counsel, is contrary to the provisions contained in the aforesaid sections. He reiterated the submissions that the distinction between the establishments is based not on the type of dance performance but on the basis of *class* of such establishments. He makes a reference to the affidavit in reply filed in Writ Petition No.2450 of 2005 at paragraph 33 *inter alia* stated as follows :-

> "Even otherwise five star hotels are class themselves and can't be compared with popularly known dance bars….the persons visiting these hotels or establishments referred therein above stand on different footing and can't be compared with the people who attend the establishments which are popularly known as dance bar. They belong to different strata of society and are a class by themselves."

83. These observations, according to learned counsel, are contrary to the decision of this Court in *Sanjeev Coke Manufacturing Company Vs. M/s Bharat Coking Coal Limited & Anr.*[39] Mr. Grover has also reiterated the submission that classification between Sections 33A and 33B establishments has no rational nexus with the object sought to be achieved by the impugned legislation. He submits that whereas Section 33A prohibits any kind or type of dance performance in eating

38. (1983) 1 SCC 305.

39. (1983) 1 SCC 147.

house, permit room or beer bar, i.e., dance bars, Section 33B allows all types and kinds of dances in establishments covered under Section 33B. Learned senior counsel further submits that the object of the impugned legislation is to protect women from exploitation by prohibiting dances, which were of indecent, obscene and vulgar type, derogatory to the dignity of women and likely to deprave, corrupt or injure the public morality, or morals. This is belied by the fact that all kinds of dances are permitted in the exempted establishments covered under Section 33B. He has also given the example that most of the Hindi film songs or even dancing in discos are much more sexually explicit than the clothes worn by the bar dancers.

84. Learned senior counsel further submitted that exploitation of women is not limited only to dance bar. Such exploitation exists in all forms of employment including factory workers, building site workers, housemaids and even waitresses. In short, he reiterated the submission that the legislation does not advance the objects and reasons stated in the amendment Act. Mr. Grover further submitted that the impugned law violates the principle of proportionality. He has pointed out that gender stereotyping is also palpable in the solution crafted by the legislature. The impugned statute does not affect a man's freedom to visit bars and consume alcohol, but restricts a woman from choosing the occupation of dancing in the same bars. The legislation, patronizingly, seeks to 'protect' women by constraining their liberty, autonomy and self-determination. Mr. Grover has also reiterated the submission that Section 33A is violative of Article 19(1)(a) of the Constitution. According to Mr. Grover, restriction imposed on the freedom of expression is not justified under Article 19(6) of the Constitution. He submits that dancing in eating houses, permit rooms or beer bars is not inherently dangerous to public interest. Therefore, restrictions on the freedom of speech and expression are wholly unwarranted. Mr. Grover also emphasised that dancing is not inherently dangerous or pernicious and cannot be treated akin to trades that are *res*

extra commercium. Bar dancers, therefore, have a fundamental right to practice and pursue their profession/ occupation of dancing in eating houses, beer bars and permit rooms. The social evils projected by the appellants, according to Mr. Grover, are related to serving and drinking of alcohol and not dancing. Therefore, there was no rational nexus in the law banning all types of dances. He also emphasised that the women can be allowed to work as waitresses to serve liquor and alcoholic drinks. There could be no justification for banning the performance of dance by them. Mr. Grover also submitted that the ban contained in Section 33A violates Article 21 of the Constitution. He submits that the right to livelihood is an integral part of the right to life guaranteed under Article 21 of the Constitution. The deprivation of right to livelihood can be justified if it is according to procedure established by law under Article 21. Such a law has to be fair, just and reasonable both substantively and procedurally. The impugned law, according to Mr. Grover, does not meet the test of substantive due process. It does not provide any alternative livelihood options to the thousands of bar dancers who have been deprived of their legitimate source of livelihood. In the name of protecting women from exploitation, it has sought to deprive more than 75,000 women and their families from their livelihoods and their only means of subsistence. Mr. Grover has submitted that there is no viable rehabilitation or compensation provision offered to the bar dancers, in order to tide over the loss of income and employment opportunities. According to learned senior counsel, in the last 7 years, the impact of the prohibition has been devastating on the lives of the bar dancers and their families. This has deprived the erstwhile bar dancers of a life with dignity. In the present context, the dignity of bar dancers (of persons) and dignity of dancing (work) has been conflated in a pejorative way. According to Mr. Grover, the bar dancing in establishments covered under Section 33A has been demeaned because the dancers therein hail from socially and economically lower castes and class. It is a class based discrimination which would not satisfy the test of Article 14.

85. Lastly, he has submitted that the plea of trafficking would not be a justification to sustain the impugned legislation. In fact, trafficking is not even mentioned in the Statement of Objects and Reasons, it was mentioned for the first time in the affidavit filed by the State in reply to the writ petition. According to learned senior counsel, the legislation has been rightly declared *ultra vires* by the High Court.

86. We have considered the submissions made by the learned senior counsel for the parties. We have also perused the pleadings and the material placed before us.

87. The High Court rejected the challenge to the impugned Act on the ground that the State legislature was not competent to enact the amendment. The argument was rejected on the ground that the amendment is substantially covered by Entries 2, 8, 33 and 64 of List II. The High Court further observed that there is no repugnancy between the powers conferred on the Centre and the State under Schedule 7 List II and III of the Constitution of India. The High Court also rejected the submissions that the proviso to Section 33A (2) amounts to interference with the independence of the judiciary on the ground that the legislature is empowered to regulate sentencing by enactment of appropriate legislation. Such exercise of legislative power is not uncommon and would not interfere with the judicial power in conducting trial and rendering the necessary judgment as to whether the guilt has been proved or not. The submission that the affidavit filed by Shri Youraj Laxman Waghmare, dated 1.10.2005, cannot be considered because it was not verified in accordance with law was rejected with the observations that incorrect verification is curable and steps have been taken to cure the same. The submissions made in Writ Petition 2450 of 2005 that the amendment would not apply to eating houses and would, therefore, not be applicable in the establishments of the petitioners therein was also rejected. It was held that the "place of public interest" includes eating houses which serve alcohol for public

consumption. It was further observed that the amendment covered even those areas in such eating houses where alcohol was not served. The High Court also rejected the challenge to the amendment that the same is in violation of Article 15(1) of the Constitution of India. It has been observed that dancing was not prohibited in the establishments covered under Section 33B only on the ground of sex. What is being prohibited is dancing in identified establishments. The Act prohibits all types of dance in banned establishments by any person or persons. There being no discrimination on the basis of gender, the Act cannot be said to violate Article 15(1) of the Constitution.

88. The High Court has even rejected the challenge to the impugned amendment on the ground that the ban amounts to an unreasonable restriction, on the fundamental right of the bar owners and bar dancers, of freedom of speech and expression guaranteed under Article 19(1)(a). The submission was rejected by applying the doctrine of pith and substance. It has been held by the High Court that dance performed by the bar dancers can not fall within the term "freedom of speech and expression" as the activities of the dancers are mainly to earn their livelihood by engaging in a trade or occupation. Similarly, the submission that the provision in Section 33A was *ultra vires* Article 21 of the Constitution of India was rejected, in view of the ratio of this Court, in the case of *Sodan Singh & Ors. Vs. New Delhi Municipal Committee & Ors.*[40] wherein it is observed as follows :-

> "We do not find any merit in the argument founded on Article 21 of the Constitution. In our opinion, Article 21 is not attracted in a case of trade or business – either big or small. The right to carry on any trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together."

89. Since, no counter appeal has been filed by any of the

40. (1989) 4 SCC 155.

respondents challenging the aforesaid findings, it would not be appropriate for us to opine on the correctness or otherwise of the aforesaid conclusions.

90. However in order to be fair to learned senior counsel for the respondents, we must notice that in the written submissions it was sought to be argued that in fact the amendments are also unconstitutional under Articles 15(1), 19(1)(a) and 21. Dr. Dhawan has submitted that the High Court has erroneously recorded the finding that the dancing in a bar is not an expression of dancers but their profession, and, therefore, it can not get the protection of Article 19(1)(a). Similarly, he had submitted that the High Court in the impugned judgment has erroneously held that the challenge to the amendment under Article 21 is too remote. The respondents, therefore, would invite this Court to examine the issue of "livelihood" under Article 142 of the Constitution of India being "question of law of general public importance. According to Dr. Dhawan, the High Court ought to have protected the bar dancers under Articles 19(1)(a) and 21 also. As noticed earlier, Mr. Rohatgi and Mr. Grover had made similar submissions. We are, however, not inclined to examine the same in these proceedings. No separate appeals have been filed by the respondents specifically raising a challenge to the observations adverse to them made by the High Court. We make it very clear that we have not expressed any opinion on the correctness or otherwise of the conclusions of the High Court with regard to Sections 33A and 33B not being *ultra vires* Articles 15(1), 19(1)(a) and Article 21. We have been constrained to adopt this approach:

(1) Because there was no challenge to the conclusions of the High Court in appeal by respondents.

(2) The learned senior counsel of the appellants had no occasion to make submissions in support of the conclusions recorded by the High Court.

(3) We are not inclined to exercise our jurisdiction under Article 142, as no manifest injustice has been caused to the respondents. Nor can it be said that the conclusions recorded by the High Court are palpably erroneous so as to warrant interference, without the same having been challenged by the respondents. We, therefore, decline the request of Dr. Rajeev Dhawan.

91. This now brings us to the central issue as to whether the findings recorded by the High Court that the impugned amendment is *ultra vires* Article 14 and 19(1)(g) suffers from such a jurisdictional error that they cannot be sustained.

Is the impugned legislation *ultra vires* Article 14?

92. Before we embark upon the exercise to determine as to whether the impugned amendment Act is *ultra vires* Article 14 and 19(1)(g), it would be apposite to notice the well established principles for testing any legislation before it can be declared as *ultra vires.* It is not necessary for us to make a complete survey of the judgments in which the various tests have been formulated and re-affirmed. We may, however, make a reference to the judgment of this Court in *Budhan Choudhry Vs. State of Bihar,*[41] wherein a Constitution Bench of seven Judges of this Court explained the true meaning and scope of Article 14 as follows :-

> "It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the statute

41. AIR 1955 SC 191.

> in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

93. The aforesaid principles have been consistently adopted and applied in subsequent cases. In the case of *Ram Krishna Dalmia* (supra), this Court reiterated the principles which would help in testing the legislation on the touchstone of Article 14 in the following words :

> "(a) That a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself
>
> (b) That there is always presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (c) That it must he presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
>
> (d) That the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
>
> (e) That in order to sustain the presumption of constitutionality the court may take into consideration

matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can he conceived existing at the time of the legislation; and

(f) That while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, *if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may be reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."* (Italics are ours)

94. These principles were reiterated by this Court in *Shashikant Laxman Kale* (supra). The relevant observations have already been noticed in the earlier part of the judgment.

95. The High Court has held that the classification under Sections 33A and 33B was rational because the type of dance performed in the establishments allowed them to be separated into two distinct classes. It is further observed that the classification does not need to be scientifically perfect or logically complete.

96. The High Court has, however, concluded that classification by itself is not sufficient to relieve a statute from satisfying the mandate of the equality clause of Article 14. The amendment has been nullified on the second limb of the twin test to be satisfied under Article 14 of the Constitution of India that the amendment has no nexus with the object sought to be achieved. Mr. Subramanium had emphasised that the impugned enactment is based on consideration of different factors, which would justify the classification. We have earlier noticed the elaborate reasons given by Mr. Subramanium to

show that the dance performed in the banned establishments itself takes a form of sexual propositioning. There is revenue sharing generated by the tips received by the dancers. He had also emphasised that in the banned establishment women, who dance are not professional dancers. They are mostly trafficked into dancing. Dancing, according to him, is chosen as a profession of last resort, when the girl is left with no other option. On the other hand, dancers performing in the exempted classes are highly acclaimed and established performer. They are economically independent. Such performers are not vulnerable and, therefore, there is least likelihood of any indecency, immorality or depravity. He had emphasised that classification to be valid under Article 14 need not necessarily fall within an exact or scientific formula for exclusion or inclusion of persons or things. [See: *Welfare Association, A.R.P., Maharashtra* (supra)] There are no requirements of mathematical exactness or applying doctrinaire tests for determining the validity as long as it is not *palpably* arbitrary. (See: *Shashikant Laxman Kale & Anr.* (supra)).

97. We have no hesitation in accepting the aforesaid proposition for testing the reasonableness of the classification. However, such classification has to be evaluated by taking into account the objects and reasons of the impugned legislation; (See: *Ram Krishna Dalmia's* case supra). In the present case, judging the distinction between the two sections upon the aforesaid criteria cannot be justified.

98. Section 33(a)(i) prohibits holding of a performance of dance, *of any kind or type,* in any eating house, permit room or beer bar. This is a complete embargo on performance of dances in the establishment covered under Section 33(a)(i). Section 33(a) contains a non-obstante clause which makes the section stand alone and absolutely independent of the act and the rules. Section 33(a)(ii) makes it a criminal offence to hold a dance performance in contravention of sub-section(i). On conviction, offender is liable to punishment for 3 years, although,

the Court may impose a lesser punishment of 3 months and fine, after recording special reasons for the same. We are in agreement with the submission of Dr. Dhawan that it is a particularly harsh provision. On the other hand, the establishments covered under Section 33B enjoy complete exemption from any such restrictions. The dance performances are permitted provided the establishments comply with the applicable statutory provisions, Bye-Laws, Rules and Regulations. The classification of the establishments covered under Sections 33A and 33B would not satisfy the test of equality laid down in the case of *State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa & Ors.,*[42] wherein it was observed as under:

> "Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."

99. Further, this Court in *E.V. Chinnaiah Vs. State of A.P. & Ors.*[43] held that:

> "Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution of India. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved."

100. Learned senior counsel for the appellants have sought to justify the distinction between two establishments, first of all as noticed earlier, on the basis of type of dance. It was emphasised that the dance performed in the prohibited establishments, itself takes a form of sexual propositioning. It was submitted that it is not only just the type of dance performed but the surrounding circumstances which have been taken into

42. (1974) 1 SCC 19.

43. (2005) 1 SCC 394.

consideration in making the distinction. The distinction is sought to be made under different heads which we shall consider seriatim. It is emphasised that in the banned establishments, the proximity between the dancing platform and the audience is larger than at the banned establishments. An assumption is sought to be made from this that there would hardly be any access to the dancers in the exempted establishments as opposed to the easy access in the banned or prohibited establishments. Another justification given is that the type of crowd that visits the banned establishments is also different from the crowd that visits the exempted establishments. In our opinion, all the aforesaid reasons are neither supported by any empirical data nor common sense. In fact, they would be within the realm of "myth" based on stereotype images. We agree with the submission made by the learned counsel for the appellant, Mr. Mukul Rohtagi and Dr. Dhawan that the distinction is made on the grounds of *"classes of establishments"* or "*classes of persons, who frequent the establishment."* and not on the form of dance. We also agree with the submission of the learned senior counsel for the respondents that there is no justification that a dance permitted in exempted institutions under Section 33B, if permitted in the banned establishment, would be derogatory, exploitative or corrupting of public morality. We are of the firm opinion that a distinction, the *foundation* of which is classes of the establishments and classes/kind of persons, who frequent the establishment and those who own the establishments can not be supported under the constitutional philosophy so clearly stated in the Preamble of the Constitution of India and the individual Articles prohibiting discrimination on the basis of caste, colour, creed, religion or gender. The Preamble of the Constitution of India as also Articles 14 to 21, as rightly observed in the Constitutional Bench Judgment of this Court in *I.R. Coelho* (supra), form the heart and soul of the Constitution. Taking away of these rights of equality by any legislation would require clear proof of the justification for such abridgment. Once the respondents had given prima facie proof of the arbitrary classification of the establishments under

Sections 33A and 33B, it was duty of the State to justify the reasonableness of the classification. This conclusion of ours is fortified by the observations in *M/s. Laxmi Khandsari* (supra), therein this Court observed as follow:

> "**14.** We, therefore, fully agree with the contention advanced by the petitioners that where there is a clear violation of Article 19(1)(g), the State has to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction, whether partial or complete, is in public interest and contains the quality of reasonableness. This proposition has not been disputed by the counsel for the respondents, who have, however, submitted that from the circumstances and materials produced by them the onus of proving that the restrictions are in public interest and are reasonable has been amply discharged by them."

101. In our opinion, the appellants herein have failed to satisfy the aforesaid test laid down by this court. The Counsel for the appellant had, however, sought to highlight before us the unhealthy practice of the customers showering money on the dancers during the performance, in the prohibited establishments. This encourages the girls to indulge in unhealthy competition to create and sustain sexual interest of the most favoured customers. But such kind of behaviour is absent when the dancers are performing in the exempted establishments. It was again emphasised that it is not only the activities performed in the establishments covered under Section 33 A, but also the surrounding circumstances which are calculated to produce an illusion of easy access to women. The customers who would be inebriated would pay little heed to the dignity or lack of consent of the women. This conclusion is sought to be supported by a number of complaints received and as well as case histories of girl children rescued from the dance bars. We are again not satisfied that the conclusions reached by the state are based on any *rational criteria*. We fail

to see how exactly the same dances can be said to be morally acceptable in the exempted establishments and lead to depravity if performed in the prohibited establishments. Rather it is evident that the same dancer can perform the same dance in the high class hotels, clubs, and gymkhanas but is prohibited of doing so in the establishments covered under Section 33A. We see no rationale which would justify the conclusion that a dance that leads to depravity in one place would get converted to an acceptable performance by a mere change of venue. The discriminatory attitude of the state is illustrated by the fact that an infringement of section 33A(1) by an establishment covered under the aforesaid provision would entail the owner being liable to be imprisoned for three years by virtue of section 33A(2). On the other hand, no such punishment is prescribed for establishments covered under Section 33B. Such an establishment would merely lose the licence. Such blatant discrimination cannot possibly be justified on the criteria of reasonable classification under Article 14 of the Constitution of India. Mr. Subramaniam had placed strong reliance on the observations made by the Court in the *State of Uttar Pradesh Vs. Kaushailiya & Ors.* (supra), wherein it was observed as follows:

> "**7.** The next question is whether the policy so disclosed offends Article 14 of the Constitution. It has been well settled that Article 14 does not prohibit reasonable classification for the purpose of legislation and that a law would not be held to infringe Article 14 of the Constitution if the classification is founded on an intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the said law. The differences between a woman who is a prostitute and one who is not certainly justify their being placed in different classes. So too, there are obvious differences between a prostitute who is a public nuisance and one who is not. A prostitute who carries on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may

not so dangerous to public health or morals as a prostitute who lives in a busy locality or in an over-crowded town or in a place within the easy reach of public institutions like religious and educational institutions. Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralise the public morals, but, what is worse, to spread diseases not only affecting the present generation, but also the future ones. Such trade in public may also lead to scandals and unseemly broils. There are, therefore, pronounced and real differences between a woman who is a prostitute and one who is not, and between a prostitute, who does not demand in public interests any restrictions on her movements and a prostitute, whose actions in public places call for the imposition of restrictions on her movements and even deporation. The object of the Act, as has already been noticed, is not only to suppress immoral traffic in women and girls, but also to improve public morals by removing prostitute from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act."

102. We fail to see how any of the above observations are of relevance in present context. The so called distinction is based purely on the basis of the class of the performer and the so called *superior class* of audience. Our judicial conscience would not permit us to presume that the class to which an individual or the audience belongs brings with him as a necessary concomitant a particular kind of morality or decency. We are unable to accept the presumption which runs through Sections 33A and 33B that the enjoyment of same kind of entertainment by the upper classes leads only to mere enjoyment and in the case of poor classes; it would lead to

immorality, decadence and depravity. Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience. The aforesaid presumption is also perplexing on the ground that in the banned establishments even a non-obscene dance would be treated as vulgar. On the other hand, it would be presumed that in the exempted establishments any dance is non-obscene. The underlying presumption at once puts the prohibited establishments in a precarious position, in comparison to the exempted class for the grant of a licence to hold a dance performance. Yet at the same time, both kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions.

103. We, therefore, decline to accept the submission of Mr. Subramaniam that the same kind of dances performed in the exempted establishments would not bring about sexual arousal in male audience as opposed to the male audience frequenting the banned establishments meant for the lower classes having lesser income at their disposal. In our opinion, the presumption is *elitist*, which cannot be countenanced under the egalitarian philosophy of our Constitution. Our Constitution makers have taken pains to ensure that equality of treatment in all spheres is given to all citizens of this country irrespective of their station in life. {See: *Charanjit Lal Chowdhury Vs. Union of India & Ors.* (supra), *Ram Krishna Dalmia's* case (supra) and *State of Uttar Pradesh Vs. Kaushailiya & Ors.* (supra)}. In our opinion, sections 33A and 33B introduce an invidious discrimination which cannot be justified under Article 14 of the Constitution.

104. The High Court, in our opinion, has rightly declined to rely upon the *Prayas* and Shubhada Chaukar's report. The number of respondents interviewed was so miniscule as to render both the studies meaningless. As noticed earlier, the subsequent report submitted by SNDT University has substantially contradicted the conclusions reached by the other

two reports. The situation herein was not similar to the circumstances which led to the decision in the case of **Radice (supra)**. In that case, a New York Statute was challenged as it prohibited employment of women in restaurants in cities of first and second class between hours of 10 p.m. and 6 a.m., on the ground of (1) due process clause, by depriving the employer and employee of their liberty to contract, and (2) the equal protection clause by an unreasonable and arbitrary classification. The Court upheld the legislation on the first ground that the State had come to the conclusion that night work prohibited, so injuriously threatens to impair women's peculiar and natural functions. Such work, according to the State, exposes women to the dangers and menaces incidental to night life in large cities. Therefore, it was permissible to enable the police to preserve and promote the public health and welfare. The aforesaid conclusion was, however, based on one very important factor which was that "the legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women." In our opinion, as pointed out by the learned counsel for the respondents, in the present case, there was little or no material on the basis of which the State could have concluded that dancing in the prohibited establishments was likely to deprave, corrupt or injure the public morality or morals.

105. The next justification for the so called intelligible differentia is on the ground that women who perform in the banned establishment are a *vulnerable* lot. They come from grossly deprived backgrounds. According to the appellants, most of them are trafficked into bar dancing. We are unable to accept the aforesaid submission. A perusal of the Objects and the Reasons would show that the impugned legislation proceed on a hypothesis that different dance bars are being used as meeting points of criminals and pick up points of the girls. But the Objects and Reasons say nothing about any evidence having been presented to the Government that these dance bars are actively involved in trafficking of women. In fact, this

plea with regard to trafficking of women was projected for the first time in the affidavit filed before the High Court. The aforesaid plea seems to have been raised only on the basis of the reports which were submitted after the ban was imposed. We have earlier noticed the extracts from the various reports. In our opinion, such isolated examples would not be sufficient to establish the connection of the dance bars covered under section 33A with trafficking. We, therefore, reject the submission of the appellants that the ban has been placed for the protection of the vulnerable women.

106. The next justification given by the learned counsel for the appellants is on the basis of degree of harm which is being caused to the atmosphere in the banned establishments and the surrounding areas. Undoubtedly as held by this Court in the *Ram Krishna Dalmia's* case (supra), the Legislature is free to recognize the degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest. We also agree with the observations of the U.S. Court in *Joseph Patsone's* case (supra) that the state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, but such conclusion have to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. In our opinion, the State neither had the empirical data to conclude that dancing in the prohibited establishment necessarily leads to depravity and corruption of public morals nor was there general consensus that such was the situation. The three reports presented before the High Court in fact have presented divergent view points. Thus, the observations made in the case of *Joseph Patsone* (supra) are not of any help to the appellant. We are also conscious of the observations made by this court in case of *Mohd. Hanif Quareshi* (supra), wherein it was held that there is a presumption that the legislature understands and appreciates the needs of its people and that its laws are directed to problems made manifest by *experience* and that its discriminations are based on *adequate grounds*.

In the present case, the appellant has failed to give any details of any experience which would justify such blatant discrimination, based purely on the class or location of an establishment.

107. We are of the opinion that the State has failed to justify the classification between the exempted establishments and prohibited establishments on the basis of surrounding circumstances; or vulnerability. Undoubtedly, the legislature is the best judge to measure the degree of harm and make reasonable classification but when such a classification is challenged the State is duty bound to disclose the reasons for the ostensible conclusions. In our opinion, in the present case, the legislation is based on an unacceptable presumption that the so called elite i.e. rich and the famous would have higher standards of decency, morality or strength of character than their counter parts who have to content themselves with lesser facilities of inferior quality in the dance bars. Such a presumption is abhorrent to the resolve in the Preamble of the Constitution to secure the citizens of India. "Equality of status and opportunity and *dignity* of the individual". The State Government presumed that the performance of an identical dance item in the establishments having facilities less than 3 stars would be derogative to the dignity of women and would be likely to deprave, corrupt or injure public morality or morals; but would not be so in the exempted establishments. These are misconceived motions of a bygone era which ought not to be resurrected.

108. Incongruously, the State does not find it to be indecent, immoral or derogatory to the dignity of women if they take up other positions in the same establishments such as receptionist, waitress or bar tender. The women that serve liquor and beer to customers do not *arouse lust* in customers but women dancing would arouse lust. In our opinion, if certain kind of dance is sensuous in nature and if it causes sexual arousal in men it cannot be said to be more in the prohibited

establishments and less in the exempted establishments. Sexual arousal and lust in men and women and degree thereof, cannot be said to be monopolized by the upper or the lower classes. Nor can it be presumed that sexual arousal would generate different character of behaviour, depending on the social strata of the audience. History is replete with examples of crimes of lust committed in the highest echelons of the society as well as in the lowest levels of society. The High Court has rightly observed, relying on the observations of this Court in *Gaurav Jain Vs. Union of India,*[44] that "prostitution in 5 star hotels is a licence given to a person from higher echelon". In our opinion, the activities which are obscene or which are likely to deprave and corrupt those whose minds are open to such immoral influences, cannot be distinguished on the basis as to whether they are performing in 5 star hotels or in dance bars. The judicial conscience of this Court would not give credence to a notion that high morals and decent behaviour is the exclusive domain of the upper classes; whereas vulgarity and depravity is limited to the lower classes. Any classification made on the basis of such invidious presumption is liable to be struck down being wholly unconstitutional and particularly contrary to Article 14 of the Constitution of India.

Is the impugned legislation *ultra vires* Article 19(1)(g) –

109. It was submitted by the learned counsel for the appellants that by prohibiting dancing under Section 33A, no right of the bar owners for carrying on a business/profession is being infringed [See: *Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors.* (supra)]. The curbs are imposed by Section 33A and 33B only to restrict the owners in the prohibited establishments from permitting dance to be conducted in the interest of general public. Since the dances conducted in establishments covered under Section 33A were obscene, they would fall in the category of *res extra commercium* and would not be protected by the fundamental

44. (1997) 8 SCC 114.

right under Article 19(1)(g). The submission is also sought to be supported by placing a reliance on the reports of Prayas and Subhada Chaukar. The restriction is also placed to curb exploitation of the vulnerability of the young girls who come from poverty stricken background and are prone to trafficking. In support of the submission, the learned counsel relied on a number of judgments of this Court as well as the American Courts, including **Municipal Corporation of the City of Ahmedabad (supra)**, wherein it was held that the expression "in the interest of general public" under Article 19(6) inter alia includes protecting morality. The relationship between law and morality has been the subject of jurisprudential discourse for centuries. The questions such as: Is the development of law influenced by morals? Does morality always define the justness of the law? Can law be questioned on grounds of morality? and above all, Can morality be enforced through law?, have been subject matter of many jurisprudential studies for over at least a century and half. But no reference has been made to any such studies by any of the learned senior counsel. Therefore, we shall not dwell on the same.

110. Upon analyzing the entire fact situation, the High Court has held that dancing would be a fundamental right and cannot be excluded by dubbing the same as *res extra commercium*. The State has failed to establish that the restriction is reasonable or that it is in the interest of general public. The High Court rightly scrutinized the impugned legislation in the light of observations of this Court made in *Narendra Kumar* (supra), wherein it was held that greater the restriction, the more the need for scrutiny. The High Court noticed that in the guise of regulation, the legislation has imposed a total ban on dancing in the establishments covered under Section 33A. The High Court has also concluded that the legislation has failed to satisfy the doctrine of direct and inevitable effect [**See:** *Maneka Gandhi's* case (supra)]. We see no reason to differ with the conclusions recorded by the High Court. We agree with Mr. Rohatgi and Dr. Dhawan that there are already sufficient rules

and regulations and legislation in place which, if efficiently applied, would control if not eradicate all the dangers to the society enumerated in the Preamble and Objects and Reasons of the impugned legislation.

111. The activities of the eating houses, permit rooms and beer bars are controlled by the following regulations:

A. Bombay Municipal Corporation Act.

B. Bombay Police Act, 1951.

C. Bombay Prohibition Act, 1949.

D. Rules for Licensing and Controlling Places of Public Entertainment, 1953.

E. Rules for Licensing and controlling Places of Public Amusement other that Cinemas.

F. And other orders are passed by the Government from time to time.

112. The Restaurants/Dance Bar owners also have to obtain licenses/permissions as listed below:

i. Licence and Registration for eating house under the Bombay Police Act, 1951.

ii. License under the Bombay Shops and Establishment Act, 1948 and the Rules thereunder.

iii. Eating House license under Sections 394, 412A, 313 of the Bombay Municipal Corporation Act, 1888.

iv. Health License under the Maharashtra Prevention of Food Adulteration Rules, 1962.

v. Health License under the Mumbai Municipal Corporation Act, 1888 for serving liquor;

vi. Performance License under Rules 118 of the Amusement Rules, 1960 ;

vii. Premises license under Rules 109 of the amusement Rules;

viii. License to keep a place of Public Entertainment under Section 33(1), clause (w) and (y) of the Bombay Police Act, 1951 and the said Entertainment Rules;

ix. FL III License under the Bombay Prohibition Act, 1949 and the Rules 45 of the Bombay Foreign Liquor Rules, 1953 or a Form "E" license under the Special Permits & Licenses Rules for selling or serving IMFL & Beer.

x. Suitability certificate under the Amusement Rules.

113. Before any of the licenses are granted, the applicant has to fulfil the following conditions :

(i) Any application for premises license shall accompanied by the site-plan indicating inter-alia the distance of the site from any religious, educational institution or hospital.

(ii) The distance between the proposed place of amusement and the religious place or hospital or educational institution shall be more than 75 metres.

(iii) The proposed place of amusement shall not have been located in the congested and thickly populated area.

(iv) The proposed site must be located on a road having width of more than 10 metres.

(v) The owners/partners of the proposed place of amusement must not have been arrested or detained for anti-social or any such activities or convicted for any such offenses.

(vi) The distance between two machines which are to be installed in the video parlour shall be reflected in the plan.

(vii) No similar place of public amusement exists within a radius of 75 metres.

(b) The conditions mentioned in the license shall be observed throughout the period for which the license is granted and if there is a breach of any one of the conditions, the license is likely to be cancelled after following the usual procedure.

114. The aforesaid list, enactments and regulations are further supplemented with regulations protecting the dignity of women. The provisions of Bombay Police Act, 1951 and more particularly Section 33(1)(w) of the said Act empowers the Licensing Authority to frame Rules '"licensing or controlling places of public amusement or entertainment and also for taking necessary steps to prevent inconvenience to residents or passers-by or for maintaining public safety and for taking necessary steps in the interests of public order, decency and morality."

115. Rules 122 and 123 of the Amusement Rules, 1960 also prescribe conditions for holding performances.

"Rule 122 – Acts prohibited by the holder of a Performance Licence : No person holding a performance Licence under these Rules shall, in the beginning, during any interval or at the end of any performance, or during the course of any performance, exhibition, production, display or staging, permit or himself commit on the stage or any part of the auditorium :-

(a) any profanity or impropriety of language ;

(b) any indecency of dress, dance, movement or gesture;

Similar conditions and restrictions are also prescribed under the Performance Licence :

"The Licensee shall not, at any time before, during the course of or subsequent to any performance, exhibition, production, display or staging, permit or himself commit on the stage or in any part of the auditorium or outside it :

(i) any exhibition or advertisement whether by way of posters or in the newspapers, photographs of nude or scantily dressed women;

(ii) any performance at a place other than the place provided for the purpose;

(iii) any mixing of the cabaret performers with the audience or any physical contact by touch or otherwise with any member of the audience;

(iv) any act specifically prohibited by the rules."

116. The Rules under the Bombay Police Act, 1951 have been framed in the interest of public safety and social welfare and to safeguard the dignity of women as well as prevent exploitation of women. There is no material placed on record by the State to show that it was not possible to deal with the situation within the framework of the existing laws except for the unfounded conclusions recorded in the Preamble as well the Objects and Reasons. [*See: State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat* (supra)], wherein it is held that the standard of judging reasonability of restriction or restrictions amounting to prohibition remains the same, except that a total prohibition must also satisfy the test that a lesser alternative would be inadequate]. The Regulations framed under Section 33(w) of the Bombay Police Act, more so Regulations 238 and

242 provide that the licensing authority may suspend or cancel a licence for any breach of the license conditions. Regulation 241 empowers the licensing authority or any authorised Police Officer, not below the rank of Sub Inspector, to direct the stoppage of any performance forthwith if the performance is found to be objectionable. Section 162 of the Bombay Police Act empowers a Competent Authority/Police Commissioner/ District Magistrate to suspend or revoke a license for breach of its conditions. Thus, sufficient power is vested with the Licensing Authority to safeguard any perceived violation of the dignity of women through obscene dances.

117. From the objects of the impugned legislation and amendment itself, it is crystal clear that the legislation was brought about on the admission of the police that it is unable to effectively control the situation in spite of the existence of all the necessary legislation, rules and regulations. One of the submissions made on behalf of the appellants was to the effect that it is possible to control the performances which are conducted in the establishments fall within Section 33B; the reasons advanced for the aforesaid only highlight the stereotype myths that people in upper strata of society behave in orderly and moralistic manner. There is no independent empirical material to show that propensity of immorality or depravity would be any less in these high class establishments. On the other hand, it is the specific submission of the appellants that the activities conducted within the establishments covered under Section 33A have the effect of vitiating the atmosphere not only within the establishments but also in the surrounding locality. According to the learned counsel for the appellants, during dance in the bars dancers wore deliberately provocative dresses. The dance becomes even more provocative and sensual when such behaviour is mixed with alcohol. It has the tendency to lead to undesirable results. Reliance was placed upon *State of Bombay Vs. R.M.D. Chamarbaugwala & Anr.* (supra), *Khoday Distilleries Ltd. & Ors. Vs. State of Karnataka & Ors.* (supra), *State of Punjab & Anr. Vs. Devans Modern*

Breweries Ltd. & Anr. (supra), *New York State Liquor Authority Vs. Dennis BELLANCA, DBA The Main Event, Et Al.* (supra), *Regina Vs. Bloom* (supra) to substantiate the aforesaid submissions. Therefore, looking at the degree of harm caused by such behaviour, the State enacted the impugned legislation.

118. We are undoubtedly bound by the principles enunciated by this Court in the aforesaid cases, but these are not applicable to the facts and circumstances of the present case. In *Khoday Distilleries Ltd.* (supra), it was held that there is no fundamental right inter alia to do trafficking in women or in slaves or to carry on business of exhibiting and publishing pornographic or obscene films and literature. This case is distinguishable because the unfounded presumption that women are being/were trafficked in the bars. The case of *State of Punjab & Anr. Vs. Devans Modern Breweries Ltd. & Anr.* (supra) dealt with liquor trade, whereas the present case is clearly different. The reliance on *New York State Liquor Authority* (supra) is completely unfounded because in that case endeavour of the State was directed towards prohibiting *topless dancing* in an establishment licensed to serve liquor. Similarly, *Regina Vs. Bloom* (supra) dealt with indecent performances in a disorderly house. Hence, this case will also not help the appellants. Therefore, we are not impressed with any of these submissions. All the activities mentioned above can be controlled under the existing regulations.

119. We do not agree with the submission of Mr. Subramanium that the impugned enactment is a form of additional regulation, as it was felt that the existing system of licence and permits were insufficient to deal with problem of ever increasing dance bars. We also do not agree with the submissions that whereas exempted establishments are held to standards higher than those prescribed; the eating houses, permit rooms and dance bars operate beyond/below the control of the regulations. Another justification given is that though it may be possible to regulate these permit rooms and

dance bars which are located within Mumbai, it would not be possible to regulate such establishments in the semi-urban and rural parts of the Maharashtra. If that is so, it is a sad reflection on the efficiency of the Licensing/Regulatory Authorities in implementing the legislation.

120. The end result of the prohibition of *any form* of dancing in the establishments covered under Section 33A leads to the only conclusion that these establishments have to shut down. This is evident from the fact that since 2005, most if not all the dance bar establishments have literally closed down. This has led to the unemployment of over 75,000 women workers. It has been brought on the record that many of them have been compelled to take up prostitution out of necessity for maintenance of their families. In our opinion, the impugned legislation has proved to be totally counter productive and cannot be sustained being *ultra vires* Article 19(1)(g).

121. We are also not able to agree with the submission of Mr. Subramanium that the impugned legislation can still be protected by reading down the provision. Undoubtedly, this Court in the case of *Government of Andhra Pradesh & Ors. Vs. P. Laxmi Devi (Smt.)* (supra) upon taking notice of the previous precedents has held that the legislature must be given freedom to do experimentations in exercising its powers, provided it does not clearly and flagrantly violate its constitutional limits, these observations are of no avail to the appellants in view of the opinion expressed by us earlier. It is not possible to read down the expression “any kind or type” of dance by any person to mean dances which are obscene and derogatory to the dignity of women. Such reading down cannot be permitted so long as any kind of dance is permitted in establishments covered under Section 33B.

122. We are also unable to accept the submission of Mr. Subramanium that the provisions contained in Section 33A can be declared constitutional by applying the doctrine of severability. Even if Section 33B is declared unconstitutional,

it would still retain the provision contained in Section 33A which prohibits any kind of dance by any person in the establishments covered under Section 33A.

123. In our opinion, it would be more appropriate that the State Government re-examines the recommendations made by the Committee which had been constituted by the State Government comprising of a Chairman of AHAR, Public and Police Officials and chaired by the Principal Secretary (E.I.), Home Department. The Committee had prepared a report and submitted the same to the State Government. The State Government had in fact sent a communication dated 16th July, 2004 to all District Judicial Magistrates and Police Commissioner to amend the rules for exercising control on Hotel Establishments presenting dance programmes. The suggestions made for the amendment of the Regulations were as follows :

(1) Bar girls dancing in dance bars should not wear clothes which expose the body and also there should be restriction on such dancers wearing tight and provocative clothes.

(2) There should be a railing of 3 ft. height adjacent to the dance stage. There should be distance of 5 ft. between the railing and seats for the customers. In respect of dance bars who have secured licences earlier, provisions mentioned above be made binding. It should be made binding on dance bars seeking new licences to have railing of 3 ft. height adjacent to the stage and leaving a distance of 5 ft. between the railing and sitting arrangement for customers.

(3) Area of dance floor should be minimum 10 x 12 ft. i.e. 120 sq. ft. and the area to be provided for such dancer should be minimum of 15 sq. ft. so that more

than 8 dancers cannot dance simultaneously on the stage having area of 12- sq. ft.

(4) If the dancers are to be awarded, there should be a ban on going near them or on showering money on them. Instead it should be made binding to collect the said money in the name of manager of the concerned dancer or to hand over to the manager.

(5) Apart from the above, a register should be maintained in the dance bar to take entries of names of the girls dancing in the bar every day. Similarly, holders of the establishment should gather information such a name, address, photograph and citizenship and other necessary information of the dance girls. Holder of the establishment should be made responsible to verify the information furnished by the dance girls. Also above conditions should be incorporated in the licences being granted.

124. Despite the directions made by the State Government, the authorities have not taken steps to implement the recommendations which have been submitted by AHAR. On the contrary, the impugned legislation was enacted in 2005. In our opinion, it would be more appropriate to bring about measures which should ensure the safety and improve the working conditions of the persons working as bar girls. In similar circumstances, this Court in the case of *Anuj Garg* (supra) had made certain observations indicating that instead of putting curbs on women's freedom, empowerment would be more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modeling done in this behalf. In our opinion, in the present case, the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance.

In fact, a large number of imaginative alternative steps could be taken instead of completely prohibiting dancing, *if the real concern of the State is the safety of women.*

125. Keeping in view the aforesaid circumstances, we are not inclined to interfere with the conclusions reached by the High Court. Therefore, we find no merit in these appeals and the same are accordingly dismissed.

126. All interim orders are hereby vacated.

ALTAMAS KABIR, CJI. 1. Having had an opportunity of going through the masterly exposition of the law in the crucible of facts relating to the violation of the provisions of Articles 19(1)(a), 19(1)(g) and 21 of the Constitution read with the relevant provisions of the Bombay Police Act, 1951, I wish to pen down some of my thoughts vis-a-vis the problem arising in all these matters requiring the balancing of equities under Articles 19(1)(g) and 21 of the Constitution.

2. The expression "the cure is worse than the disease" comes to mind immediately.

3. As will appear from the judgment of my learned Brother, Justice Nijjar, the discontinuance of bar dancing in establishments below the rank of three star establishments, has led to the closure of a large number of establishments, which has resulted in loss of employment for about seventy- five thousand women employed in the dance bars in various capacities. In fact, as has also been commented upon by my learned Brother, many of these unfortunate people were forced into prostitution merely to survive, as they had no other means of survival.

4. Of course, the right to practise a trade or profession and the right to life guaranteed under Article 21 are, by their very nature, intermingled with each other, but in a situation like the present one, such right cannot be equated with unrestricted

freedom like a run-away horse. As has been indicated by my learned Brother, at the very end of his judgment, it would be better to treat the cause than to blame the effect and to completely discontinue the livelihood of a large section of women, eking out an existence by dancing in bars, who will be left to the mercy of other forms of exploitation. The compulsion of physical needs has to be taken care of while making any laws on the subject. Even a bar dancer has to satisfy her hunger, provide expenses for her family and meet day to day expenses in travelling from her residence to her place of work, which is sometimes even as far as 20 to 25 kms. away. Although, it has been argued on behalf of the State and its authorities that the bar dancers have taken to the profession not as an extreme measure, but as a profession of choice, more often than not, it is a Hobson's choice between starving and in resorting to bar dancing. From the materials placed before us and the statistics shown, it is apparent that many of the bar dancers have no other option as they have no other skills, with which they could earn a living. Though some of the women engaged in bar dancing may be doing so as a matter of choice, not very many women would willingly resort to bar dancing as a profession.

5. Women worldwide are becoming more and more assertive of their rights and want to be free to make their own choices, which is not an entirely uncommon or unreasonable approach. But it is necessary to work towards a change in mindset of people in general not only by way of laws and other forms of regulations, but also by way of providing suitable amenities for those who want to get out of this trap and to either improve their existing conditions or to begin a new life altogether. Whichever way one looks at it, the matter requires the serious attention of the State and its authorities, if the dignity of women, as a whole, and respect for them, is to be restored. In that context, the directions given by my learned Brother, Justice Nijjar, assume importance.

6. I fully endorse the suggestions made in paragraph 123 of the judgment prepared by my learned Brother that, instead of generating unemployment, it may be wiser for the State to look into ways and means in which reasonable restrictions may be imposed on bar dancing, but without completely prohibiting or stopping the same.

7. It is all very well to enact laws without making them effective. The State has to provide alternative means of support and shelter to persons engaged in such trades or professions, some of whom are trafficked from different parts of the country and have nowhere to go or earn a living after coming out of their unfortunate circumstances. A strong and effective support system may provide a solution to the problem.

8. These words are in addition to and not in derogation of the judgment delivered by my learned Brother.

R.P. Appeal dismissed.

KALIYA

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 228 of 2008)

JULY 23, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

PENAL CODE, 1860:

s. 302 – Married woman burnt alive by her mother-in-law (appellant) – Conviction and sentence of life imprisonment – Held: In the dying declaration recorded by the doctor, the deceased stated that her mother-in-law poured kerosene on her and set her on fire – Carbon copy of dying declaration rightly admitted by trial court as secondary evidence – No objection was raised at that time – As the incident occurred in the house of appellant, and she was present therein at the relevant time, she could have furnished the explanation as to how and under what circumstances the victim died – The matter was within her special knowledge – Both the courts below rightly held that appellant was responsible for causing the death of deceased – Evidence Act, 1872 – ss. 63 and 65.

Evidence Act, 1872:

ss. 63 and 65(c) – 'Secondary evidence' – Witnesses concerned deposing that original dying declaration was not traceable – Trial court granting permission to lead secondary evidence and permitting carbon copy to be adduced in evidence – Held: In view of provisions of ss.63 and 65, such a course is permissible.

The mother-in-law of the deceased (appellant), her husband, and the father-in-law faced trial for offences punishable u/ss. 302 and 498-IPC, on the allegation that

they burnt alive the deceased for dowry. The trial court convicted all the accused of the offences charged. However, the High Court maintained the conviction of the appellant u/s. 302-IPC and acquitted the other accused of the charges.

In the instant appeal it was mainly contended for the appellant that since the original dying declaration was not filed before the trial court, the carbon copy of the same could not have been exhibited and taken on record.

Dismissing the appeal, the Court

HELD: 1.1. There is ample evidence on record to the effect that the deceased was admitted to hospital on 18.6.1984. However, her case sheet could not be deposited by the Clerk working in the hospital. PW.18, the doctor who examined the deceased, supported the case of the prosecution with respect to the admission of the deceased in the hospital and further that he recorded her dying declaration wherein she stated that when she was lying on the bed, her mother-in-law poured kerosene on her and set her on fire and ran away. He further deposed that the deceased appended her thumb impression on the dying declaration. He also deposed that before recording her dying declaration, the deceased was in a fit mental condition. His statement stands fully corroborated by the evidence of the staff nurse, (PW.5) who was present at the time of recording the dying declaration. The testimony of both these witnesses remained unimpeached. [Para 5] [766-E-H]

1.2. In the instant case, the dying declaration produced before the court was the carbon copy of the original. PW.16 and PW.17 clearly deposed that even after conducting an extensive search, the original dying declaration could not be traced. The trial court granted permission to lead secondary evidence and the same was

adduced strictly in accordance with law and accepted by the courts below. In view of the provisions of ss. 63 and 65 of the Evidence Act 1872, such a course of action is permissible. In case an objection was not raised at the time of admission of the secondary evidences, it is precluded from being raised at a belated stage. [Paras 5, 9 and 10] [766-H; 767-A-B; 768-F-G; 769-D-E]

State of Madhya Pradesh v. Dal Singh & Ors. **AIR 2013 SC 2059;** *State of Rajasthan v. Kishore,* **1996 (2) SCR 1103 = AIR 1996 SC 3035;** *M. Chandra v. M. Thangamuthu & Anr.,* **2010 (11) SCR 38 = (2010) 9 SCC 712;** *J. Yashoda v. K. Shobha Rani,* **2007 (5) SCR 367 = AIR 2007 SC 1721 – relied on**

Mafabhai Nagarbhai Raval v. State of Gujarat, **AIR 1992 SC 2186;** *Laxmi v. Om Prakash & Ors.,* **2001 (3) SCR 777 =AIR 2001 SC 2383 ;** *Govindappa & Ors. v. State of Karnataka,* **2010 (6) SCR 962 = (2010) 6 SCC 533;** *H. Siddiqui (D) by Lrs. v. A. Ramalingam* **2011 (5) SCR 587 = AIR 2011 SC 1492;** *Rasiklal Manikchand Dhariwal & Anr. v. M.S.S. Food Products,* **2011 (14) SCR 1141 = (2012) 2 SCC 196);** *The Roman Catholic Mission v. The State of Madras,* **1966 SCR 283 = AIR 1966 SC 1457;** *Marwari Khumhar & Ors. v. Bhagwanpuri Guru Ganeshpuri & Anr.,* **2000 (2) Suppl. SCR 368 = AIR 2000 SC 2629;** *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple & Anr.,* **4548 2003 (4) Suppl. SCR 450 = AIR 2003 SC;** *Smt. Dayamathi Bai v. K.M. Shaffi,* **2004 (3) Suppl. SCR 336 = AIR 2004 SC 4082;** *Life Insurance Corporation of India & Anr. v. Rampal Singh Bisen* **2010 (3) SCR 438 = (2010) 4 SCC 491 – referred to**

Narain Singh & Anr. v. State of Haryana, **AIR 2004 SC 1616 – held inapplicable**

1.3. PW.18, the doctor who examined the deceased and recorded her statement, deposed that 100% burnt

patient can also be in a fit mental and physical condition to give statement. PW.14, the doctor who performed the post-mortem, deposed that the deceased was completely burnt and the burn injuries were anti-mortem. She had died due to asphyxia, as a result of burn injuries and her death was homicidal. As the incident occurred in the house of the appellant, and she was present therein at the relevant time, she could have furnished the explanation as to how and under what circumstances the victim died. The matter was within her special knowledge. Both the courts below have, thus, rightly held that the appellant was responsible for causing the death of the deceased. [Paras 12 and 13] [770-D-E; F-G]

Case Law Reference:

AIR 2013 SC 2059	**relied on**	**Para 7**
AIR 1992 SC 2186	**referred to**	**Para 7**
2001 (3) SCR 777	**referred to**	**Para 7**
2010 (6) SCR 962	**referred to**	**Para 7**
1996 (2) SCR 1103	**relied on**	**Para 8**
AIR 2004 SC 1616	**held inapplicable**	**Para 9**
2011 (5) SCR 587	**referred to**	**Para 10**
2011 (14) SCR 1141	**referred to**	**Para 10**
1966 SCR 283	**referred to**	**Para 10**
2000 (2) Suppl. SCR 368	**referred to**	**Para 10**
2003 (4) Suppl. SCR 450	**referred to**	**Para 10**
2004 (3) Suppl. SCR 336	**referred to**	**Para 10**
2010 (3) SCR 438	**referred to**	**Para 10**

2010 (11) SCR 38	**relied on**	**Para 11**
2007 (5) SCR 367	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 228 of 2008.

From the Judgment and Order dated 06.12.2005 of the High Court of Madhya Pradesh Jabalpur, Bench at Gwalior in Criminal Appeal No. 23 of 1992.

S.K. Dubey, Ambuj Agarwal, Mridula Ray Bharadwaj, Yogesh Tiwari, B.S. Banthia, Vibha Datta Makhija, Archi Agnihotri for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 6.12.2005, passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Appeal No.23 of 1992, affirming the judgment and order dated 10.1.1992 passed by Additional Sessions Judge, Morena in Sessions Trial No.5 of 1985. By this order the appellant had been convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and sentenced to life imprisonment and a fine of Rs.500/- had also been imposed, and in default of payment of fine to undergo RI for three months.

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

A. That on 18.6.1984, Guddi, daughter-in-law of the present appellant Smt. Kaliya was admitted to J.A. Hospital, Gwalior in a burnt condition. Her dying declaration was recorded and she died of the burn injuries on the same day. Information from hospital was given to Police Station, Jhansi Road, Gwalior. Her dead body was sent for post-mortem and all formalities were properly completed.

B. An FIR was lodged and after the completion of the

investigation, a chargesheet was filed against the appellant alongwith her husband and son under Section 498-A IPC, the appellant was additionally charged under Section 302 IPC.

C. The prosecution examined a large number of witnesses including Dr. Nirmal Kumar Gupta (PW.18) who recorded the dying declaration, Merry Kutti Michael (PW.5), the staff Nurse who was present at the time of recording the dying declaration. After the conclusion of the trial, the appellant was convicted under Section 302 IPC and sentenced as mentioned hereinabove, though, other co-accused Amar Singh (son of the appellant) and Bheema (husband of the appellant) stood convicted under Section 498-A IPC and sentenced to undergo RI for 3 years.

D. The appellant as well as the other co-accused filed Criminal Appeal Nos. 23 and 17 of 1992, respectively before the Madhya Pradesh High Court. The High Court dismissed the appeal of the present appellant vide impugned judgment and order dated 6.12.2005 but allowed the appeal of the other co-accused acquitting them of the said charges.

Hence, this appeal.

3. We have heard Shri S.K. Dubey, learned Senior counsel for the appellant and Ms. Vibha Datta Makhija, learned counsel for the respondent-State.

4. The Trial Court as well as the High Court relied mainly upon the dying declaration made by Guddi, deceased wherein she had stated that she was subjected to harassment by her mother-in-law, present appellant, her father-in-law and her husband. So far as the incident dated 18.6.1984 was concerned, Guddi suffered 100 per cent burn injuries at her house. After hearing commotion, some neighbours reached the place of occurrence and extinguished the fire by pouring water on her body and took her to the hospital. In the hospital her dying declaration was recorded wherein she had specifically

stated "I was lying on the cot then my mother-in-law by pouring kerosene oil and setting fire in my silk saree ran away". Dr. (Miss.) Bharti Kanned who was on duty and Merry Kutti Michael, Staff Nurse (PW.5) were witnesses to the dying declaration recorded by Dr. Nirmal Kumar Gupta (PW.18). In the FIR there is a full reference of the dying declaration recorded by Dr. Nirmal Kumar Gupta (PW.18). After the death, the post-mortem was conducted wherein it was opined that she died of burn injuries. If she had been admitted in the hospital with 100% burns she would not be in a state to get her dying declaration recorded. The whole emphasis before the courts below as well as before this Court has been that the dying declaration cannot be relied upon since the original of the same had not been filed by the prosecution and the carbon copy could not have been exhibited and taken on record. It has been further contended that even if the carbon copy could be relied upon it may have been tampered with as is evident from many interpolations and cuttings.

5. There is ample evidence on record particularly, the statement of Dr. B.L. Jain (PW.16) and F.A. Khan (PW.17) to the effect that Guddi, deceased was admitted to J.A. Hospital on 18.6.1984. However, her case sheet could not be deposited by the Clerk working in the hospital. Dr. Nirmal Kumar Gupta (PW.18) supported the case of the prosecution with respect to the admission of Guddi in the hospital and further that he recorded her dying declaration wherein she had stated that when she was lying on the bed, her mother-in-law poured kerosene oil on her and set her on fire and ran away. He further deposed that Guddi appended her thumb impression on the dying declaration. He also deposed that before recording her dying declaration, Guddi was in a fit mental condition. His statement stands fully corroborated by the evidence of Merry Kutty Michael, the staff nurse, (PW.5) who was present at the time of recording her dying declaration. The testimony of both these witnesses, namely, Dr. Nirmal Kumar Gupta (PW.18) and Merry Kutty Michael (PW.5) remained unimpeached. Dr. Nirmal Kumar Gupta (PW.18) in his cross-examination explained that

Ex.P.4 was the carbon copy of the original. Dr. B.L. Jain (PW.16) and F.A. Khan (PW.17) clearly deposed that even after conducting an extensive search, the original dying declaration could not be traced.

In view of the provisions of Sections 63 and 65 of the Indian Evidence Act 1872 (hereinafter referred to as the 'Act 1872'), such a course of action is permissible.

6. The original record reveal that as the original dying declaration was not traceable/available, the prosecution was permitted to adduce secondary evidence. In this regard, the Trial Court passed several orders from time to time as is evident from the orders dated 4.9.1990, 15.10.1990, 7.11.1990, 8.12.1990, 26.12.1990, 25.2.1991 and 14.3.1991. And ultimately, on 13.4.1991, on being satisfied that the original dying declaration was not traceable, the Trial Court granted permission to the prosecution for adducing the secondary evidence.

7. This Court has examined the issue of putting a thumb impression on the dying declaration by 100% burnt person in *State of Madhya Pradesh v. Dal Singh & Ors.* AIR 2013 SC 2059, and after considering a large number of cases including *Mafabhai Nagarbhai Raval v. State of Gujarat,* AIR 1992 SC 2186; *Laxmi v. Om Prakash & Ors.,* AIR 2001 SC 2383; and *Govindappa & Ors. v. State of Karnataka,* (2010) 6 SCC 533 came to the conclusion as under:-

"*The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.*

Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact."

8. In *State of Rajasthan v. Kishore,* AIR 1996 SC 3035, in an identical case, this Court placed reliance on the dying declaration and upheld the conviction.

9. Shri S.K. Dubey has placed much reliance on the judgment of this Court in *Narain Singh & Anr. v. State of Haryana,* AIR 2004 SC 1616, wherein the court acquitted the accused persons only on the ground that the dying declaration itself was not proved and, therefore the question of acting on it could not arise. The ratio of the said judgment has no application in the instant case as mentioned hereinabove. In the instant case, the Trial Court had granted permission to lead secondary evidence and the same had been adduced strictly in accordance with law and accepted by the courts below.

10. Section 65(c) of the Act 1872 provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of

documents produced in court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide: *H. Siddiqui (dead) by Lrs. v. A. Ramalingam,* AIR 2011 SC 1492; and *Rasiklal Manikchand Dhariwal & Anr. v. M.S.S. Food Products,* (2012) 2 SCC 196). However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/ secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor, mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (Vide: *The Roman Catholic Mission v. The State of Madras,* AIR 1966 SC 1457; *Marwari Khumhar & Ors. v. Bhagwanpuri Guru Ganeshpuri & Anr.,* AIR 2000 SC 2629; *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple & Anr.,* AIR 2003 SC 4548; *Smt. Dayamathi Bai v. K.M. Shaffi,* AIR 2004 SC 4082; and *Life Insurance Corporation of India & Anr. v. Rampal Singh Bisen,* (2010) 4 SCC 491).

11. In *M. Chandra v. M. Thangamuthu & Anr.,* (2010) 9 SCC 712, this Court considered this aspect in detail and held as under:

"*We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.*"

A similar view has been re-iterated in *J. Yashoda v. K. Shobha Rani,* AIR 2007 SC 1721.

12. Dr. Nirmal Kumar Gupta (PW.18), deposed that 100% burnt patient can also be in a fit mental and physical condition to give statement. Dr. V.K. Deewan (PW.14), who performed the post-mortem of deceased Guddi, deposed that she was completely burnt and the burn injuries were anti-mortem. She had died due to Asphyxia, due to burn injuries, her death was homicidal.

In view thereof, both the courts below were of the considered opinion that the appellant was responsible for causing the death of Guddi, deceased.

13. The defence taken by the appellant that she had gone out of her house to provide water to the buffalo has been disbelieved by the Court. As the incident occurred in the house of the appellant, and she was present therein at the relevant time, she could have furnished the explanation as to how and under what circumstances Guddi died. The matter was within her special knowledge.

14. In view of the above, the appeal lacks merit and is accordingly dismissed.

R.P. Appeal dismissed.

COMMISSIONER OF CENTRAL EXCISE, MADURAI
v.
AYYAPPAN TEXTILES LTD.
(Civil Appeal No. 6766 of 2003)

JULY 23, 2013.

[SUDHANSU JYOTI MUKHOPADHAYA AND J. CHELAMESWAR, JJ.]

Central Excise Tariff Act, 1985:

Heading 52.03 - Cotton yarn of various counts - Demand raised against assessee for manufacturing cotton of higher counts than the declared ones - Held: If on inspection of a manufacturing premises on a particular day it is detected that goods of a particular specification are being manufactured, the department is entitled in law to presume that (until the manufacturer proves the contra) goods of the same specification are continued to be manufactured - However, in the instant case, no samples were drawn for Revenue to draw an initial presumption - Further, having regard to the paltry amount involved in the matter and the first appellate authority found substance in the defence of assessee, judgment of first appellate authority as affirmed by Appellate Tribunal, not interfered with - Evidence Act, 1872 - s.114,Ill.(d).

The respondent-assessee was issued a show cause notice dated 24.6.1994 stating that on the inspection of its factory premises, entries in two registers indicated that the assessee was manufacturing cotton yarn of higher counts than the declared ones. Revenue came to the prima facie conclusion that the assessee was liable to pay a further sum of Rs.4,98,034/- towards duty of goods allegedly manufactured between 1.2.1989 to 14.8.1993, and was also liable to penalty. The Collector, Central

Excise confirmed the demand to the extent of Rs.1,33,573/-. On appeal by the Revenue, the matter was remitted by the first appellate authority and the Deputy Commissioner upheld the demand raised in the show cause notice. But on appeal by the assessee, the Commissioner (Appeals) restricted the demand to Rs.1,32,573/- as was initially held by the Collector, Central Excise. Revenue's appeal was dismissed by the Tribunal.

Dismissing the appeal, the Court

HELD: 1.1 If the department on inspection of a manufacturing premises on a particular day detects that goods of a particular specification are being manufactured, the department, in view of the principle enunciated in s.114, Illustration (d) of the Evidence Act, 1872, is entitled in law to presume that (until the manufacturer proves the contra) goods of the same specification are continued to be manufactured. However, the case on hand is not a case where the said principle can be applied as no samples were drawn at all for the department to draw an initial presumption. The content of the recovered FILE and the statements of the employees of the respondent must be examined to ascertain the fact whether the respondent manufactured during the period covered by the FILE - yarn of a higher count than the declared one. Only after establishing such fact the department would be entitled to draw a presumption. There is no clear finding on record from any one of the authorities below that the materials gathered by the department would establish that basic fact. [para 14-15] [778-G-H; 779-A-C]

Ramalinga Choodambikai Mills Ltd. v. Government of India & Others **1984 (15) E.L.T. 407 (Mad.) - approved.**

Bojaraj Textiles Mills Ltd. v. Assistant Collector of Central

Excise **1990 (45) E.L.T. 559 (Mad.) and** *The Government of India represented by its Secretary, Ministry of Finance, Department of Revenue & Insurance, New Delhi and Others v. The Chirala Co-operative Spinning Mills Ltd., Chirala* **1980 E.L.T. 174 (A.P.) - referred to.**

Collector of Central Excise, Coimbatore v. Cambodia Mills Ltd., **2001 (128) E.L.T. 373 (Mad.) - disapproved.**

Superfil Products Ltd. v. CCE, Chennai **2002 (48) R.L.T. 319 (CEGAT - Chennai) - cited.**

1.2 On the other hand, the 1st appellate authority found that the defence of the assessee - that the test reports obtained by it for a different purpose but not to ascertain the count of a day are not representative of the count of the production of the entire week - is a tenable defence. The Tribunal instead of deciding the correctness of such a conclusion went into the questions of law unwarranted by the facts of the case. Further, having regard to the paltry amount involved in the matter, the long and chequered history of the litigation and the resultant wastage of time of the various fora, coupled with the fact that the 1st appellate authority found some substance in the defence of the assessee, judgment under appeal is not interfered with. [para 16-17] [779-C-F]

Case Law Reference:

2001 (128) E.L.T. 373 (Mad.)	**disapproved**	**para 10**
2002 (48) R.L.T. 319 (CEGAT - Chennai)	**cited**	**para 10**
1984 (15) E.L.T. 407 (Mad.)	**approved**	**para 10**
1990 (45) E.L.T. 559 (Mad.)	**referred to**	**para 10**
1980 E.L.T. 174 (A.P.)	**referred to**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6766 of 2003.

From the Judgment and Order dated 07.01.2003 of the Customs, Excise and Gold (control) Appellate Tribunal, South Zonal bench at Chennai final Order No. 4 of 2003 in Appeal No. E/252/02.

K. Radhakrishnan, Binu Tamta, Shalini Kumar, B. Krishna Prasad for the Appellant.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. This is a statutory appeal under section 35L (b) of the Central Excise Act, 1944 against the Final Order No.4/2003 of the Customs Excise & Gold (Control) Appellate Tribunal, South Zonal Bench at Chennai passed in Appeal No.E/252/02 on dated 7.01.2003.

2. This is a typical case where at every stage of the litigation irrelevant legal principles were pressed into service resulting in colossal waste of time of adjudicators including time of this Court.

3. Briefly stated the facts are as follows:

4. The respondent company is engaged at least from 1985 in the business of manufacturing of various counts of cotton yarn falling under heading 52.03 of the Central Excise Tariff Act, 1985 at the relevant point of time. It appears that at the relevant point of time the rate of tax on the yarn manufactured depended on the count/finesse of the yarn. Higher the count higher the duty. On 30.08.1993, the officers of the Central Excise Department inspected the factory premises of the respondent company and recovered two registers and a file. In the show-cause notice dated 24.06.1994 issued by the department which resulted in the present litigation, the contents of the seized documents are described as under:

"The officers found TWO REGISTERS showing the datewise details on count, strength and the Court Strength Product of various counts of yarn manufactured by them pertaining to the period 14.12.1985 to 31.12.1990 and A FILE containing the yarn test reports of various counts manufactured by M/s. Ayyappan Textiles Limited and tested at Sitalakshmi Mills Group Central laboratory, Madurai on a weekly basis. The said two Registers and file were recovered from the party.

Perusal of the two registers and the files revealed that the assessee was manufacturing higher counts over and above the tolerance limit in respect of the following counts declared to the department and cleared the same without payment of appropriate duty on the higher counts, (1) 40s (ii) 43s (iii) 60s (iv) 82s.

(emphasis supplied)

5. Subsequently, the statements of Spinning Manager of respondent company and Technical Manager from M/s. Sitalakshmi Group of Mills, were recorded, (the details of which may not be necessary for the present purpose,) and on the basis of the abovementioned material, the department came to the prima facie conclusion that the respondent company is liable to pay a further sum of Rs.4,98,034/- towards the duty on the goods allegedly manufactured between 1.2.1989 to 14.8.1993 and also liable to penalty. Therefore, the show cause notice was issued.

6. Upon receipt of the explanation, the Collector of Central Excise vide order dated 4.10.1994 confirmed the demand to the extent of Rs.1,33,573/- holding that the assessee did not dispute his liability to pay higher tax on the basis of the material contained in the two registers recovered with respect to the balance of the demand based on the material contained in the FILE:-

"...I find that the assessee's contention has considerable force as the count determined on the basis of test conducted on the basis of sample drawn on a particular day's production during a week cannot be the representative of the whole weeks production."

7. Aggrieved by the same, the department carried the matter in appeal before the tribunal. The tribunal vide order dated 25.06.1997 allowed the appeal and remitted the matter for afresh adjudication.

8. On such remand, the Deputy Commissioner who heard the matter passed order dated 31.8.1998 concluding that the respondent is liable to pay the entire amount of Rs.4,98,034/- as demanded by the show-cause notice. Aggrieved by the same, the respondent carried the matter once again before the Commissioner (Appeals) who by his order dated 22.03.2002 allowed the appeal partially and restricted the demand to Rs.1,33,573/- incidentally relying upon the findings recorded on 4.10.1994 (already extracted). Once again, the department carried the matter in appeal before the tribunal. The tribunal by the impugned order dated 07.1.2003 dismissed the appeal. Hence the instant appeal.

9. The operative portion of the impugned order reads as under:

"I have carefully considered the submissions made by both sides and perused the records. This Bench also in the case of Superfil Products Ltd. Vs. CCE, Chennai has followed the judgment rendered by the Hon'ble High Court of Judicature at Madras in the case of Cambodia Mills Ltd. (supra), the ratio of the above decision has a binding force on this Bench. By respectfully following the judgment rendered by the Hon'ble High Court at Madras in the case of CCE, Coimbatore Vs. Cambodia Mills Ltd. (supra) and the judgment rendered by this Bench in the case of Superfil Products Ltd. Vs. CCE, Chennai (supra), I reject the

appeal filed by the revenue and sustain the impugned order passed by the Commissioner (Appeals). Ordered accordingly."

10. In substance, following the earlier judgment of the Madras High Court rendered in *Collector of Central Excise, Coimbatore v. Cambodia Mills Ltd.,* 2001 (128) E.L.T. 373 (Mad.) and *Superfil Products Ltd. v. CCE, Chennai.* 2002 (48) R.L.T. 319 (CEGAT - Chennai), the appeal was dismissed. Whereas the decisions relied upon by the department in *Ramalinga Choodambikai Mills Ltd. v. Government of India & Others* 1984 (15) E.L.T. 407 (Mad.), *Bojaraj Textiles Mills Ltd. v. Assistant Collector of Central Excise* 1990 (45) E.L.T. 559 (Mad.) and *The Government of India represented by its Secretary, Ministry of Finance, Department of Revenue & Insurance, New Delhi and Others v. The Chirala Co-operative Spinning Mills Ltd., Chirala* 1980 E.L.T. 174 (A.P.) were simply ignored.

11. In *Cambodia Mills Ltd.* (supra), the division bench of the Madras High Court was considering a case where samples of yarn were drawn from the mill. It was found that the samples were of higher counts than what was being declared by the manufacturer. The department demanded a higher rate of tax on the entire production made subsequent to the date of inspection in view of the fact that the yarn produced on the date of inspection was found to be of higher counts. Eventually the matter reached the High Court. It appears that the question before the High Court in the aforementioned case was "whether the differential duty on the differential count of yarn which is in excess of the declared counts shall be demanded for the entire production from the period of drawal of the sample till the next sample….." (para 7). The High Court opined that there was no material on record to support the conclusion drawn by the department and directed the demand be restricted only to the yarn manufactured on the date of the drawal of the sample.

12. On the other hand, the department relied upon the decision in *Ramalinga Choodambikai Mills Ltd.* (supra), which is also a case of cotton yarn. Samples were drawn on 14.9.1966. On that day, 69 bales of cotton yarn manufactured prior to that date were lying in a packed condition in the factory premises. Finding that the samples were of higher count than the declared count by the manufacturer, the department demanded a higher tax not only on the 69 bales of yarn existing in the factory premises on the date of the drawal of the samples but also further material manufactured between the date of inspection (14.09.1966) and 20.10.1966 on which date fresh samples had again been drawn. The question was whether the demand in so far as it pertained to the yarn manufactured between the two dates of inspection solely on the basis of the test report of the samples drawn on the first date of inspection is legally tenable. The High Court held that such a demand was tenable.[1]

13. The said decision was followed in *Bojaraj Textiles Mills Ltd.* (supra) and *The Chirala Co-operative Spinning Mills Ltd.* (supra). Unfortunately, none of the above-mentioned three judgments appear to have been brought to the notice of the division bench of the Madras High Court when it considered the case of Cambodia Mills Ltd. (supra).

14. In our opinion the view taken in *Ramalinga Choodambikai Mills Ltd.* (supra) appears to be a sound view in law and obviously based on the principle enunciated under Section 114 of the Evidence Act in illustration (d) "that a thing or state of thins which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence." If the department on inspection of a manufacturing premises on a particular day detects that goods of a particular specification are being manufactured, the department is entitled in law to presume that (until the manufacturer proves the contra) goods of the same specification are continued to be manufactured.

15. However, the case on hand is not a case where the above principle can be applied as no samples were drawn at all for the department to draw an initial presumption. The content of the recovered FILE and the statements of the employees of the respondent must be examined to ascertain the fact whether the respondent manufactured during the period covered by the FILE - yarn of a higher count than the declared count. Only after establishing such fact the department would be entitled to draw a presumption. We do not find any clear finding on record from any one of the authorities below that the materials gathered by the department would establish that basic fact.

16. On the other hand the 1st appellant authority found that the defence of the respondent - that the test reports obtained by the respondent for a different purpose but not to ascertain the count of a day are not representative of the count of the production of the entire week - is a tenable defence.

17. The Tribunal instead of deciding the correctness of such a conclusion went into the questions of law unwarranted by the facts of the case. Having regard to the paltry amount involved in the matter, the long and chequered history of the litigation and the resultant wastage of time of the various fora, coupled with the fact, the 1st appellate authority found some substance in the defence of the respondent, we are not inclined to interfere with the judgment under appeal. The appeal is dismissed.

R.P. Appeal dismissed.

KAILASH

v.

STATE OF M.P.

(Criminal Appeal No. 2260 of 2009)

JULY 24, 2013

[A.K. PATNAIK AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

PENAL CODE, 1860:

s.376(1) - Rape of a girl aged about 15 years - Suicide committed by her - Conviction by courts below u/s 376(1) with sentence of 10 years RI - Held: Keeping in view the evidence of the eye-witness, supported by other witnesses, the medical report and the forensic laboratory report, the conclusion of guilt found proved against appellant by trial court as well as High Court cannot be faulted - Code of Criminal Procedure, 1973 - s.313.

The daughter of PW-2, aged about 15 years, committed suicide by hanging herself in her house. The trial court considering the post-mortem report, forensic laboratory report and the evidence of witnesses, particularly, the eye-witness, (PW-5), convicted the appellant u/s 376(1) IPC and sentenced him to RI for 10 years. He was, however, acquitted of the offence punishable u/s 306 IPC. The High Court affirmed the conviction and the sentence.

In the instant appeal, it was contended for the appellant that there was abnormal delay on recording the statement of PW-5 by the police, who was stated to have disclosed about the occurrence to the grand-mother and mother of the deceased on the following day of the incident.

Dismissing the appeal, the Court

HELD: 1.1 It is true that the evidence of PWs-1 and 2 discloses that PW-5 informed them about the rape committed by the appellant on the deceased on the very next day after the funeral had taken place. However, there was nothing on record to suggest that the said information was passed on to the prosecution agency immediately after the receipt of the said information by PWs1 and 2. In such circumstances, it can only be stated that as soon as it was brought to the notice of the prosecution agency as to the commission of the offence by the appellant, through PW- 5, further action was taken by the police by nabbing the appellant and proceeding with the prosecution in accordance with law. With regard to the abnormal delay in proceeding against the appellant, the trial court has held that the witnesses were all of rural background and illiterate persons and, therefore, some allowance will have to be given for their laxity in bringing the factum of the rape committed by the appellant on the deceased. [para 8] [785-F-H; 786-A-C]

1.2 The evidence of PW-5, who was aged about 13 to 14 years at the time of occurrence and was the eye-witness of the incident, was found to be natural and he withstood the lengthy cross-examination, which did not bring out any contradiction in his version apart from the fact that he had no axe to grind against the appellant. Moreover, his evidence was also corroborated by PW-7 to considerable extent regarding the involvement of the appellant in the commission of the crime on the deceased. The medical evidence also fully supported the crime alleged against the appellant. As per the report of forensic laboratory with regard to articles seized and the clothes of the deceased, sexual intercourse committed on the deceased, was confirmed. Further, when based on the evidence of PW 5 and the medical reports, the

incriminating circumstances that existed against the appellant were put in 313 questioning, he had no explanation to offer. Therefore, the ultimate conclusion of guilt found proved against the appellant as held by the trial court as well as the High Court cannot be faulted. [para 7-8] [785-A-C; 786-C-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2260 of 2009.

From the Judgment and Order dated 08.09.2006 of the High Court of Madhya Pradesh at Indore Bench, in Criminal Appeal No. 1030 of 2003.

Ashok Kumar Sharma for the Appellant.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal by the sole accused is directed against the Single Bench decision of the High Court of Madhya Pradesh, Indore Bench dated 08.09.2006, passed in Criminal Appeal No.1030 of 2003. The appellant, who was initially charged under Section 306 and 376(2)(f) IPC, was convicted by the trial Court only for the offence under Section 376(1) IPC and was imposed with the punishment of 10 years rigorous imprisonment, along with the fine of Rs.500/- and in default of the payment of fine to undergo one more year's rigorous imprisonment.

2. The brief facts which are required to be stated are that on 23.07.2002, PW-2 - the mother of the deceased, when she returned from her day's work in the field at 6 p.m., found her daughter, the deceased Radha Bai, who had returned back from the field at around 3 O'clock, inside the house with the door locked from inside. One Parmanand climbed the roof and found the deceased hanging from the roof with a Saree. The said Parmanand stated to have opened the door, cut the rope and brought the body down. PW-1 reported the matter to Aagar Police Station and thereafter, PW-9 went to the place of incident and prepared the sketch map Ext.P-8 and sent the dead body

of the deceased for postmortem. He also stated to have recovered the Saree under seizure letter Ext.P-10.

3. The postmortem was conducted by PW-4, Dr. Shashank Saxena on 24.07.2002, at 3.45 p.m and in the postmortem report the doctor noted that the deceased was aged about 15 years, that below the neck there was mark of bluishness and on the ligetcher mark, there were marks of abrasion and on one side of the ligetcher mark, ecmoyosis was present. From the vagina of the body blood was found oozed out, which was frozen and spread over in the midst of the legs on the front side. On inspecting the vagina, it was found that it was reddish, congested and frozen blood was present. Laceration on the wall of the vagina of 1 cm size was also noted. The doctor in his opinion stated that the cause of the death of the deceased was due to stoppage of breathing, which was due to hanging and the injuries which were present on the body of the deceased were antemortem. The doctor stated to have collected blood stained clothes of the deceased, viscera and pubic hairs, as well as the liquid oozed out from the vagina on the role of cotton, sealed and sent the same to the Station House Officer. The postmortem report was marked as Ext.P-3. According to the doctor, the age of the deceased was 15 years based on the age written in the application form. The further opinion of the doctor was that due to hanging, no injuries could have been caused on the private organs.

4. Based on the investigation, the prosecution came to the conclusion that the deceased was raped and a case under Section 306 and 376(2)(f) IPC was registered against the appellant accused on 04.08.2002. The appellant was arrested and was put to trial. The trial Court after appreciating the evidence placed before it, acquitted the appellant from the charge under Section 306 IPC, but found him guilty for an offence punishable under Section 376(1) IPC and sentenced him as stated above.

5. The prosecution examined PW-1 to PW-10. PW-5 who

is the cousin of the deceased, was an eye-witness to the occurrence and, therefore, his evidence became imperative. According to PW-5, who was aged about 15 to 16 years on the date of the occurrence, deposed that on the date of the incident he went to the field around 11 a.m for discharging excreta, when he heard the crying sound of his sister, the deceased Radha Bai. On hearing the cries of his sister, when he rushed to the place he found the deceased lying on the ground and the appellant was mounted on her by putting off his pant and the petticoat of the deceased was also lifted, while the appellant was sitting over her. It was also stated by him that the appellant was thrusting his penis and was indulging in some shameful activity. According to PW-5, when he questioned the appellant as to what he did to his sister, the appellant stated to have slapped him twice by catching hold of his shirt and asked him not to speak to anyone about that or else he would be killed. PW-5 further deposed that his sister returned back home, while PW-5 went to Tanodiya and when he returned back from Tanodiya he came to know that the deceased committed suicide by hanging.

6. PW-5 stated to have narrated what he saw on the morning of 23.07.2002 to PW-2 and PW-1 on the day after the cremation of the deceased was over. Thereafter, PW-2 stated to have informed based on the version of PW-5 that she came to know that it was the appellant who was responsible for the commission of rape on the deceased Radha Bai. The above fact was also supported by the evidence of PW-7, Babulal who in his evidence stated that the deceased Radha Bai was his niece, that on the date of the occurrence he had also gone to the field, where he saw PW-5, Pappu, going towards his house weeping and he also saw the deceased Radha Bai going from the bushes weeping towards her house. PW-7 stated to have seen the appellant also going towards his house and that when he asked the appellant as to what had happened, the appellant stated to have silenced PW-7 or else threatened to beat him. Though, PW-7 was treated as hostile, some part of the

evidence did support the version of PW-5.

7. The medical evidence also to a large extent confirmed that the deceased Radha Bai was raped prior to the suicide committed by her. It has also come in evidence that the seized articles of the deceased, which were sent to the forensic laboratory, were returned back with the report Ext.P-15. As per the report of the forensic laboratory the slides of the deceased Radha Bai, her clothes, underwear, petticoat and Saree contained spots of sperm and in the slide of the deceased on her pubic hair, clothes etc., human blood was found and such human blood was also found on the underwear and petticoat, as well as Saree of the deceased. As per the report, sexual intercourse committed on the deceased Radha Bai was confirmed. The trial Court has observed that though there was a lengthy cross-examination of PW-5, nothing was brought out and his evidence was natural and did not create any doubt as to the veracity of his statement.

8. Keeping the above findings of the trial Court, as well as that of the High Court on the commission of the offence of rape by the appellant on the deceased Radha Bai, when we heard learned counsel for the appellant, the only submission placed before us was that PW-5, stated to have informed PWs-1 and 2, namely, the grand-mother and mother of the deceased Radha Bai on the very next day after the funeral had taken place, but yet the statement of PW-5, was recorded by the police only on 04.08.2002. In so far as the said submission is concerned, it was true that the evidence of PWs-1 and 2 disclose that PW-5 informed them about the alleged rape committed by the appellant on the deceased Radha Bai, on 24.07.2002 i.e. on the very next day after the funeral had taken place. However, there was nothing on record to suggest that the said information was passed on to the prosecution agency immediately after the receipt of the said information by PWs1 and 2. In such circumstances, it can only be stated that as soon as it was brought to the notice of the prosecution agency as to the commission of the offence by the appellant through PW-5,

further action was taken by the police by nabbing the appellant and proceeding with the prosecution in accordance with law. Therefore, when we consider the submission of the learned counsel about the abnormal delay in proceeding against the appellant up to the alleged date of occurrence, the trial Court has also held that the witnesses were all of rural background and illiterate persons and, therefore, some allowance will have to be given for their laxity in bringing the factum of the rape alleged to have been committed by the appellant on the deceased Radha Bai. When we consider the evidence of PW-5, who was a child witness, who was stated to be between 13 to 14 years at the time of occurrence, we find that his evidence was found to be natural and he withstood the lengthy cross-examination, which did not bring out any contradiction in his version apart from the fact that he had no axe to grind against the appellant. Further when based on the evidence of PW 5 and the medical reports, the incriminating circumstances that existed against the appellant were put in 313 questioning, he had no explanation to offer. The medical evidence also fully supported the crime alleged against the appellant. Moreover, the evidence of PW-7, also corroborated the version of PW-5 to considerable extent regarding the involvement of the appellant in the commission of the crime on the deceased Radha Bai. Therefore, the ultimate conclusion of guilt found proved against the appellant as held by the trial Court as well as the High Court cannot be faulted.

9. Having regard to our above conclusion, we do not find any merit in the appeal. The appeal fails and the same is dismissed.

10. The appellant is on bail. The bail bond stands cancelled and he shall be taken into custody forthwith to serve out the remaining part of sentence, if any.

R.P. Appeal dismissed.

STATE OF U.P. & ORS.
v.
PANKAJ KUMAR VISHNOI
(Criminal Appeal Nos. 2366-2367 of 2011)

JULY 25, 2013

[DIPAK MISRA AND VIKRAMAJIT SEN, JJ.]

Service Law:

Compassionate appointment of respondent as Constable – Claim for appointment on compassionate ground as Sub-Inspector, without appearing in physical test – Held: It is for the appointing authority to see that minimum standard of working and efficiency expected of the post is maintained – The rule has merely dispensed with the written test or interview by a selection committee, but not the maintenance of minimum standard of efficiency required for the post – Respondent after being disqualified in the physical test could not have claimed as a matter of right appointment in respect of a particular post — Circular issued by Inspector General of Police is in consonance with r.8(2) – Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – rr. 5 and 8(2).

Compassionate appointment – Object of – Explained – Held: The posts in Classes III and IV are the lowest posts in non-manual and manual categories and, therefore, they alone can be offered on compassionate grounds to relieve the family of the financial destitution and to help it get over the emergency — The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution.

The respondent was appointed as Constable on

compassionate ground, as his father, a Head Constable of Police, had died while in service, on 22.04.2002. Subsequently, the respondent participated in physical test for the post of Sub-Inspector (Civil Police), but failed. He then filed a writ petition praying for compassionate appointment on the post of Sub-Inspector (Civil Police) without subjecting him to appear in any physical test and interview. The single Judge dismissed the writ petition. However, the Division Bench allowed the respondent's writ appeal and directed the Department to once again subject him to physical test.

Disposing of the appeals, the Court

HELD: 1.1. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied that but for the provision of employment, the family will not be able to meet the crisis then a job is to be offered to the eligible member of the family. The object of compassionate employment is not to give a member of such family a post much less a post for post held by the deceased. Mere death of an employee in harness does not entitle his family to such source of livelihood. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and, therefore, they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory and has a rational nexus with the object sought to be achieved viz. relief against destitution. [Para 10] [794-B-F]

Umesh Kumar Nagpal v. State of Haryana **(1994) 4 SCC 138;** *SAIL v. Madhusudan Das* **2008 (14) SCR 824 = (2008) 15 SCC 560;** *General Manager, State Bank of India and*

Others v. Anju Jain **2008 (12) SCR 576 = (2008) 8 SCC 475;** *Union of India and Another v. Shashank Goswami and Another* **(2012) 11 SCC 307;** *State Bank of India and Another v. Raj kumar* **(2010) 11 SCC 661 – relied on**

1.2. It is for the appointing authority to see that minimum standard of working and efficiency expected of the post is maintained. Rule 8 (2) of the Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 confers discretion on the appointing authority to interview the candidate in order to satisfy himself that the candidate will be able to maintain the minimum standard of work and efficiency expected of the post. What has been dispensed with is the written test or interview by a selection committee but not the maintenance of minimum standard and of efficiency required for the post. It is for the said reason that the Inspector General has issued an order /letter, circular, which is in consonance with the r.8(2). It does not travel beyond the rule but it acts in furtherance of the rule and there is justification for the same. [Paras 15, 16, 17, and 20] [797-F, G-H; 798-A; 800-B]

I.G. Karmik and Ors. v. Prahlad Mani Tripathi **2007 (5) SCR 978 = (2007) 6 SCC 162 – relied on.**

1.3. The respondent appeared in the physical test and could not qualify. Therefore, he could not have claimed as a matter of right and demanded for an appointment in respect of a particular post; and the High Court could not have granted further opportunity after the crisis was over. The order passed by the Division Bench is wholly unsustainable and is set aside. [Para 21-22] [800-C, D-E]

1.4. It has been brought to the notice of this Court that the High Court has directed the Department to hold a second physical test and to keep the results in a sealed cover. Since the second physical test could not have

been directed to be held for the purpose of extending the benefit of compassionate appointment, the sealed covers need not be opened. [Para 23] [800-G-H]

Case Law Reference:

2007 (5) SCR 978	**relied on**	**Para 6**
(1994) 4 SCC 138	**relied on**	**Para 10**
2008 (14) SCR 824	**relied on**	**Para 11**
2008 (12) SCR 576	**relied on**	**Para 12**
(2012) 11 SCC 307	**relied on**	**Para 13**
(2010) 11 SCC 661	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2366-2367 of 2011.

From the Judgment & Order dated 20.12.20006 of the High Court of Judicature at Allahabad in Special Appeal No. 1602 of 2006 and Order dated 27.08.2009 in Review Application No. 172835 of 2007 in Special Appeal No. 1602 of 2006.

WITH

C.A. No. 2406 of 2011.

R. Dash, Gunnam Venkateswara Rao for the Appellants.

Shamiti Mukherjee, Manoj K. Mishra for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Regard being had to the commonality of controversy of the appeals were heard together and are disposed of by a common order. For the sake of convenience, the facts from Civil Appeal Nos. 2366-2367 of 2011 are adumbrated herein.

2. The gravamen of grievance that has been assertively amplified and pronouncedly stressed by the appellants, State of Uttar Pradesh and its functionaries, in these appeals by special leave is that the Division Bench of High Court of judicature at Allahabad by orders dated 20.12.2006 and dated 27.08.2009 passed in Special Appeal No. 1602 of 2006 and in Review Application No. 172835/2007 respectively has reversed the verdict of the learned Single Judge and further declined to review the same as a consequence of which erroneous directions have been issued pertaining to compassionate appointment in a higher post in violation of the norms and procedure.

3. The facts which are imperative to be stated are that the father of the respondent, a Head Constable in the Department of Police breathed his last on 22.04.2002 in harness. The respondent, being a dependant on his deceased father, moved an application for grant of compassionate appointment before the Superintendent of Police, Rampur on 20.12.2002. After consideration of the application a decision was taken at the U.P. Police Headquarters to offer him an appointment on the compassionate basis on the post of Constable and in accordance with such decision a letter of appointment dated 9.5.2003 was issued by the Superintendent of Police and, Rampur and he was required to join on 11.5.2003. Instead of joining, the respondent preferred Civil Misc. Writ Petition No. 23703 of 2003 for issue of writ of a Mandamus to the competent authority to extend him the benefit of compassionate appointment on the post of Sub-Inspector (Civil Police) as he was eligible for the said post. Be it noted, during the pendency of the writ petition the respondent in pursuance of the order dated 9.5.2003 joined on the post of Constable on 28.6.29003. Eventually, on 16.3.2004 the writ petition was dismissed as withdrawn.

4. As the facts are further uncurtained, a physical test examination was conducted from 27.6.2005 to 29.6.2005 for the post of Sub-Inspector (Civil Police) and the petitioner

participated in the said physical examination but could not become successful as a result of which his candidature for the post of Sub-Inspector was rejected. It is worth noting in that physical test 460 candidates appeared out of which 263 candidates fulfilled the minimum physical requirements and accordingly they were selected.

5. Calling in question his non-selection and non-appointment he preferred Writ Petition No. 63596 of 2006 with a prayer for grant of compassionate appointment on the post of Sub-Inspector (Civil Police) without subjecting him to appear in any physical test examination and interview. Learned Single Judge vide order dated 23.11.2006 dismissed the Writ petition on two counts, namely, the second writ petition for issuance of grant of compassionate appointment was not maintainable as the earlier writ petition was dismissed being withdrawn without any liberty to refile another petition and secondly, the prayer for offering the post of Sub-Inspector (Civil Police) without subjecting him to undergo the physical efficiency test was absolutely misconceived.

6. The aforesaid order passed by learned Single Judge was assailed in Special Appeal No. 1602 of 2006 and the Division Bench came to hold that the first dismissal was not an impediment for entertaining the second writ petition; and that the respondent who was physically examined in the year 2002 and with passage of time one may become unfit or more fit. Being of this view it proceeded to direct as follows :-

> "As such the writ petition is allowed. The writ petitioner appellate will be granted compassionate appointment in the post found suitable after he is subjected to a physical test once again now such a test will be conducted within a period of two months from the date hereof and either appointment offered forthwith or a reasoned order passed as to exactly why and in what manner and when the writ petitioner was found physically unfit. No order as to costs"

7. The aforesaid order was sought to be reviewed but the application for review did not meet with any success. Hence, the present appeal.

8. Mr. R. Dash, learned senior counsel for the appellant has submitted that once the respondent had failed in the physical test and did not qualify for the post of Sub-Inspector, the High Court could not have directed for holding another test. He has invited our attention to Sub-Rule 8 (2) of the Rules and submitted that even though the person is considered eligible for appointment in place of an employee dying in harness yet the minimum standard of working and efficiency is required to be considered. To buttress the facet of efficiency and minimum standard he has placed reliance upon the order/ letter- circular issued by the Inspector General of Police. He has also drawn inspiration from the pronouncement in *I. G. Karmik and Ors. v. Prahlad Mani Tripathi.*[1] That apart, learned senior counsel would submit that there is no vested right for getting compassionate appointment and, therefore, the respondent cannot put forth a claim that he should be considered for a particular post because of his educational qualification.

9. Mr. Shamit Mukherjee, learned senior counsel, per contra, contended that there was no command in the Rules for holding a test at the time of appointment on compassionate basis and hence, the applicant is to be extended the benefit of appointment on relaxation of the Rules. It is urged by him that the physical test was conducted on the basis of an order passed by the Inspector General of Police which cannot be placed reliance upon in the absence of any stipulation in the Rules 8 (2) itself. The next plank of submission of Mr. Mukherjee is that number of people have been given liberty to undergo the physical test for the second time but the respondent has been deprived of the said benefit.

10. Before we proceed to appreciate the entitlement of the

1. (2007) 6 SCC 162.

respondent for a particular post on compassionate basis, we think it necessary to refer to certain pronouncements in the field pertaining to compassionate appointment itself. In *Umesh Kumar Nagpal v. State of Haryana*[2] while dealing with the concept of compassionate appointment the Court has observed that the whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. Mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied that but for the provision of employment, the family will not be able to meet the crisis then a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence, they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution.

11. In *SAIL v. Madhusudan Das*[3] this Court reiterating the principle has stated thus:-

> "*15*. This Court in a large number of decisions has held that the appointment on compassionate ground cannot be claimed as a matter of right. It must be provided for in the rules. The criteria laid down therefor viz. that the death of the sole bread winner of the family, must be established. It is meant to provide for a minimum relief. When such

2. (1994) 4 SCC 138.
3. (2008) 15 SCC 560.

contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right."

12. In *General Manager, State Bank of India and Others v. Anju Jain*[4] it has been clearly stated that appointment on compassionate ground is never considered to be a right of a person. In fact, such appointment is violative of rule of equality enshrined and guaranteed under Article 14 of the Constitution. As per the settled law, when any appointment is to be made in Government or semi-government or in public office, cases of all eligible candidates are be considered alike. Tthe State or its instrumentality making any appointment to public office, cannot ignore the mandate of Article 14 of the Constitution. At the same time, however, in certain circumstances, appointment on compassionate ground of dependants of the deceased employee is considered inevitable so that the family of the deceased employee may not starve. The primary object of such scheme is to save the bereaved family from sudden financial crisis occurring due to death of the sole bread winner. It is an exception to the general rule of equality and not another independent and parallel source of employment.

13. In *Union of India and Another v. Shashank Goswami and Another*[5] it has been observed that the claim for appointment on compassionate grounds is based on the premise that the applicant was dependant on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and

4. (2008) 8 SCC 475.

5. (2012) 11 SCC 307.

permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service, and, therefore, appointment on compassionate grounds cannot be claimed as a matter of right.

14. In *State Bank of India and Another v. Raj kumar*[6] it has been ruled that the dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is, therefore, traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme.

15. Regard being had to the aforesaid enunciation of law in the field we shall proceed to scrutinize the Rule position and the claim that had been put forth by the respondent and accepted by the High Court. The Rule dealing with compassionate appointment in the State of U.P. at the relevant time was Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short the '1974 Rules'). Rule 5 of the said Rules reads as under:-

"In case, a government servant dies in harness after the commencement of these rules and the spouse of the deceased government servant is not already employed under the Central Government or a State Government or a corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central government or a State Government making an application for the purposes, be given a suitable employment in government service on a

6. (2010) 11 SCC 661.

post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

(i) fulfils the educational qualifications prescribed for the post.

(ii) is otherwise qualified for government service; and

(iii) makes the application for employment within five years from the date of the death of the government servant."

16. The aforesaid Rule stipulates that a candidate would be given a suitable employment in government service on a post except the post which comes within the purview or U.P. Public Service Commission in relaxation of normal recruitment subject to certain conditions as enumerated in the said Rule. Rule 8 of the 1974 Rules lays the postulates pertaining to relaxation of age and other requirements which are as follows:-

"1) The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.

2) The procedural requirement for selection, such as written test or interview by a selection committee or any other authority, shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards of work and efficiency expected to the post."

17. Thus, Rule 8 (2) confers discretion on the appointing authority to interview the candidate in order to satisfy himself that the candidate will be able to maintain the minimum standard of work and efficiency expected of the post. What has been dispensed with is the written test or interview by a selection

committee but not the maintenance of minimum stand of efficiency required for the post. It is apt to note that for the said reason the Inspector General issue an order /letter, circular. It is seemly to reproduce the same :-

"The appointing authority has been authorised in this regard that for recruitment of the dependants of deceased during service period of government servant under Rule 8 Sub-rule 2 of Service Rules 1974 that it should be decided on the basis of interview by the Authorised Authority that the candidate is whether competent to discharge his duties as per norms of the service or not. Apart from this according to the Service Rule clause A for selection under these rules, the concerned candidate should be necessarily competent and healthy for this post.

There are so many other works related to the physical fitness for Asst. Sub-Inspector Civil Police/Platoon Commander as arresting of the criminal, handling of the various kinds of arms etc. In these circumstances, it is necessary that candidate selected for this post should carry physical competency and fitness.

Under the above provision of the Service Rules vested arrangements keeping in view the circumstances of the work of Asstt. Sub- Inspector and Platoon Commander, the officer will be nominated by the Inspector General of Police Uttar Pradesh for consideration of appointment selection for the post of Asstt. Sub-Inspector and Platoon Commander, wherein a officer of the rank by Dy. Inspector General of Police will be for selection."

18. The said order/letter-circular has a Chart that provides the guidelines for evaluation of physical endurance. It is as follows: -

Sl No.	Item	Standard for male	Standard for female
1.	Cricket ball throw	50 Meter	20 Meter
2.	Long Jump	13 Feet	8 Feet
3.	Chining up	5 times	
4.	Running and walk 5 km	30 minutes	Running 200 meters in 40 seconds
5.	Sitting and stand up	(1) 40 in 2 minutes 30 seconds (b) 50 sitting in 60 seconds	
6.	Shuttle race (25x4 mtr)		Within 29 seconds
7.	Skipping		60 times within a minute

19. Mr. Mukherjee has submitted that such an order could not have been passed by the appointing authority as it is contrary to the Rules. The aforesaid submission leaves us unimpressed inasmuch as it is for the appointing authority to see that minimum standard of working and efficiency expected of the post is maintained. In *I.G. Karmik and others* (supra) this Court while dealing with the employment in the Department of Police has expressed thus:-

> "Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out be this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the reason of the death of the bread earned. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion."

20. We have no iota of doubt that the order/letter-circular issued by the Inspector General is in consonance with the Rule 8(2). It does not travel beyond the rule but it acts in furtherance of the rule and there is justification for the same.

21. It is accepted position that the respondent appeared in the test and could not qualify. Once he did not qualify in the physical test, the High Court could not have asked the department to give him an opportunity to hold another test to extend him the benefit of compassionate appointment on the post of Sub-Inspector solely on the ground that there has been efflux of time. The respondent after being disqualified in the physical test could not have claimed as a matter of right and demand for an appointment in respect of a particular post and the High Court could not have granted further opportunity after the crisis was over.

22. In our considered opinion, the order passed by the Division Bench is wholly unsustainable and is hereby set aside. We may, however, hasten to add that it is open to the respondent to compete in the normal course if eligible for the post of Sub-Inspector for promotion in accordance with rules prescribed for promotion.

23. At this juncture, we have been apprised at the Bar that following the decision of the Division Bench which has been set aside in this appeal, in subsequent writ petitions and appeals the High Court has directed the Department to hold a second physical test and to keep the results in a sealed cover. As we have already opined that the second physical test could not have been directed to be held for the purpose of extending the benefit of compassionate appointment, the sealed covers need not be opened. Needless to say, the candidates therein

are also entitled to compete for promotion in accordance with the rules.

24. We will be failing in our duty if we do not take note of an apprehension that has been expressed by Mr. Mukherjee, leanred counsel for the appellant that for the purpose of promotion certain relaxations are given and the appellants should not be deprived of the same merely because they had not qualified in the physical test undertaken by them. Mr. R. Dash, learned senior counsel appearing for the state very fairly stated that they will be given relaxation if they are entitled to the same and the State shall not hold anything against them on the foundation that they had not passed the physical test on the first occasion

25. All the appeals are disposed of in above terms leaving the parties to bear their respective costs.

R.P. Appeals disposed of.

STATE OF M.P.
v.
MOHAN & OTHERS
(Criminal Appeal No. 1052 of 2013)

JULY 30, 2013

[K.S. RADHAKRISHNAN AND PINAKI CHANDRA GHOSE, JJ.]

Penal Code, 1860:

s.307 read with s.319 – Attempt to murder – Ingredients of – Explained – Held: A gun shot, as in the instant case, may miss the vital part of the body and may result in a lacerated wound, that itself is sufficient to attract s.307 — High Court is, therefore, in error in reducing the sentence, holding that the injury was not on the vital part of the body – Sentence/ Sentencing.

Sentence/Sentencing:

Trial court sentencing the accused to 3 years RI u/s 307 IPC for causing gun shot injuries to victims – High Court reducing the sentence to period already undergone – Held: In spite of various judicial pronouncements of Supreme Court, High Courts are reducing the sentence without application of mind and stating any reasons — In a case where accused persons have found been guilty u/s 307 IPC, the sentence already undergone, of about 20 to 50 days or 211 days, would not be an adequate sentence and not commensurate with the guilt established — If High Court considers it fit to reduce the sentence, it must state reasons, for the reduction – Administration of justice – Judgments/Orders.

The respondents-accused, who were prosecuted for causing gun-shot injuries to complainants, were

convicted by the trial court u/s 307 IPC and were sentenced to 3 years RI each. On appeal, the High Court reduced the sentence to the period already undergone, which was 50 days, 211 days, 39 days, and 23 days respectively, in respect of the four respondents, holding that injury was not caused on the vital parts of the body.

Allowing the appeal, the Court

HELD: 1.1. A gun shot, as in the instant case, may miss the vital part of the body and may result in a lacerated wound, that itself is sufficient to attract s.307. The High Court, while reducing the sentence, has not properly appreciated the scope of s.307, IPC under which the respondents were found guilty. In order to attract s.307, causing of hurt is sufficient and the injury need not be on the vital parts of the body. If anybody does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 IPC uses the word 'hurt' which has been explained in s.319, IPC and not "grievous hurt" within the meaning of s.320, IPC. Therefore, in order to attract s.307, the injury need not be on the vital part of the body. High Court is, therefore, in error in reducing the sentence, holding that the injury was not on the vital part of the body. Period undergone by way of sentence also is not commensurate with the guilt established. There is no good reason to interfere with the judgment of the trial court. The judgment of the High Court reducing the sentence is set aside and that of the trial court restored. [para 15, 16 and 18] [860-D-E, G-H; 811-A-C; 812-D]

1.2. In spite of various judicial pronouncements of this Court, the High Courts are committing the same mistake and reducing the sentence without application of mind and stating no reasons. In a case where the accused persons have been found guilty u/s 307 IPC, the sentence already undergone of about 20 to 50 days or

211 days would not be an adequate sentence, nor would it be commensurate with the guilt established. If the High Court considers it fit to reduce the sentence, it must state reasons, for the reduction. [para 14] [810-B-D]

Sadha Singh and Another v. State of Punjab **(1985) 3 SCC 225;** *State of M.P. v. Sangram and Others* **2005 (1) Suppl. SCR 562 = AIR 2006 SC 48; and** *State of Madhya Pradesh v. Saleem @ Chamaru and Anr*. **2005 (1) Suppl. SCR 562 = AIR 2005 SC 3996 – relied on**

Case Law Reference:

(1985) 3 SCC 225	**relied on**	**para 12**
AIR 2006 SC 48	**relied on**	**para 13**
2005 (1) Suppl. SCR 562	**relied on**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1052 of 2013.

From the Judgment and Order dated 13.12.2011 of the High Court of Madhya Pradesh, Judicature Jabalpur, Bench at Gwalior in Criminal Appeal No. 898 of 2007.

B.P. Singh, C.D. Singh for the Appellant.

Arvind Kumar for the Respondents.

The Judgment of the Court was delivered by

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

2. State is aggrieved by the order of the High Court dated 13.12.2011 passed in CRLA No. 898 of 2007, reducing the sentence awarded by the trial Court from three years Rigorous Imprisonment with a fine of Rs.1,000/- to each of the accused persons, with default clause, to that of the period already undergone.

3. Respondents herein were charge-sheeted for the offences punishable under Sections 294, 307 read with Section 34 IPC and were convicted and sentenced as stated above. The incident leading to the above charges occurred on 11.6.2006 at 11.00 O'clock in the night when complainants attempted to drive away the animals of the accused persons trespassed into their courtyard. Accused persons, infuriated by the conduct of the complainants, reached the spot of the incident and started abusing them. One of the accused, Ummed Singh, using his fire arm, fired a gun shot, which hit Lalaram, one of the complainants on his back and the complainant including Lalaram in order to save their lives ran away from the spot. Ummed Singh again fired another gunshot, which hit Mogh Singh, another complainant. Due to the injuries sustained by Lalaram, he fell down. The accused persons committed the same in furtherance of their common intention or knowledge that their actions would result in causing death to the complainants.

4. The prosecution, in order to establish the guilt of the accused persons, examined large number of witnesses including PW14, the doctor who examined the injured persons. The defence also adduced oral evidence.

5. Dr. Sudhir Rathore (PW-14) examined the injured Lalaram on 12.6.2006 and found the following injuries on his person:

(i) Lacerated wound having diameter of 0.5 cm. over scalp occipital region and skin deep blackening seen all around the wound.

(ii) Lacerated wound of 0.5cm over left scapular region and muscle deep blackening seen all around the wound.

(iii) Lacerated wound of 0.5 cm. over right arm middle, 1/3rd medial aspect and blackening seen all around.

P.W.14, after examining Kamar Lal on 12.2.2006, noticed the following injuries on him:

(i) Lacerated wound of 0.5 cm on the right thumb and the blackening was present all around the injury.

(ii) Lacerated wound of 0.5 cm on the lateral aspect.

6. P.W.14 also examined the father of the complainant and found lacerated wound of 0.5 cm on the vertex part of the head and the blackening was found all around the wound. Doctor deposed that the injuries were caused by the use of the firearm.

7. The trial court after appreciating the entire evidence held as follows:

"46. In the night at 11 O' clock coming of the accused persons equipped with weapons and firing at the informant side not only once rather several times and to do so without any provocation and at the time of occurrence there intention also that killed all of them, show this common intention of the accused persons that in reality the intention of the accused persons was to kill the informant side.

48. In such circumstance for concluding the intention of the accused persons the selection of the vehicle used in the crime by them is very important, which is in the circumstance of the present case is gun and according to the report (Exhibit P.26), the pellet, article 'D' has been examined this can be fired from the gun, article 'A-1' and an one barreled gun of 12 bore even the examination of which has been done by the Assistant Chemical Examiner and the Senior Scientist Officer, according to that it was in the operative condition and from the residue found in the barreled of which the presence of nitrite has been found to be positive which shows this that this gun has been used and although conclusively this cannot be said that when it has been used for the last time, because scientifically it is not possible to tell this with certainty."

8. The trial Court, after holding the accused persons guilty of the charges leveled against them, took a lenient view, though the term of the sentence under Section 307 IPC may extend to life imprisonment, if hurt is caused to any person by such an act and held as follows:

> "58. The entire circumstances was studied. The accused persons are farmers and both the side are of same family. Among them the dispute of partition is pending. Prominently and importantly the injuries which have been sustained by the injured persons, except the injury of thumb others are of superficial nature the doctor has not given report regarding any injury to be fatal; therefore in the well-thought opinion it is very essential to give this much sentence to the accused persons, due to which they can realize the seriousness of their crime and which is in accordance with the offence committed by them."

9. Taking note of the above aspects, the trial Court, as already indicated, sentenced all the accused persons to suffer three years' rigorous imprisonment and to pay a fine of Rs.1,000/- each and in case of default of payment of fine, the accused persons were ordered to undergo rigorous imprisonment for further one year.

10. In the appeal before the High Court, the accused persons stated that they had already deposited the fine and are challenging only on the quantum of sentence. Further, it was also submitted that the accused persons were not persons of criminal antecedent. The High Court, we may say so, by a cryptic order reduced the sentence awarded to the accused persons to the period already undergone by them. The relevant portion of the order of the High Court is extracted hereunder:

> "Considering the nature of offence and the period which has already undergone by the appellants, further considering the fact that the injury has not been caused on vital part, seems to be sufficient for the ends of justice. Therefore, the appeal filed by the appellants is partly allowed maintaining the conviction of the appellants and their jail sentences are reduced to already undergone."

11. Even though the High Court has stated that the sentence is being reduced taking note of the nature of the offence and the fact that injury has not been caused on the vital parts of the body, we notice, it has neither been discussed nor referred to the nature of the offence or the injuries. The High Court also not examined whether the period undergone would be sufficient and commensurate with the guilt established. The following chart also would indicate the period the accused persons spent in judicial custody:

S. No.	Name of the accused	Date of arrest	Date of release	Days of Custody
1.	Mohan Singh Dhakad	12.06.06	31.07.06	50 days
2.	Ummed Singh Dhakad	13.06.06	08.01.2007	211 Days
3.	Balbir Singh Dhakad	17.06.2006	25.07.2006	39 Days
4.	Hiralal Yadav	03.07.2006	25.07.2006	23 Days

12. PW14, the doctor, has explained the nature of injuries and use of the firearm for causing the injuries. Fire arm, it is proved, was used repeatedly against the complainants, causing bodily hurt. This Court had occasion to consider the scope of Section 307, IPC in *Sadha Singh and Another v. State of Punjab* (1985) 3 SCC 225, wherein the trial Court awarded the substantive sentence of three years of rigorous imprisonment and also imposed a fine, which were reduced by the High Court to a period of three months of imprisonment already undergone

by the accused, but by enhancing the fine. This Court held that the reduction of the sentence was not justified. In that case also, the doctor opined that the injuries were caused by firearm, just like the present case. This Court, reversing the judgment of the High Court and upholding that of the trial Court, held as follows:

> "8. If the learned Judge had in mind the provisions of Section 360 of CrPC so as to extend the benefit of treatment reserved for first offenders, these appellants hardly deserve the same. Admittedly, both the appellants were above the age of 21 years on the date of committing the offence. They have wielded dangerous weapons like firearms. Four shots were fired. The only fortunate part of the occurrence is that the victim escaped death. The offence committed by the appellants is proved to be one under Section 307 of IPC punishable with imprisonment for life. We were told that the appellants had hardly suffered imprisonment for three months. If the offence is under Section 307 IPC i.e. attempt to commit murder which is punishable with imprisonment for life and the sentence to be awarded is imprisonment for three months, it is better not to award substantive sentence as it makes mockery of justice……."

13. This Court in *State of M.P. v. Sangram and Others* (AIR 2006 SC 48) took strong exception in the manner in which the High Court, while disposing of the criminal appeal, reduced the sentence without application of mind. That was also a case where the accused was charge-sheeted for offence punishable under Section 307 IPC. The trial Court imposed the sentence of seven years rigorous imprisonment, which was reduced by the High Court to one year, without stating any satisfactory reasons for reduction of sentence. This Court held as follows:

> "5. The High Court has not assigned any satisfactory reasons for reducing the sentence to less than one year.
>
> 6. That apart, the High Court has written a very short and cryptic judgment. To say the least, the appeal has been disposed of in a most unsatisfactory manner exhibiting complete non-application of mind. There is absolutely no consideration of the evidence adduced by the parties."

14. We are of the view that in spite of various judicial pronouncements of this Court, we have come across several cases where the High Courts are committing the same mistake and reducing the sentence without application of mind and stating no reasons. In a case where the accused persons have already been found guilty under Section 307 IPC, we fail to see how the sentence of about 20 to 50 days or 211 days in the case of accused Ummed Singh, would be an adequate sentence. Sentence already undergone, in our view, is not commensurate with the guilt established. If the High Court considers it fit to reduce the sentence, it must state reasons, for the reduction.

15. High Court, in our view, while reducing the sentence, has not properly appreciated the scope of Section 307, IPC under which the respondents were found guilty.

The relevant portion of Section 307 reads as follows:

> "307. Attempt to murder.-- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned……."

16. High Court was of opinion that injuries has not been caused on vital parts of the body. In order to attract Section 307, the injury need not be on the vital parts of the body. In order to attract Section 307, causing of hurt is sufficient. If anybody does

any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 uses the word 'hurt' which has been explained in Section 319, IPC and not "grievous hurt" within the meaning of Section 320, IPC. Therefore, in order to attract Section 307, the injury need not be on the vital part of the body. A gun shot, as in the present case, may miss the vital part of the body, may result in a lacerated wound, that itself is sufficient to attract Section 307. High Court is, therefore, in error in reducing the sentence, holding that the injury was not on the vital part of the body. Period undergone by way of sentence also in our view is not commensurate with the guilt established.

17. We also have to remind ourselves the object and purpose of imposing adequate sentence. Reference may be made to the judgment of this Court in *State of Madhya Pradesh v. Saleem @ Chamaru and Anr.,* AIR 2005 SC 3996.

> "8. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose "'such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.
>
> 9. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude -or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and

> against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.
>
> 10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal"."

18. We, therefore, find no good reason to interfere with the judgment of the trial court. Consequently, the appeal is allowed and judgment of the High Court reducing the sentence is set aside and the judgment and order of the trial Court are restored.

R.P. Appeal allowed.

T.K. GINARAJAN

v.

THE COMMISSIONER OF INCOME TAX,COCHIN, KERALA

(Civil Appeal No. 5216 of 2002)

AUGUST 1, 2013.

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

Income Tax Act, 1961:

ss.2(24), 15, 16 and 17 – "Income", "salary", "perquisite" – Connotation of – Deduction of 40% of the incentive bonus paid to Development Field Officer of LIC prior to 1.4.1989 claimed as expenditure incurred for canvassing business – Held: Incentive bonus has to be treated as salary, subject to permissible deductions u/s 16 – Expenses incurred in the performance of duty as Development Officer for generating the business so as to make him eligible for the incentive bonus is not a permissible deduction and, therefore, the same is exigible to tax.

The appellant, a Field Officer in Life Insurance Corporation of India, claimed in the income tax return deduction of 40% of the incentive bonus paid to him prior to 1.4.1989 on the ground that he had incurred expenditure to the extent of 40% of the incentive bonus for canvassing business. His claim was declined by the Assistant Income Tax Officer and the Commissioner of Income-Tax (appeals). The Tribunal held against the Revenue, but the High Court held in favour of Revenue.

In the instant appeal, the question for consideration before the Court was: whether the incentive bonus paid to the Development Officers by the Life Insurance

Corporation prior to 01.04.1989 would form part of the salary and, thus, exigible to income tax.

Dismissing the appeal, the Court

HELD: 1.1. The incentive bonus paid to the employee by the employer is nothing but salary since such payments are covered by the exhaustive definition of 'salary' u/s 17(1) of the Incoem Tax Act, 1961. The inclusive definition of 'salary', 'perquisite' and 'profits' in lieu of salary is given u/s 17 of the Act. It is now trite law that the Income-Tax Act is a complete code as far as tax on income is concerned. 'Income' is defined u/s 2(24) of the Act and the computation of income is provided under Chapter-III of the Act (starting with s.10). In the case of salaried persons, the only permissible deduction is u/s 16 of the Act. [para 4] [818-A-D]

Commissioner of Income-Tax vs. M.D. Patil **(1998) 229 ITR 71 (Karnataka);** *K.A. Choudary vs. Commissioner of Income-Tax and Others* **(1990) 183 ITR 29 (Andhra Pradesh);** *Commissioner of Income-Tax vs. E. A. Rajendran* **(1999) 235 ITR 514 (Madras);** *Commissioner of Income-Tax vs. P. Arangasamy and Others* **(2000) 242 ITR 563 (Madras);** *Commissioner of Income-Tax vs. Sri Anil Singh* **(1995) 215 ITR 224 (Orissa);** *Commissioner of Income-Tax vs. Gopal Krishna Suri* **(2001) 248 ITR 819 (Bombay);** *Commissioner of Income-Tax vs. Ramlal Agarwala* **(2001)250 ITR 828 - approved.**

State of West Bengal and Others vs. Texmaco Limited **(1999) 1 SCC 198 distinguished.**

1.2. What is excluded u/s 10(14) as it stood prior to 01.04.1989 is the expenses incurred in the performance of the duty. It is for the employer to certify the actual expenses incurred in the performance of duty and in which case, as clarified by the CBDT, to that extent, the

same shall not be shown as part of salary. There is no claim by the employee either for reimbursement or exclusion of the actual expenditure incurred in performance of the duty. Compartmentalization of income under various heads and computation of the taxable portion strictly in accordance with the formula of deductions, rebates and allowances are to be done only as per the scheme provided under the Act. *Kiranbhai's* case decided by the High Court of Gujarat does not lay down the correct principle of law. [para 8-9] [821-B-D, F-G, H; 822-A]

Karamchari Union, Agra vs. Union of India and Others **2000 (2) SCR 33 = (2000) 3 SCC 335 – relied on.**

Commissioner of Income-Tax vs. Kiranbhai H. Shelat and Another **(1999) 235 ITR 635 - disapproved.**

1.3. The appellant being a salaried person, the incentive bonus received by him prior to 01.04.1989 has to be treated as salary and he is entitled only for the permissible deductions u/s 16 of the Act. The expenses incurred in the performance of duty as Development Officer for generating the business so as to make him eligible for the incentive bonus is not a permissible deduction and, therefore, the same is exigible to tax. [para 11] [822-E-G]

Case Law Reference:

(1998) 229 ITR 71 (Karnataka)	**approved**	**para 6**
(1990) 183 ITR 29 (Andhra Pradesh)	**approved**	**para 6**
(1999) 235 ITR 514 (Madras)	**approved**	**para 6**
(2000) 242 ITR 563 (Madras)	**approved**	**para 6**
(1995) 215 ITR 224	**approved**	**para 6**
(Orissa) (2001) 248 ITR 819	**approved**	**para 6**

(Bombay) (2001)250 ITR 828	**approved**	**para 6**
(1999) 235 ITR 635	**disapproved**	**para 6**
2000 (2) SCR 33	**relied on**	**para 9**
(1999) 1 SCC 198	**distinguished**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5216 of 2002.

From the Judgment and Order dated 02.11.2001 of the High Court o Kerala in ITA Nos. 8, 20, 21, 22 of 2000 and 31, 42 & 49 of 2001.

Meha Aggarwal, Varun Tandon, Wadud Aman, Subramonium Prasad for the Appellant.

Amarjit Singh Chandhiok, ASG, Arijit Prasad, Ritesh Kumar, S.A. Haseeb, Shweta Gupta, Honey Kumari, Mallika Ahluwalia (for B.V. Balaram Das) for the Respondent.

The Judgment of the Court was delivered by

KURIAN, J. 1. Whether the incentive bonus paid to the Development Officers by the Life Insurance Corporation (hereinafter referred to as 'LIC') prior to 01.04.1989 would form part of the salary and, thus, exigible to income tax, is the issue arising for consideration in this case.

SHORT FACTS

2. Appellant - T.K. Ginarajan, Development Officer in the LIC claimed deduction of 40% of the incentive bonus paid to him in the Return of Income-Tax for the various years prior to 01.04.1989 on the ground that he had incurred expenditure to the extent of 40% of the incentive bonus for canvassing business. LIC of India had requested the Central Board of Direct Taxes (hereinafter referred to as 'CBDT') for a clarification on deduction explaining that the Development

Officers had actually incurred some expenditure in the performance of their duty, to the tune of at least 40% of the incentive bonus paid to them. However, the CBDT affirmed that the incentive bonus paid by the LIC to the Development Officers formed part of their income towards salary. To quote:

> "... Such portion of the incentive bonus which is actually spent by the Development Officer for duties of office can still be exempted from tax if the LIC makes the payment against the expenses incurred by the Development Officer by way of reimbursement of expenses. In that case, such reimbursement will not form a part of the 'salary' of the Development Officer and only the incentive bonus will appear in their salary certificates. LIC has not certified that a part of the incentive bonus is against the expenses incurred by the Development Officers by way of reimbursement of expenses. If such a part is certified and that part will not form part of the salary and that part of the incentive bonus which is not certified will appear in the salary certificate. Hence, no deduction is contemplated from the incentive bonus, which finds a place in the salary certificates. ..."

3. However, with effect from 01.04.1989, the LIC itself issued a clarification to the effect that the Development Officers would be entitled to claim reimbursement to the extent of 30% of the incentive bonus granted to them. Thus, the dispute is confined only to the period prior to 01.04.1989 and, thereafter, the Development Officers are entitled to the reimbursement of actual expenses incurred by them, to the extent of 30%. In other words, after 01.04.1989, only that part of the incentive bonus after reimbursing the expenses to the extent of 30% will appear in the salary certificate. What is the fate of the incentive bonus to the Development Officers in LIC prior to 01.04.1989 for the purpose of income-tax is the question to be considered in this case.

4. Income towards salary is explained under Section 15

of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act'). Permissible deductions are provided under Section 16. The inclusive definition of 'salary', 'perquisite' and 'profits' in lieu of salary is given under Section 17 of the Act. It is now trite law that the Income-Tax Act, 1961 is a complete code as far as tax on income is concerned. 'Income' is defined under Section 2(24) of the Act and the computation of income is provided under Chapter-III of the Act (starting with Section 10). In the case of salaried persons, the only permissible deduction is under Section 16 of the Act. Section 17 has clearly provided for the details of income by way of salary. There is no serious dispute in this case that the incentive bonus paid to the employee by the employer is nothing but salary and there cannot be any dispute either since such payments are covered by the exhaustive definition of 'salary' under Section 17(1). For the purpose of ready reference, we shall extract the same:

""Salary", "perquisite" and "profits in lieu of salary" defined.

17. For the purposes of sections 15 and 16 and of this section,-

(1) "salary" includes -

(i) wages;

(ii) any annuity or pension;

(iii) any gratuity ;

(iv) any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;

(v) any advance of salary;

(vi) any payment received by an employee in respect of any period of leave not availed of by him;

(vi) the annual accretion to the balance at the credit

of an employee participating in a recognised provident fund, to the extent to which it is chargeable to tax under rule 6 of Part A of the Fourth Schedule;

(vii) the aggregate of all sums that are comprised in the transferred balance as referred to in sub-rule (2) of rule 11 of Part A of the Fourth Schedule of an employee participating in a recognised provident fund, to the extent to which it is chargeable to tax under sub-rule (4) thereof; and

(viii) the contribution made by the Central Government or any other employer in the previous year, to the account of an employee under a pension scheme referred to in section 80CCD;"

5. In the case of the appellant, the claim for exclusion of 40% of the incentive bonus towards the expenditure was declined by the Assistant Income-Tax Officer. The Commissioner of Income-Tax (Appeals) dismissed the appeal. However, the Income-Tax Appellate Tribunal held in favour of the assessee. But the High Court was in favour of the Revenue and, thus, the Civil Appeal.

6. The Full Bench of the High Court of Karnataka in *Commissioner of Income-Tax vs. M.D. Patil*[1] took the view that incentive bonus earned by the Development Officers of the LIC of India is nothing but salary and no deduction over and above the standard deduction provided under Section 16 is permissible under the Act. Accordingly, the claim of expenditure or net income theory put forward by the Development Officers was rejected by the High Court of Karnataka. Similar is the view taken by the High Court of Andhra Pradesh in *K. A. Choudary vs. Commissioner of Income-Tax and Others*[2], the Madras

1. (1998) 229 ITR 71 (Karnataka)
2. (1990) 183 ITR 29 (Andhra Pradesh)

High Court in *Commissioner of Income-Tax vs. E.A. Rajendran*[3] and in *Commissioner of Income-Tax vs. P. Arangasamy and Others*[4], the Orissa High Court in the decision in *Commissioner of Income-Tax vs. Sri Anil Singh*[5], the High Court of Bombay in *Commissioner of Income-Tax vs. Gopal Krishna Suri*[6] and the Calcutta High Court in *Commissioner of Income-Tax vs. Ramlal Agarwala*[7], all in favour of the Revenue. However, the High Court of Gujarat in *Commissioner of Income-Tax vs. Kiranbhai H. Shelat and Another*[8] has taken a contrary view placing heavy reliance on Section 10(14) of the Act as it stood prior to 01.04.1989. Section 10(14) of the Act prior to 01.04.1989 reads as follows:-

"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

xxx xxx xxx

(14) any special allowance or benefit, not being in the nature of an entertainment allowance or other perquisite within the meaning of clause (2) of section 17, specifically granted to meet expenses wholly, necessarily and exclusively *incurred in the performance* of the duties of an office or employment of profit, to the extent to which such expenses are actually incurred for that purpose."

7. "Perquisite" is excluded from the purview of Section 10(14). 'Perquisite' is defined under Section 17(2) of the Act. Explanation 3 under Section 17(2) clearly provides that:

3. (1999) 235 ITR 514 (Madras).
4. (2000) 242 ITR 563 (Madras).
5. (1995) 215 ITR 224 (Orissa).
6. (2001) 248 ITR 819 (Bombay).
7. (2001) 250 ITR 828.
8. (1999) 235 ITR 635.

""Salary" includes the pay, allowances, bonus or commission payable monthly or otherwise or any monetary payment, by whatever name called, from one or more employers, as the case may be, …."

8. That apart, what is excluded under Section 10(14) as it stood prior to 01.04.1989 is the expenses incurred in the performance of the duty. It is for the employer to certify the actual expenses incurred in the performance of duty and in which case, as clarified by the CBDT, to that extent, the same shall not be shown as part of salary. On facts, as clearly noted in the Judgment of the High Court of Kerala, there is no claim by the employee either for reimbursement or exclusion of the actual expenditure incurred in performance of the duty. These two distinctions unfortunately missed the notice of the High Court of Gujarat. The Court in fact was swayed by the letter written by the LIC of India to the CBDT for clarification that, to the extent of 40% of the incentive bonus could be exempted as expenditure incurred for the development of business which made them eligible for the incentive bonus. The High Court of Gujarat failed to take note of the reply by the CBDT that it was for the LIC of India to reimburse the actual expenditure involved in the performance of the duty by the Development Officers and to that extent the same was not to be shown as salary.

9. Compartmentalization of income under various heads and computation of the taxable portion strictly in accordance with the formula of deductions, rebates and allowances are to be done only as per the scheme provided under the Act. As held by this Court in *Karamchari Union, Agra vs. Union of India and Others*[9], the Income-Tax Act, 1961 is a self contained code and taxability of the receipt of any amount or allowance has to be determined on the basis of the meaning given to the words or phrases given in the Act. Thus, we do not agree with the view taken by the High Court of Gujarat in *Kiranbhai's* case

9. (2000) 3 SCC 335.

(supra). The same does not lay down the correct principle of law.

10. Though learned counsel for the appellant made a persuasive attempt to place reliance on the decision of this Court in *State of West Bengal and Others vs. Texmaco Limited*[10], we are afraid the same is of no assistance to the appellant. The incentive bonus referred to in the said decision is the special scheme of the company. The question considered in the said decision was as to whether the said bonus would form part of salary as defined under the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979. This Court held, placing reliance on the definition of 'salary' in the said Act that only in case there was remuneration on a regular basis, the same was exigible to tax under the said Act. On facts, it was found that there was no regular payment of incentive bonus. That is not the factual or legal position in the case of the appellant under the Act and, therefore, the said decision is not relevant at all for the purpose of this case.

11. The appellant being a salaried person, the incentive bonus received by him prior to 01.04.1989 has to be treated as salary and he is entitled only for the permissible deductions under Section 16 of the Act. The expenses incurred in the performance of duty as Development Officer for generating the business so as to make him eligible for the incentive bonus is not a permissible deduction and, hence, the same is exigible to tax. There is no merit in the appeal. The appeal is accordingly dismissed. No costs.

R.P. Appeal dismissed.

10. (1999) 1 SCC 198.

DHARMENDRA KIRTHAL
v.
STATE OF U.P. AND ANOTHER
(Writ Petition (Crl.) No. 100 of 2010)

AUGUST 02, 2013

[H. L. GOKHALE AND DIPAK MISRA, JJ.]

UTTAR PRADESH GANGSTERS AND ANTI SOCIAL ACTIVITIES (PREVENTION) ACT, 1986:

s. 12 – Trial by Special Courts to have precedence – Constitutional validity of – Held: Legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial – Emphasis is on speedy trial and not denial of it – As the trial under the Act would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial – Thus, the provision does not frustrate the concept of fair and speedy trial which are the imperative facets of Art. 21 of the Constitution – The concept of preventive detention is not even remotely attracted to the arrest and detention for an offence under the Act – There is a distinction between an accused who faces trial in other courts and the accused in the Special Courts under the Act, because such accused is a gangster as defined u/s. 2(c) of the Act and is involved in anti-social activities with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person – The differentiation between the two is a rational one and cannot be said to be arbitrary – It does not defeat the concept of permissible classification in the realm of Art. 14 of the Constitution – Constitutional validity of s.12 of the Act, upheld – Constitution of India, 1950 – Arts. 14, 21 and 22(4).

s.19 – Scope of bail – Explained.

In the instant writ petition, the petitioner challenged the constitutional validity of the Uttar Pradesh Gangsters and Anti-social Activities (Prevention) Act, 1986. The Court issued notice in regard to validity of s.12 of the Act. It was, inter alia, contended for the petitioner that (1) the provision of giving precedence to the trial before the Special Court under the Act and keeping the trial before other courts in abeyance would frustrate the basic tenet of Art. 21 of the Constitution i.e. the concept of speedy and fair trial; (2) detention of accused under the Act deprived him of his liberty as the trial in other cases would not be allowed to proceed and accused would be compelled to languish in custody; (3) the detention under the Act, being virtually in the nature of a preventive detention, would be violative of Art. 22(4) of the Constitution; and (4) that the trial of accused by the Special Court under the Act keeping the trial in other courts in abeyance would be violative of the equal treatment before the law as envisaged under Art. 14 of the Constitution.

Dismissing the petition, the Court

HELD: 1. It is the duty of the Court to uphold the constitutional validity of a statute. Further, there is always the presumption in favour of the constitutionality of an enactment. [Para 22] [840-B-C]

Charanjit Lal Chowdhury v. The Union of India and Others **1950 SCR 869 = AIR 1951 SC 41;** *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Others* **1959 SCR 279 = AIR 1958 SC 538;** *State of Bihar and Others v. Bihar Distillery Limited* **1996 (9) Suppl. SCR 479 = AIR 1997 SC 1511;** *Burrakur Coal Co. Ltd. v. Union of India* **1962 SCR 44 = AIR 1961 SC 954;** *Pathumma and Others v. State of Kerala and Others* **1978 (2) SCR 537 = (1978) 2 SCC 1;** *State of Gujarat*

v. Mirzapur Moti Kureshi Kassab Jamat and Others **2005 (4) Suppl. SCR 582 = (2005) 8 SCC 534;** *R. S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Limited and Another* **1978 (1) SCR 338 = (1977) 4 SCC 98 – relied on**

2.1. Section 12 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 clearly mandates that the trial under this Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial of any other case in any other court. The Statement of Objects and Reasons and Preamble make it quite clear that the Legislature felt the compulsion to make special provisions against gangsterism and anti-social activities. The legislature thought it appropriate to provide that the trial of such other case shall remain in abeyance. It is apt to note that "any other case" against the accused in "any other court" does not include the Special Court. The emphasis is on speedy trial and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial. It is also worthy to note that the Special Court has been conferred jurisdiction under sub-s. (1) of s. 8 of the Act to try any other offences with which the accused may, under any other law for the time being in force, have been charged and proceeded at the same trial. [Para 15 and 32] [837-B-C; 844-C-F]

Ashok Kumar Dixit v. State of U.P. and Another **AIR 1987 All 235;** *Subhash Yadav v. State of U.P. and Another* **2000 (10) SCC 145;** *Kartar Singh v. State of Punjab* **1994 (2) SCR 375 = (1994) 3 SCC 569;** *Gujarat University and Another v. Shri Krishna Ranganath Mudholkar and Others* **AIR 1963 SC 703 = 1963 Suppl. SCR 122;** *Shashikant Laxman Kale and Another v. Union of India and Another* **1990 (3) SCR 441 = AIR 1990 SC 2114;** *New India Assurance Co. Ltd. v. Asha*

Rani and Others **2002 (4) Suppl. SCR 543 = (2003) 2 SCC 223;** *Arun Ghosh v. State of West Bengal* **1970 (3) SCR 283 = (1970) 1 SCC 98;** *Hussainara Khatoon (I) v. Home Secretary, State of Bihar* **1979 (3) SCR 169 = (1980) 1 SCC 81;** *Sunil Batra v. Delhi Administration (I)* **1979 (1) SCR 392 = (1978) 4 SCC 494,** *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna* **1979 (3) SCR 532 = (1980) 1 SCC 98,** *Hussainara Khatoon (VI) v. Home Secretary, State of Bihar, Govt. of Bihar, Patna* **1979 (3) SCR 1276 = (1980) 1 SCC 115 ,** *Kadra Pahadia v. State of Bihar (II)* **(1983) 2 SCC 104;** *T.V. Vatheeswaran v. State of T.N.* **1983 (2) SCR 348 = 1983 (2) SCC 68 and** *Abdul Rehman Antulay v. R.S. Nayak* **1991 (3) Suppl. SCR 325 = 1992 (1) SCC 225 – referred to.**

2.2. As far as fair trial is concerned, it is an integral part of the very soul of Art. 21 of the Constitution. Fair trial is the quintessentiality of apposite dispensation of criminal justice. There is, however, qualitative difference between the right to speedy trial and the right of the accused to fair trial. Unlike the right of the accused to fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. [Para 33-34] [845-A; 846-B-C]

Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others **2004 (3) SCR 1050 = (2004) 4 SCC 158 – relied on.**

Mohd. Hussain alias Julfikar Ali v. State (Government of NCT of Delhi) **2012 (10) SCR 480 = (2012) 9 SCC 408; and** *Niranjan Hemchandra Sashittal and Another v. State of Maharashtra* **(2013) 4 SCC 642 – referred to**

2.3. On a careful scrutiny of the provision, it is quite vivid that the trial is not hampered as the trial in other court is to remain in abeyance by the legislative

command. Thus, the question of procrastination of trial does not arise. As the trial under the Act would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial. Thus, the provision does not frustrate the concept of fair and speedy trial which are the imperative facets of Art. 21 of the Constitution. [Para 36] [846-D-E]

3. As regards the plea that the accused would be compelled to languish in jail as trials in other cases are not allowed to proceed, suffice it to say that as far as other cases are concerned, there is no prohibition to move an application taking recourse to the appropriate provision under the Code of Criminal Procedure for grant of bail. What is stipulated u/s. 12 of the Act is that the trial in other case is to be kept in abeyance. Special Courts have been conferred with the power to try any other offence with which the accused under the Act is charged at the same trial. Besides, s. 19 the Act empowers the Special Courts to grant bail to an accused under the Act though the provision is rigorous. Thus, it cannot be said that the accused is compelled to languish in custody because of detention under the Act. [Para 39 and 41] [848-F-H; 849-A; 850-E]

State of Maharashtra v. Bharat Shanti Lal Shah and Others **2008 (12) SCR 1083 = (2008) 13 SCC 5 – distinguished.**

Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another **2012 (7) SCR 584 = (2012) 9 SCC 446 – referred to.**

4. The concept of preventive detention is not even remotely attracted to the arrest and detention for an offence under the Act. [Para 42] [850-G]

5.1. As far as Art. 14 of the Constitution is concerned, the procedure provided in the Act does not tantamount

to denial of fundamental fairness in trial. It does not really shock the judicial conscience and by no stretch of imagination, it can be said to be an anathema to the sense of justice. It is neither unfair nor arbitrary. It is to be noted that there is a distinction between an accused who faces trial in other courts and the accused in the Special Courts because the accused under the Act is tried by the Special Court as he is a gangster as defined u/s. 2(c) of the Act and is involved in anti-social activities with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. It is a crime of a different nature. Apart from normal criminality, the accused is also involved in organized crime for a different purpose and motive. The accused persons under the Act belong to altogether a different category. The legislature has felt that they are to be dealt with in a different manner and, accordingly, the trial is mandated to be held by the Special Court in an expeditious manner. The intention of the legislature is to curb such kind of organized crimes which have become epidemic in the society. The legislature, being guided by its sacrosanct duty to protect the individual members of society to enjoy their rights without fear and see that some people do not become a menace to the society in a singular or collective manner, has enacted such a provision. [Para 43-44] [851-B-G]

The Works Manager, Central Railway Workshop, Jhansi v. Vishwanath and Others **(1969) 3 SCC 95 = 1970 (2) SCR 726 – referred to**

5.2. Thus, the accused under the Act is in a distinct category and the differentiation between the two, namely, a person arrayed as an accused in respect of offences under other Acts and an accused under the Act is a rational one. It cannot be said to be arbitrary. It does not defeat the concept of permissible classification. The

classification is in the permissible realm of Art. 14 of the Constitution. [Paras 45 and 46] [852-E-F; 853-B]

Kartar Singh v. State of Punjab **1994 (2) SCR 375 = (1994) 3 SCC 569 - referred to.**

5. This Court upholds the constitutional validity of s.12 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, as it does not infringe any of the facets of Arts.14 and 21 of the Constitution of India. [Para 47] [853-C-D]

Case Law Reference:

AIR 1987 All 235	**referred to**	**Para**
2000 (10) SCC 145	**referred to**	**Para**
1994 (2) SCR 375	**referred to**	**Para 4**
1963 Suppl. SCR 122	**referred to**	**Para 12**
1990 (3) SCR 441	**referred to**	**Para 13**
2002 (4) Suppl. SCR 543	**referred to**	**Para 14**
1970 (3) SCR 283	**referred to**	**Para 15**
1950 SCR 869	**relied on**	**Para 22**
1959 SCR 279	**relied on**	**Para 23**
1996 (9) Suppl. SCR 479	**relied on**	**Para 24**
1962 SCR 44	**relied on**	**Para 25**
1978 (2) SCR 537	**relied on**	**Para 26**
2005 (4) Suppl. SCR 582	**relied on**	**Para 27**
1978 (1) SCR 338	**relied on**	**Para 28**
2004 (3) SCR 1050	**relied on**	**Para 33**

1979 (3) SCR 169	**referred to**	**Para 31**
1979 (1) SCR 392	**referred to**	**Para 31**
1979 (3) SCR 532	**referred to**	**Para 31**
1979 (3) SCR 1276	**referred to**	**Para 31**
(1983) 2 SCC 104	**referred to**	**Para 31**
1983 (2) SCR 348	**referred to**	**Para 31**
1991 (3) Suppl. SCR 325	**referred to**	**Para 31**
2012 (10) SCR 480	**referred to**	**Para 34**
(2013) 4 SCC 642	**referred to**	**Para 35**
2012 (7) SCR 584	**relied on**	**Para 38**
2008 (12) SCR 1083	**distinguished**	**Para 41**
1970 (2) SCR 726	**referred to**	**Para 44**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 100 of 2010.

Under Article 32 of the Constitution of India.

Dinesh Kumar Garg, Ritu Puri Bala, Abhishek Garg for the Petitioner.

Irshad Ahmad, AAG, Raman Yadav, Abhisth Kumar, Archana Singh (for Kamlendra Mishra) for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In this writ petition preferred under Article 32 of the Constitution of India, the petitioner who is undergoing trial before the learned Special Judge, District Baghpat, U.P., has called in question the constitutional validity of number of provisions of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (Act 7 of 1986) (for

short "the Act") being violative of Articles 14, 21, 22(4) and 300A of the Constitution of India and further prayed for issue of a writ of certiorari for quashment of the First Information Report dated 2.5.2010 giving rise to Crime No. 100 of 2010 registered at Police Station Ramala, District Baghpat.

2. At the very outset, it is imperative to state that this Court, on 20th September, 2010, while issuing notice, had passed the following order: -

> "Issue notice in regard to the validity of Section 12 of the U.P. Gangster & Anti-Social Activities (Prevention) Act, 1986."

Regard being had to the aforesaid, we shall only dwell upon and delve into the constitutional validity of the section 12 of the Act.

3. It is necessary to state here that the validity of the Act was called in question before the High Court of Judicature at Allahabad and a Full Bench of the High Court in *Ashok Kumar Dixit v. State of U.P. and Another*[1] upheld the constitutional validity and dismissed the writ petition. The assail to the constitutional validity travelled to this Court in *Subhash Yadav v. State of U.P. and Another*[2] and a two-Judge Bench of this Court referred the matter to the Constitution Bench by stating thus: -

> "Heard learned counsel for the parties at some length.
>
> We are informed that the question of vires of the Terrorist Affected Areas (Special Courts Act) 1984, is pending before a Constitution Bench. In the light of this, in our opinion, it would be proper that these matters wherein the constitutional validity of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, is challenged, should also be heard by the Constitution Bench."

1. AIR 1987 All 235.
2. Writ Petition (Crl.) No. 317 of 1987 dt. 9.12.1987.

4. When the matter was listed before the Constitution Bench along with connected matters, the larger Bench in *Kartar Singh v. State of Punjab*[3] observed as follows: -

> "Though originally, a number of other matters falling under various Acts such as the U.P. Gangsters and Anti-social Activities (Prevention) Act, 1986 (U.P. Act 7 of 1986), the Prevention of Illicit Traffic of Narcotics Drugs and Psychotropic Substances Act, 1988 and some provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), were listed for hearing, we have fully and conclusively heard only the matters pertaining to the Act of 1984, Act of 1985 and Act of 1987 and U.P. Act 16 of 1976."

5. Thus, the constitutional validity of the Act was not decided by the said Constitution Bench. Thereafter, the matters relating to this Act were placed before another Constitution Bench. The Court, in *Subhash Yadav v. State of U.P. and Another,*[4] took note of the challenge and the decision rendered in *Ashok Kumar Dixit* (supra) and observed thus: -

> "**3.** We had started hearing arguments in the writ petitions when the matters remained part-heard. We have now been informed that Subhash Yadav, petitioner in Writ Petition (Crl.) No. 317 of 1987 was discharged by the trial court as early as on 3-4-1990 while Amar Mani Tripathi, petitioner in Writ Petition (Crl.) No. 407 of 1987 was acquitted by the trial court on 20-5-1992. Learned counsel for Jitender, petitioner in Writ Petition (Crl.) No. 562 of 1987 submits that despite numerous attempts made to contact the petitioner and find out about the position of the

3. (1994) 3 SCC 569.
4. (2000) 10 SCC 145.

criminal case against him, there is no response. Learned counsel has, therefore, reported no instructions to pursue the writ petition any further.

4. In view of the developments which have taken place by the discharge of petitioner Subhash Yadav and acquittal of petitioner Amar Mani Tripathi and no instructions having been reported on behalf of petitioner Jitender, nothing survives for consideration in these writ petitions, as the exercise to determine the constitutional validity of the Act, would now be only of an academic interest insofar as these cases are concerned. Writ Petitions (Crl.) Nos. 317 and 407 of 1987 are, therefore, dismissed as infructuous while Writ Petition (Crl.) No. 562 of 1987 is dismissed for non-prosecution."

6. In view of the aforesaid position, the constitutional validity of the Act is still alive, but as a restricted notice was issued pertaining only to the validity of Section 12 of the Act and the learned counsel for the parties confined their submissions in that regard, we would, as stated earlier, address ourselves singularly on that point. Be it noted, Section 12 of the Act provides that the trial under the Act of any offence by special court shall have precedence over the trial of any other case against the accused in any other court and shall be concluded in preference to the trial of such other case and accordingly trial of such other case shall remain in abeyance.

7. We have heard Mr. D.K. Garg, learned counsel for the petitioner, and Mr. Irshad Ahmad, learned Additional Advocate General for the State of U.P.

8. Assailing the validity of the said provision, Mr. Garg, learned counsel for the petitioner, has raised the following contentions: -

(a) The provision frustrates the basic tenet of Article 21 of the Constitution as has been interpreted by this

Court to encapsulate in a sacrosanct manner the concept of speedy and fair trial, for the trial before the other courts are kept in abeyance and precedence is given to the trial before the special courts under this Act as a consequence of which the trial in other Court does not take place.

(b) The precedence conferred on the cases before the special courts tantamounts to illegal detention of an accused as he is deprived of his liberty as the trial in other cases are not allowed to proceed and the accused is compelled to languish in custody.

(c) The detention which is virtually in the nature of a preventive detention violates Article 22(4) of the Constitution.

(d) The accused, who is tried by the special courts under this Act, is treated differently because trial in other courts are kept in abeyance whereas the accused tried by other courts gets the benefit of speedy trial. There is no justification to treat the accused under this Act in such a manner as it violates the equal treatment before the law as envisaged under Article 14 of the Constitution.

9. Mr. Irshad Ahmad, learned Additional Advocate General for the State of U.P., resisting the aforesaid proponements, contended as follows: -

(i) The submission that the fundamental concept of speedy trial is throttled and stifled is neither correct nor sustainable as, on the contrary, the purpose of the legislature is to guarantee speedy trial by providing the precedence of the trial under this Act over other cases and keeping other cases before other courts in abeyance. From the scanning of the scheme of the Act, the emphasis on speedy trial is

luminous and, hence, the ground urged on this score deserves to be repelled.

(ii) The liberty of the accused is not jeopardized but schematic canvas and conceptual interpretation would reveal that the command of the legislature is for speedy trial and further there are provisions for grant of bail.

(iii) The contention that it is in the nature of preventive detention has no legs to stand upon as preventive detention and detention in connection with the crime under the Act have different connotations altogether.

(iv) The accused in other cases, who is not tried under this Act, stands on a different footing altogether and such a classification is permissible in the constitutional backdrop and, therefore, it does not invite the frown of Article 14 of the Constitution.

10. To appreciate the rival submissions raised at the Bar in their proper perspective, we think it seemly to refer to the Statement of Objects and reasons of the Act which is as follows: -

"Gangsterism and anti-social activities were on the increase in the State posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with this new menace. With a view to break the gangs by punishing the gangsters and to nip in the bud their conspiratoral designs it was considered necessary to make special provisions for the prevention of, and for coping with gangsters and anti-social activities in the State.

Since the State Legislature was not in session and immediate legislative action in the matter was necessary, the Uttar Pradesh Gangsters and Anti-social Activities (Prevention) Ordinance 1986 (U.P. Ordinance No. 4 of

1986) was promulgated by the Governor on January 15, 1986, after obtaining prior instructions of the President.

The Uttar Pradesh Gangsters and Antisocial Activities (Prevention) Bill, 1986 is accordingly introduced with certain necessary modifications to replace the aforesaid Ordinance."

11. The Preamble of the Act reads as follows: -

"An Act to make special provisions for the prevention of, and for coping with gangsters and anti-social activities and for matters connected therewith or incidental thereto."

12. Reference to the Statement of Objects and Reasons and the Preamble of the Act is meant to appreciate the background and purpose of the legislation. In this context we may refer with profit to the dictum in *Gujarat University and Another v. Shri Krishna Ranganath Mudholkar and Others,*[5] where the majority observed as follows: -

"Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the Legislature to enact a Statute, but in interpreting the Statute they must be ignored."

13. In *Shashikant Laxman Kale and Another v. Union of India and Another,*[6] a three-Judge Bench of this Court has expressed: -

"For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the

5. AIR 1963 SC 703.
6. AIR 1990 SC 2114.

antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady."

14. In *New India Assurance Co. Ltd. v. Asha Rani and Others,*[7] the Court referred to the Statement of Objects and Reasons of the Motor Vehicles Amendment Act, 1994 to understand the purpose behind the legislation.

15. The Statement of Objects and Reasons and Preamble make it quite clear that the Legislature felt the compulsion to make special provisions against gangsterism and anti-social activities. While speaking about terrorism, the majority in *Kartar Singh* (supra) opined that it is much more rather a grave emergent situation created either by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity. The learned Judges put it on a higher plane than public order disturbing the "even tempo of the life of community of any specified locality" as has been stated by Hidayatullah, C.J., in *Arun Ghosh v. State of West Bengal.*[8]

16. The present Act deals with gangs and gangsters to prevent organized crime. Section 2 of the Act is the dictionary clause. Section 2(b) defines the term "gang" and we think it apt to quote the relevant part which is as follows: -

> ""Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities"

After so defining, the legislature has stipulated the offences

7. (2003) 2 SCC 223.

8. (1970) 1 SCC 98.

which are punishable under the Act, but they need not be referred to.

17. The term "gangster" has been defined under Section 2(c) which is as follows: -

> ""gangster" means a member or leader or organizer of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities."

18. Section 3 of the Act deals with penalty. It is apt to reproduce the same : -

> "3. **Penalty**. – (1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:
>
> Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.
>
> (2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine."

19. Section 5 of the Act deals with Special Courts and

Section 5(1) provides that for the interest of speedy trial of offences under this Act, the State Government may, if it considers necessary, constitute one or more special courts. Section 7 deals with the jurisdiction of the Special Courts. Section 7(1) provides that notwithstanding anything contained in the Code, where a Special Court has been constituted for any local area, every offence punishable under any provision of this Act or any rule made thereunder shall be triable only by the Special Court within whose local jurisdiction it was committed, whether before or after the constitution of such Special Court. Sub-section (2) of Section 7 lays the postulate that all cases triable by a Special Court, which immediately before the constitution of such Special Court were pending before any court, shall on creation of such Special Court having jurisdiction over such cases, stand transferred to it.

20. Section 8 deals with the power of Special Courts with respect to other offences which reads as follows: -

> "**8. Power of Special Courts with respect to other offences.** – (1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial.
>
> (2) If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof."

21. Section 10 provides the procedure and powers of Special Courts and Section 11 provides for protection of witnesses. Section 12, the validity of which is under attack, is as follows: -

> "**12. Trial by Special Courts to have precedence**. – The trial under this Act of any offence by Special Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance."

22. At this juncture, we may profitably recapitulate that it is the duty of the Court to uphold the constitutional validity of a statute and that there is always the presumption in favour of the constitutionality of an enactment. In this context, we may fruitfully refer to the decision in *Charanjit Lal Chowdhury v. The Union of India and Others*[9] wherein it has been ruled thus: -

> "It is the accepted doctrine of American Courts, which I consider to be well founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

23. In *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Others,*[10] this Court had ruled that there is always a presumption in favour of the constitutionality of an enactment and the burden is on him who challenges the same to show that there has been a clear transgression of the constitutional principles and it is the duty of the Court to sustain that there is a presumption of constitutionality and in doing so, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislations.

24. In *State of Bihar and Others v. Bihar Distillery*

9. AIR 1951 SC 41.
10. AIR 1958 SC 538.

Limited,[11] the said principle was reiterated.

25. In *Burrakur Coal Co. Ltd. v. Union of India,*[12] Mudholkar, J., speaking for the Constitution Bench, observed: -

> "Where the validity of a law made by a competent legislature is challenged in a court of law, that court is bound to presume in favour of its validity. Further, while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained."

26. In *Pathumma and Others v. State of Kerala and Others,*[13] the seven-Judge Bench has opined thus: -

> "The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such a right clashes with the larger interest of the country it must yield to the latter."

Again in the said judgment, it has been ruled thus: -

> "It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections

11. AIR 1997 SC 1511.

12. AIR 1961 SC 954.

13. (1978) 2 SCC 1.

> of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds."

27. The said principles have been reiterated by the majority in another Constitution Bench in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Others.*[14]

28. At this juncture, we think it condign to sit in a time machine and refer to the opinion expressed by Krishna Iyer, J., in *R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Limited and Another:* -[15]

> "A prefatory caveat. When examining a legislation from the angle of its vires, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal – in interpreting the organic law of the nation. We must also remember the constitutional proposition enunciated by the U.S. Supreme Court in *Munn v. Illinois* viz., 'that courts do not substitute their social and economic beliefs for the judgment of legislative bodies'. Moreover, while trespasses will not be forgiven, a presumption of constitutionality must colour judicial construction. These factors, recognized by our Court, are essential to the modus vivendi between the judicial and legislative branches of the State, both working beneath the canopy of the Constitution."

29. We have referred to the aforesaid authorities for the sanguine reason that the submissions raised at the Bar are to be considered in the backdrop of the aforesaid "caveat". The

14. (2005) 8 SCC 534.

15. (1977) 4 SCC 98.

16. (1876) 94 US 113 (quoted in Labour Board v. Jones & Laughlin, 391 US 1, 33-34-Corwin Constitution of the USA, Introduction, P. XXXI)

"Modus Vivendi" which needs a purposive and constructive ratiocination while engaged in the viceration of the provision, which draws its strength and stimulus in its variations from the Constitution, we have to see whether the provision trespasses the quintessential characteristics of the Organic Law and, therefore, should not be allowed to stand.

30. Keeping the aforesaid enunciation in view, we shall presently proceed to deal with the stand and stance of both the sides. The first submission which pertains to the denial of speedy trial has been interpreted to be a facet of Article 21 of the Constitution. In ***Kartar Singh*** (supra), the majority, speaking through Pandian,J., has expressed thus: -

> "**85.** The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. This right has been actuated in the recent past and the courts have laid down a series of decisions opening up new vistas of fundamental rights. In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge.
>
> **86.** The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy

> trial is properly reflected in Section 309 of the Code of Criminal Procedure."

31. Be it noted, the Court also referred to the pronouncements in *Hussainara Khatoon (I) v. Home Secretary, State of Bihar,*[17] *Sunil Batra v. Delhi Administration (I),*[18] *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, Patna,*[19] *Hussainara Khatoon (VI) v. Home Secretary, State of Bihar, Govt. of Bihar, Patna,*[20] *Kadra Pahadia v. State of Bihar (II),*[21] *T.V. Vatheeswaran v. State of T.N.,*[22] and *Abdul Rehman Antulay v. R.S. Nayak.*[23]

32. The present provision is to be tested on the touchstone of the aforesaid constitutional principle. The provision clearly mandates that the trial under this Act of any offence by the Special Court shall have precedence and shall be concluded in preference to the trial of such other courts to achieve the said purpose. The legislature thought it appropriate to provide that the trial of such other case shall remain in abeyance. It is apt to note here that "any other case" against the accused in "any other court" does not include the Special Court. The emphasis is on speedy trial and not denial of it. The legislature has incorporated such a provision so that an accused does not face trial in two cases simultaneously and a case before the Special Court does not linger owing to clash of dates in trial. It is also worthy to note that the Special Court has been conferred jurisdiction under sub-section (1) of Section 8 of the Act to try any other offences with which the accused may, under any other law for the time being in force, have been charged and proceeded at the same trial.

17. (1980) 1 SCC 81.
18. (1978) 4 SCC 494.
19. (1980) 1 SCC 98.
20. (1980) 1 SCC 115.
21. (1983) 2 SCC 104.
22. (1980) 2 SCC 68.
23. (1992) 1 SCC 225.

33. As far as fair trial is concerned, needless to emphasise, it is an integral part of the very soul of Article 21 of the Constitution. Fair trial is the quintessentiality of apposite dispensation of criminal justice. In *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others,*[24] it has been held as follows: -

> "*33*. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation—peculiar at times and related to the nature of crime, persons involved—directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system."

In the said case, emphasis was laid on the triangulation of the interest of the accused, the victim and the society and stress was further laid on the fact that it is the community that acts through the State and the prosecuting agencies and the interests of the society are not to be treated completely with disdain and as persona non grata. In paragraphs 39 and 40 of the said judgment, it has been ruled thus: -

> "**39.** Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.
>
> **40.** The fair trial for a criminal offence consists not only in

24. (2004) 4 SCC 158.

> technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

34. In *Mohd. Hussain alias Julfikar Ali v. State (Government of NCT of Delhi),*[25] this Court observed that "speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the right of the accused to fair trial. Unlike the right of the accused to fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself.

35. Same principle was reiterated in *Niranjan Hemchandra Sashittal and Another v. State of Maharashtra.*[26]

36. On a careful scrutiny of the provision, it is quite vivid that the trial is not hampered as the trial in other courts is to remain in abeyance by the legislative command. Thus, the question of procrastination of trial does not arise. As the trial under the Act would be in progress, the accused would have the fullest opportunity to defend himself and there cannot be denial of fair trial. Thus, in our considered opinion, the aforesaid provision does not frustrate the concept of fair and speedy trial which are the imperative facets of Article 21 of the Constitution.

37. The next limb of attack pertains to scuttling of liberty of the person who is made an accused for an offence under the Act. There can never be any shadow of doubt that sans liberty, the human dignity is likely to be comatosed. The liberty of an individual cannot be allowed to live on the support of a ventilator. Long back in the glory of liberty, Henry Patrick, had to say this: -

> "Is life so dear, or peace so sweet as to be purchased at

25. (2012) 9 SCC 408.

26. (2013) 4 SCC 642.

the price of chains and slavery? – Forbid it, Almighty God! – I know not what course others may take, but, as for me, give me liberty or give me death.[27]"

38. When the liberty of an individual is atrophied, there is a feeling of winter of discontent. Personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of "rational liberty". In essence, liberty of an individual should not be allowed to be eroded but every individual has an obligation to see that he does not violate the laws of the land or affect others' lawful liberty to lose his own. The cry of liberty is not to be confused with or misunderstood as unconcerned senile shout for freedom. It may be apt to add here that the protection of the collective is the bone marrow and that is why liberty in a civilized society cannot be absolute. It is the duty of the courts to uphold the dignity of personal liberty. It is also the duty of the court to see whether the individual crosses the "Lakshman Rekha" that is carved out by law is dealt with appropriately. In this context, we may profitably reproduce a passage from the judgment in *Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and Another:*[28] -

"**17.** We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasise, the sacrosanctity of liberty is paramount in a civilised society. However, in a democratic body polity which is wedded to the rule of law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by

27. Henry, Patrick, Speech in the Virginia Revoluntionary Council, Richmod 1175 in Henry, Willaim Writ, Patrick Henry: Life Correspondence and Speeches (New York: Charles Scribner's Sons, 1891), Vol. 1, p. 268.

28. (2012) 9 SCC 446.

larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well-accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialised. The life of an individual living in a society governed by the rule of law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

39. From the aforesaid, it is quite clear that no individual has any right to hazard others' liberty. The body polity governed by Rule of law does not permit anti-social acts that lead to a disorderly society. Keeping the aforesaid perspective in view, the submission of the learned counsel for the petitioner and the argument advanced in oppugnation by the learned counsel for the respondent are to be appreciated. It is urged that an accused tried under this Act suffers detention as the trial in other cases are not allowed to proceed. As far as other cases are concerned, there is no prohibition to move an application taking recourse to the appropriate provision under the Code of Criminal Procedure for grant of bail. What is stipulated under Section 12 of the Act is that the trial in other case is to be kept in abeyance. Special courts have been conferred with the power to try any other offence with which the accused under the Act is charged at the same trial. Quite apart from the above,

the Act empowers the special courts to grant bail to an accused under the Act though the provision is rigorous. Sections 19(4) and 19(5) deal with the same. They are as follows: -

"**19. Modified application of certain provisions of the Code** –

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless:

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code."

40. The said provisions are akin to the provisions contained in Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

41. The provision under Section 37 of the NDPS Act, though lays conditions precedent and they are in addition to what has been stipulated in the Code of Criminal Procedure, yet there is no deprivation of liberty. Be it noted, a more stringent provision is contained in MCOCA under Section 21 (5). It reads as under:-

"21(5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the court

that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question."

A three-Judge Bench in *State of Maharashtra v. Bharat Shanti Lal Shah and Others*[29] dealing with said facet has opined thus:-

"63. As discussed above the object of MCOCA is to prevent the organized crime and, therefore, there could be reason to deny consideration of grant of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence under some other Act would not be in any case in consonance with the object of the Act which is enacted in order to prevent only organized crime."

Thereafter, the learned judges observed that the expression "or under any other Act" in the provision being discriminatory was violative of Articles 14 and 21 of the Constitution. Such a provision is absent in Section 19 of the Act. Thus, there being a provision for grant of bail, though restricted, we are disposed to think that the contention that the accused is compelled to languish in custody because of detention under the Act does not deserve acceptation and is, accordingly, negatived.

42. The next submission of the learned counsel is that it is in the nature of preventive detention as is understood under Article 22(4) of the Constitution of India. The said contention is to be taken note of only to be rejected, for the concept of preventive detention is not even remotely attracted to the arrest and detention for an offence under the Act.

43. The next proponement, as noted, pertains to the

29. (2008) 13 SCC 5.

violation of the equality clause as enshrined under Article 14 of the Constitution. Mr. Garg has endeavoured to impress upon us that the accused who is only tried by other courts gets the benefit of speedy trial whereas the accused tried under this Act has to suffer because trial in other courts are kept in abeyance. We have already expressed our view that the concept of speedy and fair trial is neither smothered nor scuttled when the trial in other courts are kept in abeyance. As far as Article 14 is concerned, we do not perceive that the procedure provided in the Act tantamounts to denial of fundamental fairness in trial. It does not really shock the judicial conscience and by no stretch of imagination, it can be said to be an anathema to the sense of justice. It is neither unfair nor arbitrary. It is apposite to note here that there is a distinction between an accused who faces trial in other courts and the accused in the special courts because the accused herein is tried by the Special Court as he is a gangster as defined under Section 2(c) of the Act and is involved in anti-social activities with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person.

44. It is a crime of a different nature. Apart from normal criminality, the accused is also involved in organized crime for a different purpose and motive. The accused persons under the Act belong to altogether a different category. The legislature has felt that they are to be dealt with in a different manner and, accordingly, the trial is mandated to be held by the special courts in an expeditious manner. The intention of the legislature is to curb such kind of organized crimes which have become epidemic in the society. In *Kartar Singh* (supra), the majority has said, "Legislation begins where Evil begins". The legislature, as it seems to us, being guided by its sacrosanct duty to protect the individual members of society to enjoy their rights without fear and see that some people do not become a menace to the society in a singular or collective manner, has enacted such a provision. In this context, we may refer with profit to the authority in *The Works Manager, Central Railway*

Workshop, Jhansi v. Vishwanath and others,[30] wherein a three-Judge Bench, though in a different context, has observed that certain types of enactments are more responsive to some urgent social demands and also have more immediate and visible impact on social vices by operating more directly to achieve social reforms. We have referred to the said observations only to highlight how the legislature in a welfare State immediately steps in for social reforms to eradicate social vices. Similarly, sometimes it is compelled to take steps to control the frenzied criminal action of some anti-social people. In the case at hand it can be stated with certitude that the legislature has felt that there should be curtailment of the activities of the gangsters and, accordingly, provided for stern delineation with such activities to establish stability in society where citizens can live in peace and enjoy a secured life. It has to be kept uppermost in mind that control of crime by making appropriate legislation is the most important duty of the legislature in a democratic polity, for it is necessary to scuttle serious threats to the safety of the citizens. Therefore, the legislature has, in actuality, responded to the actual feelings and requirements of the collective.

45. Thus, the accused under the Act is in a distinct category and the differentiation between the two, namely, a person arrayed as an accused in respect of offences under other Acts and an accused under the Act is a rational one. It cannot be said to be arbitrary. It does not defeat the concept of permissible classification. The majority in *Kartar Singh* (supra) has expressed thus: -

> "**218.** The principle of legislative classification is an accepted principle whereunder persons may be classified into groups and such groups may differently be treated if there is a reasonable basis for such difference or distinction. The rule of differentiation is that in enacting laws differentiating between different persons or things in

30. (1969) 3 SCC 95.

different circumstances which govern one set of persons or objects such laws may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances."

46. Tested on the touchstone of the abovestated principles, the irresistible conclusion is that the classification is in the permissible realm of Article 14 of the Constitution. Therefore, the submission that Section 12 invites the wrath of Article 14 of the Constitution is sans substratum and, accordingly, we have no hesitation in repelling the same and we so do.

47. In view of the aforesaid analysis, we uphold the constitutional validity of Section 12 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 as it does not infringe any of the facets of Articles 14 and 21 of the Constitution of India. Ex-consequenti, the writ petition, being devoid of merit, stands dismissed.

R.P. Writ Petition dismissed.

SADANANDA MONDAL
v.
STATE OF WEST BENGAL
(Criminal Appeal No.1555 of 2009)

AUGUST 05, 2013

[P. SATHASIVAM, CJI AND J. CHELAMESWAR, J.]

PENAL CODE, 1860:

s. 302/34 – Death of victim by gunshot injury – Out of 14 accused, 13 acquitted by counts below – Conviction of appellant and sentence of life imprisonment – Held: Out of the two brothers of deceased, evidence of one was disbelieved by High Court as he made inconsistent statements u/s 161 Cr.P.C. and before court – The other brother introduced names of other accused persons whom he did not name in FIR – There was also no explanation as to the discrepancy in the father's name of appellant, though he was a neighbour — Besides, there was no recovery of gun used in the crime or of any pellet — Courts below, having disbelieved the entire case of prosecution as regards 13 out of 14 accused, on the basis of the same evidence should not have convicted the appellant when there was no clinching evidence or incriminating circumstance against him – Further, appellant did not abscond, which fact proves his defence that he has nothing to do with the crime – Prosecution has failed to establish its case beyond reasonable doubt — Conviction and sentence imposed on appellant, set aside.

The appellant was prosecuted along with 13 others for causing the death of the brother of PW1. The prosecution case was that during a picnic, a dispute arose between some of the persons on the accused side on the one hand and the complainant party on the other, which was settled by the intervention of mediators.

However, when the complainant party reached near the house of appellant's father, the appellant came out of the house and fired at the brother of PW1. The injured was taken to the hospital, where he died on the following day. The trial court convicted 6 accused u/s 302/34 IPC. The High Court maintained the conviction and sentence of the appellant and acquitted the other 5 convicts.

Allowing the appeal, the Court

HELD: 1.1. From the evidence of PW-1, it is seen that the appellant is the next door neighbour of the deceased. This witness introduced the names of other accused persons whom he did not name in the FIR. PW-2 turned hostile. PW-3, another younger brother of the deceased, though deposed before the court that he saw that the appellant fired a shot at the deceased, the Investigating Officer, PW-12, admitted in his cross-examination that PW-3 had not stated anything in his statement u/s. 161 Cr.P.C. In such circumstance, no weightage need be given to his statement made in the court. The High Court itself has rightly concluded that his evidence is unreliable. [Para 8] [861-B-E]

1.2. The courts below, having disbelieved the entire case of the prosecution as regards 13 out of 14 accused persons, on the basis of the same evidence, should not have convicted the appellant when there was no other cogent and convincing evidence or incriminating circumstance against him. The High Court committed an error in convicting him solely on the basis of the evidence of PW-1, who was one of the brothers of the deceased when the other brother viz., PW-3 did not corroborate him. [Para 10] [861-G-H; 862-A]

1.3. Admittedly, there was no recovery of the alleged weapon used in the incident. The pellet alleged to have emanated from the gun also was not recovered. There

was also no explanation as to the discrepancy in the father's name of the appellant and the de facto complainant being a neighbour of the appellant could not have made such a vital mistake. Another important circumstance which goes against the case of prosecution is the conduct of the accused. He was very well available before and after the incident and did not abscond which factor proves his defence that he has nothing to do with the crime. [Para 11-12] [862-C-F]

1.4. Thus, the prosecution has failed to establish its case beyond reasonable doubt even against the appellant and he is also entitled to the benefit of doubt along with the other accused. Accordingly, the conviction and sentence imposed on the appellant is set aside. [Para 13] [862-F-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1555 of 2009.

From the Judgment and Order dated 11.04.2008 of the High Court at Calcutta in C.R.A. No. 155 of 2004.

Pradip Ghosh, Rauf Rahim, Yadunandan Bansal for the Appellant.

Chanchal Kr. Ganguli, Avijit Bhattacharjee, Soumi Kundu for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. This appeal has been filed against the final judgment and order dated 11.04.2008 passed by the High Court of Calcutta in C.R.A. No. 155 of 2004 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein.

2. **Brief facts:**

(a) On 14.01.2002, Avik Mondal (PW-1) - the de facto complainant and the cousin brothers of Sadananda Mondal (the appellant herein), namely, Newton Mondal, Manoj Mondal, Brojen Mondal and others were holding picnic. At about 4 p.m., the complainant party had altercation with Newton Mondal, Lalmohan Mondal, Brojen Mondal and Dilip Tarafdar. At the relevant time, on the intervention of Madhu Ghosh, Mrinmoy Chakraborty, Kartick Ghosh and Asish Sarkar, the dispute was settled and thereafter all of them left the place for their houses. When Bharat Mondal, elder brother of the de facto complainant, reached near the house of Narugopal Mondal, the son of Narugopal, namely, Sadananda Mondal (the appellant herein), fired at him from his house which hit on his chest near the lungs and he fell down. PW-1 lifted Bharat Mondal with the help of some villagers and took him in a Jeep to Berhampore Hospital for treatment.

(b) Thereafter, at 9.00 p.m., Avik Mondal (PW-1) went to the Tehatta Police Station and lodged a complaint. On the basis of the said complaint, a First Information Report (FIR) being No. 10 of 2002 was lodged under Section 326 of the Indian Penal Code, 1860 (in short "IPC"). On the following day, i.e., 15.01.2002, Bharat Mondal succumbed to his injuries.

(c) On the basis of the said report, Sadananda Mondal-the appellant herein (A-1) along with 13 others viz., Prasanta Mondal (A-2), Sushanta Mondal (A-3), Sanatan Mondal (A-4), Nisith Mondal (A-5), Sukhen Mondal (A-6), Biswanath Mondal (A-7), Manoj Mondal (A-8), Mahitosh Mondal (A-9), Brojen Mondal (A-10), Dilip Tarafdar (A-11), Newton Mondal (A-12), Lalmohan Mondal (A-13) and Dasarath Tarafdar (A-14) was taken into custody. After investigation, a chargesheet was filed against the accused persons under Section 302 read with Section 34, Section 120-B of IPC and the case was committed to the Court of Additional Sessions Judge, Fast Track Court 1, Krishnanagar, Nadia and was numbered as Sessions Case No. 2(10) of 2003.

(d) Vide orders dated 17/19.02.2004, the Additional

Sessions Judge, Fast Track Court-I, Krishnanagar, in Sessions Trial No. 111 of December, 2003 arising out of Sessions Case No. 2(10) of 2003 convicted 8 accused persons viz., Sadananda Mondal (A-1), Sukhen Mondal (A-6), Biswanath Mondal (A-7), Manoj Mondal (A-8), Mahitosh Mondal (A-9), Brojen Mondal (A-10), Dilip Tarafdar (A-11) and Newton Mondal (A-12) under Sections 302 read with 34 IPC and sentenced to undergo imprisonment for life along with a fine of Rs. 5,000/- each, in default, to further undergo rigorous imprisonment for one year. However, rest of the six accused persons, viz., Prasanta Mondal (A-2), Sushanta Mondal (A-3), Sanatan Mondal (A-4), Nisith Mondal (A-5), Lalmohan Mondal (A-13) and Dasarath Tarafdar (A-14) were acquitted of all the charges.

(e) Being aggrieved of the above order, A-1 (the appellant herein), preferred an appeal being C.R.A. No. 155 of 2004 and rest of the 7 accused persons filed an appeal being C.R.A. No. 166 of 2004 before the High Court. The High Court, by order dated 11.04.2008 allowed C.R.A. No. 166 of 2004 and set aside the judgment and order dated 17/19.02.2004 passed by the Additional Sessions Judge against the appellants therein and dismissed C.R.A. No. 155 of 2004 preferred by the appellant herein.

(f) Aggrieved by the said order, the appellant has preferred this appeal by way of special leave before this Court.

3. Heard Mr. Pradip Ghosh, learned senior counsel for the appellant and Mr. Chanchal Kr. Ganguli, learned counsel for the respondent-State.

Contentions:

4. Mr. Pradip Ghosh, learned senior counsel for the appellant, after taking us through the entire materials, namely, oral and documentary evidence, the decision of the trial Court as well as the High Court submitted that when the prosecution case was disbelieved by the courts below as regards 13 out of 14 accused persons, whether the High Court is right in confirming the conviction and sentence imposed on the appellant alone on the basis of the same evidence which had

been found to be unreliable in respect of 13 accused persons. He also submitted that whether the High Court was justified in convicting the appellant solely on the basis of the evidence of PW-1 who was one of the brothers of the deceased when the other brother viz., PW-3 did not corroborate, more particularly, when the evidence of PW-3 was found by the High Court to be unreliable. He also submitted that the High Court should have acquitted the appellant giving him the benefit of doubt as the prosecution failed to prove its case beyond reasonable doubt. On the other hand, Mr. Ganguli, learned counsel appearing for the respondent-State submitted that in spite of acquittal of 13 out of 14 accused persons, it was the appellant herein who came out of his house and fired a shot at Bharat Mondal (since deceased) using a fire arm which hit him on his chest near the lungs and he fell down. He further pointed out that though the other accused managed to escape, the present appellant was the person who fired a gun shot which resulted in the death of one person, accordingly, he prayed for dismissal of the appeal.

5. We have considered the rival contentions and perused all the relevant materials.

Discussion:

6. It is relevant to point out that the prosecution charge sheeted 14 accused persons including the appellant. Out of 14, the trial Court acquitted 8 accused persons and the High Court acquitted 5 out of 6 accused persons. In other words, after the impugned order of the High Court, except A-1 (the appellant herein), all were acquitted from the charge under Section 302 read with Section 34. In these circumstances, we have to consider whether the prosecution has established the case against the appellant beyond reasonable doubt.

7. It is useful to refer the contents of FIR (Ex.P-1) which reads as under:

"To

The O.C. Tehatta P.S.

Sir,

I, Avik Mondal son of Satyanranjan Mondal of Sahebnagar

Madhyampara Police Station, District Nadia arriving to this Police Station this day of 14.01.2002 at about 9.00 p.m. in the night, am submitting the complaint that today at noon in the Kash field, we and in the side of one place the sons of the uncle of Sadananda Mondal, i.e., Newton Mondal, Manoj Mondal, Brojen Mondal and others were taking part in a picnic. In the afternoon at about 4.00 p.m. there made a quarrel amongst Newton Mondal, son of Mantu Mondal, Lalmohan Mondal son of Sunil Mondal, Brojen Mondal, son of Mahadeb Mondal and Dilip Tarafdar son of Ratan Tarafder and that quarrel was settled by mediator Madhu Ghosh, Mrinmoy Chakraborty, Kartick Ghosh and Asis Sarkar and after settling the dispute we set out towards our respective house and when my elder brother Bharat Mondal son of Satyanaranjan Mondal when came near the house of Narugopal Mondal, then Sadananda son of Narugopal shot aiming my elder brother from his huse at about 5.00 p.m. in the afternoon.

The bullet shot by him, hit my elder brother in his belly and wounded seriously and we sent him to the Bejrampore Hospital then we came to Police Station and submit complaint.

Therefore, Sir, after taking necessary steps the aforesaid matter according to law and to impose punishment upon the accused Sadananda Mondal and it is mentioned here that the said Sadananda Mondal is a running Military Service man.

Submitted humbly

Sd. Avik Mondal

Sd. Satya Ranjan Mondal

(Sahebnagar)

(In Bengali)"

It is seen from the FIR that it not only implicates Sadananda Mondal, the appellant herein, but also other accused who were acquitted by the trial Court and the High Court. No doubt, it

states that the bullet hit Bharat Mondal (the deceased) in his belly which resulted in fatal injury. The complaint was made by PW-1.

8. From the evidence of Avik Mondal (PW-1), it is seen that the appellant is the next door neighbour of the deceased. This witness introduced the names of other accused persons whom he did not name in the FIR. Prasun Biswas (PW-2) turned hostile, however, prosecution relied on his statement to the extent that the incident took place near his house and he heard the sound of bomb explosion. Badal Mondal (PW-3), another younger brother of the deceased, also supported the case of the prosecution. According to PW-3, when he was returning from the field, he saw that the appellant fired a shot at Bharat Mondal (since deceased) with a fire-arm below his chest. He also stated that on seeing the same, he got frightened and fled away towards his house. It is relevant to point out that the Investigating Officer, Kanchan Roy Mukherjee (PW-12), sub-Inspector of Police admitted in his cross-examination that PW-3 had not stated anything while recording the statement under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code'). In such circumstance, no weightage need be given to his statement made in the Court. The High Court itself has rightly concluded that his evidence is unreliable.

9. Dr. Ranjit Kumar Roy Chowdhury, the surgeon, who conducted the post-mortem of the deceased, was deposed as PW-11. After narrating all the injuries, he opined that death was due to gun shot injury leading to shock which was ante mortem and homicidal in nature. The post-mortem report has been marked as Exh. 5.

10. The courts below, having disbelieved the entire case of the prosecution as regards 13 out of 14 accused persons, on the basis of the same evidence, as rightly pointed out by Mr. Ghosh, should not have convicted the appellant when there was no other cogent and convincing evidence against him. In other words, in the absence of any clinching evidence or incriminating circumstance against him, the High Court

committed an error in convicting the appellant solely on the basis of the evidence of PW-1, who was one of the brothers of the deceased when the other brother viz., PW-3 did not corroborate him, particularly, when the evidence of PW-3 was found by the High Court to be unreliable. Having disbelieved the alleged eye-witnesses while considering the case of other accused persons, in the absence of any reason, the High Court is not justified in accepting the very same statement of the witnesses in the case of the appellant herein.

11. Admittedly, there was no recovery of the alleged weapon used in the incident. The pellet alleged to have emanated from the gun also not got recovered and even no attempt was made to recover the same. It is also not known whether the pellet so fired was from the same weapon. We have already pointed out that PW-3 made inconsistent statements during the trial and while being examined under Section 161 of the Code. There was also no explanation as to the discrepancy in the father's name of the appellant (Naan Gopal and Santosh) and the de facto complainant being a neighbour of the appellant could not have made such a vital mistake.

12. Another important circumstance which goes against the case of the prosecution is the conduct of the accused. He was very well available before and after the incident. In other words, the appellant-accused did not abscond which factor proves his defence that he has nothing to do with the crime in question.

13. In the light of the above discussion, we are satisfied that the prosecution has failed to establish its case beyond reasonable doubt even against the appellant and he is also entitled to the benefit of doubt along with the other accused. Accordingly, the conviction and sentence imposed on the appellant A-1 is set aside and he is ordered to be released forthwith if not required in any other offence. The appeal is allowed.

R.P. Appeal allowed.