THREESIAMMA JACOB & ORS.

v.

GEOLOGIST, DPTT. OF MINING & GEOLOGY & ORS.

(CIVIL APPEAL NOS.4540-4548 OF 2000 etc.)

JULY 8, 2013

[R.M. LODHA, J. CHELAMESWAR AND MADAN B. LOKUR, JJ.]

LAND LAWS:

Jenmis or holders of jenmom rights in Malabar area - Rights with regard to minerals underneath the soil - Held: Ownership of sub-soil/mineral wealth should normally follow the ownership of the land, unless the owner of the land is deprived of the same by some valid process -- In the instant appeals, no such deprivation is brought to the notice of the Court -- Appellants are, therefore, the proprietors of the minerals obtaining in their lands -- The recitals in the patta or the Collector's standing order that exploitation of mineral wealth in the patta land would attract additional tax cannot in any way indicate the ownership of State in minerals -- The power to tax is a necessary incident of sovereign authority (imperium) but not an incident of proprietary rights (dominium) - Constitution of India, 1950 - Arts. 294 and 297 -- Mines and Minerals (Regulation and Development) Act, 1957 -- Mineral Concession Rules, 1960 - Kerala Minor Mineral Concession Rules, 1967 -- Coking Coal Mines (Nationalisation) Act, 1972 -- Coal Bearing Areas (Acquisition and Development) Act, 1957 -- Atomic Energy Act, 1962 -- Oilfields (Regulation and Development) Act, 1948 - Mines and Minerals.

The appellants filed writ petitions before the High Court claiming that they were holders of jenmom rights in the subject lands situate in Malabar area in the State of Kerala and the State had no legal authority to demand

payment of royalties on the minerals excavated by them. The Full Bench of the High Court held that the owners of jenmom lands in the Malabar area were not the proprietors of the soil and the minerals underneath the soil, and dismissed all the writ petitions. The appeals filed by the writ petitioners were referred by a two Judge Bench to the three Judge Bench.

Disposing of the appeals,

HELD: 1.1 There is positive evidence in the Board Standing Order No. 10 dated 19.03.1888 (BSO No.10) that the State did not claim any proprietary right over the mineral wealth obtaining in lands held over a ryotwari patta or in jenmom lands in Malabar. The limited right claimed is "to a share in the produce of the minerals worked, if thought necessary by government." By necessary implication, it follows that the State recognised the legal right of the land holder to the subsoil metals and minerals - whatever name such right is called - proprietary or otherwise. [para 37-38] [884-B-C; 885-A; 886-A-B]

1.2 Apart from the legal implication of BSO No.10 with respect to Malabar, from an analysis of the enactments and the judicial pronouncements necessary inference is that British recognized that the State had no inherent right in law to be the owner of all mineral wealth in this country. British never claimed proprietary rights over the soil, and jenmis were recognised to be the absolute owners of the soil. It is obvious from the BSO No.10 that the British never claimed any proprietary right in any land in the Old Madras Province and, therefore, both ryotwari pattadars and jenmis must also be held to be the proprietors of the subsoil rights/minerals until they are deprived of the same by some legal process. This conclusion with regard to subsoil/mineral rights will still hold good even if the lands in question, as per the

judgment under appeal, have been converted to be lands held on ryotwari settlement, for the reason that even in the lands held on ryotwari patta, the British did not assert proprietary rights. [para 39] [886-C-F]

State of Andhra Pradesh v. Duvvuru Balarami Reddy & Ors. **1963 SCR 173 = AIR 1963 SC 264; and** *Secretary of State v. Ashtamurthi* **(1890) ILR 13 Mad 89 - referred to.**

1.3 The Constitution of India recognized the fact that the mineral wealth obtaining in the land mass (territory of India) did not vest in the State in all cases; and that under the law, as it existed, proprietary rights in minerals (subsoil) could vest in private parties who happen to own the land [Arts. 294 and 297]. This conclusion gets fortified from the provisions of the Mineral Concession Rules, 1960. While Chapter 4 of the Rules deals with the lands where the minerals vest in the Government, Chapter 5 deals with the lands where the minerals vest in a person other than the Government. Correspondingly, the Minor Mineral Concession Rules made by the State of Kerala also recognises such a distinction in Chapters V and VI. [para 42] [888-A-E]

1.4 Kunhikoman and Balmadies did not deal with the question whether a jenmi is entitled either before or after the settlement of 1926 to the subsoil rights or minerals in the land held by him. In Balmadies this Court took note of two facts - (1) that originally jenmis of Malabar area were absolute proprietors of the land; and (2) when Malabar area was annexed, the British expressly disclaimed the proprietorship of the soil. This Court, in Balmadies, rejected the contention that as a result of the resettlement of 1926, jenmom rights stood converted into ryotwari estate. [para 33, 34 and 36] [882-A-C; 883-H; 884-A]

Karimbil Kunhikoman v. State of Kerala **1962 Suppl. SCR 829 = AIR 1962 SC 723; and** *Balmadies Plantations*

Ltd. and Anr. v. The State of Tamil Nadu **1973 (1) SCR 258 = AIR 1972 SC 2240; and** *Secretary of State v. Vira Rayan* **(1886) ILR 9 Mad 175 - referred to.**

1.5 The High Court erred in holding that a ryotwari pattadar is not entitled to the subsoil (minerals) in his patta land. The reliance placed by the High Court on the judgment in Sri Srinivasachariar is wholly misplaced. The issue in that case was not with reference to any claim of subsoil rights in a land held under ryotwari patta, nor was it laid down that irrespective of the nature of the tenure - all mineral wealth in this country vested in the Crown or the State. [para 46] [889-E-F and G-H]

Secretary of State v. Sri Srinivasachariar, **AIR 1921 PC 1; and** *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo,* **AIR 1916 PC 191 - held inapplicable.**

T. Swaminathan and Anr. v. State Of Madras and Ors, **AIR 1971 Mad 483 - disapproved.**

2.1 The recitals in the patta or the Collector's standing order that the exploitation of mineral wealth in the patta land would attract additional tax cannot in any way indicate the ownership of the State in the minerals. The power to tax is a necessary incident of sovereign authority (imperium) but not an incident of proprietary rights (dominium). Proprietary right is a compendium of rights consisting of various constituent, rights. If a person has only a share in the produce of some property, it can never be said that such property vests in such a person. In the instant case, the State asserted its 'right' to demand a share in the 'produce of the minerals worked' though the expression employed is right - it is in fact the Sovereign authority which is asserted. From the language of the BSO No.10 it is clear that such right to demand the share could be exercised only when the pattadar or somebody claiming through the pattadar,

extracts/works the minerals - the authority of the State to collect money on the happening of an event - such a demand is more in the nature of an excise duty/a tax. The assertion of authority to collect a duty or tax is in the realm of the sovereign authority, but not a proprietary right. Neither the content of BSO No.10, nor the legal effect thereof has been examined by the High Court. [para 51-52] [891-E-G; 892-A-D]

2.2 Mines and Minerals (Development and Regulation) Act, 1957 is an enactment made by Parliament to regulate the mining activities in this country. The said Act does not in any way purport to declare the proprietary rights of the State in the mineral wealth nor does it contain any provision divesting any owner of a mine of his proprietary rights. On the other hand, various enactments made by the Parliament such as Coking Coal Mines (Nationalisation) Act, 1972 and Coal Bearing Areas (Acquisition and Development) Act, 1957 make express declarations u/ss 4 and 7 respectively providing for acquisition of the mines and rights in or over the land from which coal is obtainable. Even with regard to the minerals which are greatly important and highly sensitive in the context of the national security and also the security of humanity like uranium - the Atomic Energy Act, 1962 only provides u/s 5 for prohibition or regulation of mining activity in such mineral. The said Act does not in any way declare the proprietary right of the State. Similarly, the Oilfields (Regulation and Development) Act, 1948, which deals with the oilfields containing crude oil, petroleum etc. does not anywhere declare the proprietary right of the State. [para 54-56] [893-B-D; 894-B-C]

2.3 There is nothing in the law which declares that all mineral wealth/sub-soil rights vest in the State, on the other hand, the ownership of sub-soil/mineral wealth should normally follow the ownership of the land, unless the owner

of the land is deprived of the same by some valid process. In the instant appeals, no such deprivation is brought to the notice of the Court and, therefore, this Court holds that the appellants are the proprietors of the minerals obtaining in their lands. [para 57] [895-B-C; 896-A]

Kaliki Subbarami Reddy v. Union of India **ILR 1969 AP 736;** *V. Gangarathinam v. State of Tamil Nadu,* **1990 TNLJ 374; and** *S. Sabhayogam v. State of Kerala,* **AIR 1963 Kerala 101 - cited.**

Case Law Reference:

1973 (1) SCR 258	**referred to**	**para 8**
AIR 1963 Kerala 101	**cited**	**para 8**
AIR 1971 Mad 483	**disapproved**	**para 12**
AIR 1916 PC 191	**held inapplicable**	**para 12**
ILR 1969 AP 736	**cited**	**para 12**
1990 TNLJ 374	**cited**	**para 12**
1962 Suppl. SCR 829	**referred to**	**para 19**
1963 SCR 173	**referred to**	**para 24**
(1890) ILR 13 Mad 89	**referred to**	**para 30**
AIR 1921 PC 1	**held inapplicable**	**para 12**
ILR 1969 AP 736	**cited**	**para 12**
(1886) ILR 9 Mad 175	**referred to**	**para 35**
1990 TNLJ 374	**cited**	**para 50**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4540-4548 of 2000.

From the Judgment and Order dated 02.08.1999 of the

High Court of Kerala at Ernakulam in O.P. No. 1843 of 1998, 16653, 8674 of 1997, 3009 of 1994, 20992 of 1997, 4501 of 1993, C.R.P. No. 2209 of 1993 and O.P. No. 12330, 14749 of 1998 dated 06.08.1999.

WITH

C.A. No. 4549 of 2000.

S. Gurukrishnakumar, Addl. Adv. Gen., A. Raghunath, M.T. George, Kavitha K.T., B. Balaji, A. Prasana Venkat, T. Mouli Mahendran, R. Veeramani, Vanitha Giri, R. Sathish, T. Harish Kumar for the appearing parties.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. These appeals are placed before us pursuant to the Order dated 8th December, 2004 of a Division Bench of this Court which opined that the points involved in these and certain other appeals "need to be decided by a three Judge Bench."

2. These appeals arise out of a common judgment rendered in a number of writ petitions by a full Bench of the Kerala High Court dated 2nd August, 1999 by which all the writ petitions were dismissed.

3. The said full Bench of the Kerala High Court was called upon to examine the question (on a reference by another Division Bench) - whether the owners of jenmom lands in the Malabar area[1] are the proprietors of the soil and the minerals underneath the soil - and answered the said question in the negative:

> "Hence, we are of the view that so far as the lands in question are concerned, the minerals belong to the Government…" (para 31)

1. Parts of Kerala popularly known as Malabar area which earlier formed part of the erstwhile Madras province in the British India.

4. To illustrate the background in which such question arises, we may quote the facts of one of the writ petitions considered by the full Bench as narrated by the full Bench.

> "2. According to the petitioner in this case, her husband obtained jenmon assignment of 2 Acres of granite rocks situated in Dhoni Akathethara Amsom and Village, palakkad Taluk, Malabar. The petitioner's husband obtained the property from the previous jenmy, C.P. Thampurankutty Menon. Thereafter, the petitioner's husband executed a registered gift deed. According to the petitioner, the property was enjoyed by the earlier jenmy and thereafter by the petitioner without any interference from the Government. Due to ignorance of the legal position, the petitioner entered into a lease agreement with the Department of Mining and Geology to conduct quarrying operations in her property. Later on she realised that it was not necessary to pay any royalty to the Government with regard to the property belonging to her. In the above circumstances, she made a fresh application to the Department for licence. But the respondents failed to provide necessary permits to the petitioner. When she received a notice from the Kerala Minerals Squad directing her to stop the quarrying activities, she gave a reply to reconsider her contention. Thereafter, by Ext. P6, she was informed by the Department to renew the lease."

5. It can be seen from the above that the appellants asserted that they are holders of *jenmom* rights in the lands in question and the State has no legal authority to demand payment of royalties on the minerals excavated by the holder of *jenmom* right.

6. Such a claim of the appellants is based on the belief and assertion of the appellants (1) that the holder of the *jenmom* rights is not only the proprietor of the soil for which he has *jenmom* rights, but also the owner of the mineral wealth lying beneath the soil. (2) that the understanding of the appellants

that a claim of royalty can be made only by the owner of the mineral against a person who is excavating the mineral with the consent of the owner.

7. We must straightway record that the second of the above-mentioned propositions regarding the character and legal nature of royalty, (though was considered by this Court on more than one occasion) stands referred to a larger Bench by an Order of reference dated 30th March, 2011 of a three-Judge Bench in *Mineral Area Development Authority & Ors. Vs. Steel Authority of India & Ors.* (2011) 4 SCC 450, therefore, we are not required to examine and decide the question. We are only required to examine the amplitude of the rights of the *jenmom* land holders called *jenmis* in the Malabar area of the Kerala State and decide whether a *jenmi* is entitled to the rights of subsoil/the minerals lying beneath the surface of the land.

8. The appellants' case is that a *'jenmi'*[2] holds *jenmom*[3] lands as absolute owner and has proprietary rights over both the soil and subsoil. The *ryotwari* settlement made by the British Government in the Malabar area of the erstwhile Madras

2. The expression jenmi etymologically means the holder of jenmom rights in a piece of land. Though the expression is defined in some of the enactments pertaining to the present State of Kerala, such definitions areenactment specific but not comprehensive to describe the full legal contours of the jenmom rights.

3. In Malabar the exclusive right to, and hereditary possession of, the soil is denoted by the term jenmam which means birthright and the holder thereof is known as jenmi, jenmakaran or mutalalan. Until the conquest of Malabar by the Mahomedan princes of Mysore, the jenmis appear to have held their lands free from any liability to make any payment, either in money or in produce, to government and therefore until that period, such an absolute property was vested in them as was not found in any other part of the Presidency. The late Sir Charles Turner after noticing the various forms of transactions prevalent in Malabar remarked that they pointed to an ownership of the soil as complete as was enjoyed by a freeholder in England.

These jenmis have been from time immemorial exercising the right of selling, mortgaging, or otherwise dealing with the property. They had full absolute property in the soil. **(Ref. "Land Tenures in the Madras Presidency", S. Sundararaja Iyengar, Second Edition, Page 49-50).**

Province only obligated the *jenmis* to pay revenue to the State but did not in any way affect their proprietary rights in the lands. Nor did the *ryotwari* settlement have the effect of transferring and vesting the ownership either of the land or the subsoil (minerals) to the State. In support of this submission, the appellants heavily relied on a judgment of this Court in *Balmadies Plantations Ltd. and Anr. v. The State of Tamil Nadu* AIR 1972 SC 2240 and also a standing order of the Board of Revenue of the erstwhile Madras Province dated 19th March 1888 and argued that earlier full Bench decision of the Kerala High Court in *S. Sabhayogam v. State of Kerala,* AIR 1963 Kerala 101 required a reconsideration.

9. On the other hand, the State of Kerala took the stand that subsequent to the extension of the ryotwari settlement to the Malabar area of the erstwhile Madras Province, the jenmis ceased to be the absolute owners and proprietors of the lands held by them. The ryotwari settlement had the effect of transferring the ownership of subsoil (minerals) to the Government. The ryotwari pattadars rights are only confined to the surface.

10. The High Court rejected the contentions of the petitioners. The High Court attempted to distinguish the decision of this Court in *Balmadies Plantations* (supra):

> "Even though there is some force in the contention of the petitioners, the above observations of the Supreme Court are not inconformity with the observations made by the Full Bench (which followed the decision of the Supreme Court in *Kunhikoman's* case), that does not mean that the view taken by the Full Bench is not correct, because it can be seen from paragraph 14 of the above judgment itself that the Supreme Court has observed that in the Kerala case documents were produced and on the basis of the documents, the Court took the view that the nature of rights has changed after the Ryotwari settlements."

11. We must confess that we have some difficulty to understand the exact purport of the above extract. Be that as it may. The High Court recorded two conclusions (1) that the earlier full Bench decision of the Kerala High Court in the case of *S. Sabhayogam* case (supra) did not require any reconsideration as contended by the petitioners; and (2) the lands in question cannot be classified any more as jenmom lands but are lands held on a ryotwari patta.

> "The State has produced certain documents to show that the lands are Ryotwari lands. Ext.R1(a) produced will show that there are only two categories of lands, Ryotwari and Inam. Thus, on a consideration of the documents produced by the State and on a consideration of the decisions cited, we are satisfied that the decision reported in *S. Sabhayogam v. State of Kerala* - AIR 1963 Kerala 101 - does not require reconsideration in the light of the decision of the Supreme Court in *Balmadies Plantations v. State of Tamil Nadu* - AIR 1972 SC 2240. Hence, we hold that the lands in question are not jenmom lands and they are Ryotwari patta lands."

12. In view of such a conclusion the High Court rejected the submission that the petitioners are entitled to the rights over the subsoil relying upon certain passages from *Secretary of State v. Sri Srinivasachariar,* AIR 1921 PC 1, *T. Swaminathan (Dead) and Another v. State of Madras and Others,* AIR 1971 Mad 483, *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo,* AIR 1916 PC 191, *Kaliki Subbarami Reddy v. Union of India,* ILR 1969 AP 736 and *Gangarathinam v. State of Tamil Nadu,* 1990 TNLJ 374; and certain recitals (in Malayalam) made in the patta issued to one of the petitioners before it which is translated by the High Court as follows:

> "The assessment shown in the pattayam is the share due to the Government for the agricultural produce on the surface of the property. If minerals are found in the property and the minerals are worked by the pattadar with regard to those properties a separate tax is to be paid in addition to the tax shown in the pattayam."

13. The High Court though referred to the standing order of the Madras Revenue Board dated 19th March 1888, it did not record any conclusive finding on the effect of the said order.

14. Before us the same submissions which were made before the High Court were repeated by both the parties, therefore, we are not elaborating the submissions made before us.

15. Before we examine the correctness of the judgment under appeal, we deem it necessary to take note of the legal position regarding the rights over minerals as they obtain in England. Halsbury's Laws of England[4] state the legal position:

> **"19. Meaning of 'land' and cognate terms.** Prima facie 'land' or 'lands' includes everything on or under the surface, although this meaning has in some cases been held to have been restricted by the context. 'Soil' is apt to denote the surface and everything above and below it, but similarly its meaning may be restricted by the context so as to exclude the mines. 'Subsoil' includes everything from the surface to the centre of the earth…….
>
> 20……Mines, quarries and minerals in their original position are part and parcel of the land. Consequently the owner of surface land is entitled prima facie to everything beneath or within it, down to the centre of the earth. This principle applies even where title to the surface has been acquired by prescription, but it is subject to exceptions. Thus, at common law, mines of gold and silvery belong to the Crown, and by statute unworked coal which was, at the restructuring date, vested in the British Coal Corporation is vested in the Coal Authority. Any minerals removed from land under a compulsory rights order or opencast working

4. [Vol.31, 4th Ed. pp.28-29].

of coal become the property of the person entitled to the rights conferred by the order. The property in petroleum existing in its natural condition in strata is vested by statute in the Crown."

16. We are required to examine whether the law of this country and more particularly with reference to Malabar area regarding the rights over the mines and minerals is the same as it obtains in England or different.

17. By the time South India came under control of the British Government, there were in vogue innumerable varieties of land tenures in various parts of South India which eventually came to be called the Madras Presidency. The history of these tenures and how they were dealt under the various laws made either by the East India Company government or the British government (hereinafter in this judgment both the above are referred to as 'British' for the sake of convenience) was examined in detail in two seminal works titled - the Land Systems of British India by Bedan Henry Powell first published in 1892 and Land Tenures in the Madras Presidency by S. Sundararaja Iyengar, published in 1916.

18. Both the above-mentioned works examined the nature and legal contours of various kinds of land tenures in vogue. While Powell's book dealt with the pan Indian situation, Iyengar's book is confined to Madras presidency alone. Both the books took note of the existence of a land tenure known as *jenmom* in the present State of Kerala.

19. The history of the land tenures in South India and salient features of *jenmon* rights or the rights of a *jenmi* fell for the consideration of this Court on more than one occasion. Two Constitution Benches of this Court had occasion to examine the above questions in *Karimbil Kunhikoman v. State of Kerala* [AIR 1962 SC 723], and *Balmadies Plantations Ltd. and Anr. v. The State of Tamil Nadu* [AIR 1972 SC 2240], wherein their Lordships examined in some detail the nature of land tenures

as they existed in the erstwhile Madras province generally and the Malabar area specifically.

20. In the case of *Kunhikoman* (supra), this Court held that there were two varieties of tenures in existence in the erstwhile province of Madras. Those tenures were known as **landlord tenures** and *ryotwari* tenures. It was held by this Court that the landlord *tenures* were governed by the various enactments in force from time to time whereas the *ryotwari* tenures were governed by the standing orders of the Board of Revenue - in other words the orders issued by the Executive Government of the Madras province[5].

21. Eventually, the **landlord tenures** in the erstwhile province of Madras came to be governed by the enactment known as Madras Estates Land Act, No. 1 of 1908 which admittedly did not apply to Malabar area.[6]

22. The Madras Estates Land Act, 1908, which extensively dealt with the rights and obligations of the landlords/landholders owning an estate (popularly known as *Zamindars*) expressly recognises the right of the landholder to reserve mining rights while admitting a *ryot* to the possession of the *ryoti* land.[7] By

5. Kunhikoman case – Para 12. …..The usual feature of land-tenure in Madras was the ryotwari form but in some districts, a landlord class had grown up both in the northern and southern parts of the Presidency of Madras as it was before the Constitution. The permanent settlement was introduced in a part of the Madras Presidency in 1802. There were also various tenures arising out of revenue free grants all over the Province (see Chap. IV, Vol. III of Land Systems of British India by Baden Powell) and sometimes in some districts both kinds of tenures, namely, landlord tenures and the ryotwari tenures were prevalent. There were various Acts, in force in the Presidency of Madras with respect to landlord tenures while ryotwari tenures were governed by the Standing Orders of the Board of Revenue.

6. Para 12 of Kunhikoman (supra) - …..Eventually, in 1908, the Madras legislature passed the Madras Estates Land Act, No. 1 of 1908 …… This Act applied to the entire Presidency of Madras except the Presidency town of Madras, the district of Malabar and …….

7. Section 7 – Reservation of mining rights - Nothing in this Act shall affect any right of a landholder to make a reservation of mining rights on admitting any person to possession of ryoti land.

necessary implication it follows that the landholder had the legal right and title to the minerals/subsoil over the lands comprising his estate and he is legally entitled either to grant the mining rights to the *ryot* or withhold the same. This implication which we drew gets fortified by Section 3 of Estates Abolition Act which expressly declares that with effect from the 'notified date' - a defined expression under Section 1(10), the estate with all the assets including mines and minerals shall stand transferred to and vest in the State. If the minerals/subsoil did not belong to the estate holder, there was no need to make an express declaration such as the one made in Section 3(b).[8]

23. Similarly, it can also be noticed that under various enactments abolishing the various lands tenures in South India such as *inams* etc., express provisions were made that the mines and minerals existing in such abolished tenures shall stand transferred to the Government and vest in the Government. See, for example, Section 2-A[9] of The Andhra Pradesh (Andhra Area) *Inams* (Abolition and Conversion into Ryotwari) Act, 1956. We must remember that Andhra area of the present State of Andhra Pradesh was part of the old Madras Province.

24. *State of Andhra Pradesh v. Duvvuru Balarami Reddy*

8. Section 3(b) - the entire estate including minor imams (Post- settlement or pre-settlement) included in the assets of the zamindari estate at the permanent settlement of that estate; all communal lands and porambokes; other non-ryoti lands; waste lands; pasture lands; Lanka lands; forests; mines and minerals; quarries; rivers and streams; tanks and irrigation works; fisheries; and ferries, shall stand transferred to the Government and vest in them, free of all encumbrances; and the Andhra Pradesh (Andhra Area) Revenue Recovery Act, 1864 the Andhra Pradesh (Andhra Area) Irrigation Cess Act, 1865 and all other enactments applicable to ryotwari areas shall apply to the estate;

9. **2-A. Transfer to, and vesting in the Government of all communal lands, porambokes etc. in inam lands** - Notwithstanding anything contained in this Act all communal lands and porambokes, grazing lands, waste lands, forest lands, mines and querries, tanks, tank-beds andirrigation works, streams and rivers, fisheries and ferries in the inam lands shall stand transferred to the Government and vest in them free of all encumbrances.

& Ors.[10] was a case where the respondents before this Court secured a lease of a piece of land in an *inam* village (shrotriem) and sought to carry on mica mining operation and applied for permission from the State of Andhra Pradesh under the Mineral Concession Rules, 1949 made under the Mines & Minerals Regulation & Development Act, 1948. The question was whether the lessor (shrotriemdar) had rights over the subsoil/ minerals and whether he could pass rights therein by a lease.[11] A Constitution Bench of this Court examined the rights of the *Inamdar* under the legal regime that existed in the Madras province and came to the conclusion on the basis of a decision of the Privy Council[12] that every *Inamdar* necessarily did not own the subsoil rights. Such right depended upon the terms of

10. [11] AIR 1963 SC 264.

11. The main question therefore that falls for decision in these appeals is whether shrotriemdars can be said to have rights in the minerals. (para 7)

12. This matter has been the subject of consideration by the Madras High Court on a number of occasions and eventually the controversy was set at rest by the decision of the Judicial Committee in Secy. Of State for India v. Srinivasachariar, 48 Ind App 56 : (AIR 1921 PC 1). That case came on appeal to the Judicial Committee from the decision of the Madras High Court in Secy. Of State for India v. Srinivasachariar, ILR 40 Mad 268 : (AIR 1918 Mad 956). The controversy before the Madras High Court was with respect to a shrotriem inam which was granted by the Nawab of Carnatic in 1750 and had been enfranchised by the British Government in 1862. (para 7)

The Judicial Committee held that the grant of a village in inam might be no more than an assignment of revenue, and even where there was included a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of each case. The Judicial Committee also considered the standing orders of the Board of Revenue of 1890 and 1907 which have been referred to by the appeal court in the judgment under appeal. This decision thus establishes that the mere fact that a person is the holder of an inam grant would not by itself by enough to establish that the inam grant included the grant of sub-soil rights in addition to the surface rights and that the grant of sub-soil would depend upon the language used in the grant. If there are no words in the grant from which the grant of sub-soil rights can be properly inferred the inam grant would only convey the surface rights to the grantee, and the inam grant could not by itself be equated to a complete transfer for value of all that was in the grantor. (para 8)

the original grant - *Inam*. It, therefore, follows that in a given case if the original grant of *Inam* specifically conveyed the subsoil rights (by the grantor), the Inamdar would become the owner of the mineral wealth also.

25. The necessary inference is that the British recognised that the State had no inherent right in law to be the owner of all mineral wealth in this country. They recognised that such rights could inhere in private parties, at least *Zamindars* and *Inamdars* or *ryots* claiming under them in a given case.

26. Coming to the *ryotwari* tenures, this Court held that they were governed by the standing orders issued from time to time by the Revenue Board. Under the *ryotwari* system land was given on lease by the government to the ryot under a *patta*. Noticing the salient features of the *ryotwari* system as explained in various authoritative works, this Court opined that *"though a ryotwari pattadar is virtually like a proprietor and has many of the advantages of such a proprietor"*, such pattadar was never considered a proprietor of land but only a tenant.[13]

27. We must remember that in the case of *Kunhikoman*

13. Para 13 of Kunhikoman (supra) – .....The other class of land-tenures consisted of ryotwari pattadars which were governed by the Board's Standing Orders, there being no Act of the legislature with respect to them. The holders of ryotwari pattas used to hold lands on lease from Government. The basic idea of ryotwari settlement is that every bit of land is assessed to a certain revenue and assigned a survey number for a period of years, which is usually thirty and each occupant of such land holds it subject to his paying the land-revenue fixed on that land. But it is open to the occupant to relinquish his land or to take new land which has been relinquished by some other occupant or become otherwise available on payment of assessment (see Land Systems of british India by Baden-Powell, Vol. III, Chap. IV S. II, p. 128). Though, theoretically, according to some authorities the occupant of ryotwari land held it under an annual lease (see Macleane, Vol. I Revenue Settlement, p. 104), it appears that in fact the Collector had no power to terminate the tenant's holding for any cause whatever except failure to pay the revenue or the ryot's own relinquishment or abandonment. The ryot is generally called a tenant, of Government but he is not a tenant from year to year and cannot be ousted as long as he pays the land revenue assessed. He has also the right to sell or mortgage or gift the land or lease it and the transferee becomes liable in his place for the revenue. Further, the lessee of a ryotwari pattadar has no rights except those conferred under the lease and is generally a sub- tenant at will liable to ejectment at the end of each year. In the Manual of Administration, as quoted by Baden Powell, in Vol. III of Land Systems of British India at p. 129, the ryotwari tenure is summarized as that

"of a tenant of the State enjoying a tenant-right which can be inherited, sold, or burdened for debt in precisely the same manner as a proprietary right, subject always to payment of the revenue due to the State".

Though therefore the ryotwari pattadar is virtually like a proprietor and has many of the advantages of such a proprietor, he could still relinquish or abandon his land in favour of the Government. It is because of this position that the ryotwari pattadar was never considered a proprietor of the land under his patta, though he had many of the advantages of a proprietor.

(supra), the petitioners did not claim any adjudication of their rights as holders of *jenmom* lands. On the other hand, the appellants asserted that they were holders of *ryotwari pattas* issued according to *ryotwari* settlement in the erstwhile State of Madras under the revenue Board Standing Order. This Court further recorded:-

".....it is not in dispute that the ryotwari system was introduced in the South Canara District in the earlier years of this century"

28. The question before this Court was whether the holder of such a *ryotwari patta* could be called the holder of an estate within the meaning of the Kerala Agrarian Relations Act and therefore, precluded by Article 39A of the Constitution to claim the benefit of the fundamental rights under Articles 19(1)(d) and 31 of the Constitution.

29. The legal nature of the rights of a jenmi was considered in greater detail in the case of *Balmadies Plantations* (supra). At para 6 of the said judgment, the Constitution Bench recorded:-

"6. .....Originally the janmis in Malabar were absolute proprietors of the land and did not pay land revenue. After Malabar was annexed by the British in the beginning of the 19th century, the janmis conceded the liability to pay land revenue....."

30. This Court took note of a decision of the Madras High Court in *Secretary of State v. Ashtamurthi* [(1890) ILR 13 Mad

89][14] where the Madras High Court recorded:-

> ".. At the annexation of Malabar in 1799, the Government disclaimed any desire to act as the proprietor of the soil, and directed that rent should be collected from the immediate cultivators. *Trimbak Ranu v. Nana Bhavani* (1875) 12 Bom HCR 144 and *Secretary of State v. Vira Rayan* (1886) ILR 9 Mad 175 thus limiting its claim to revenue. Further in their despatch of 17th December 1813 relating to the settlement of Malabar the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates. This may be regarded as an absolute disclaimer by the Government of the day of any proprietary right in the janmis' estate. …. ."

31. This Court in *Balmadies Plantations* case (supra) quoted with approval the above extracted passage from *Ashtamurthi's* (supra) judgment.

32. It was specifically argued on behalf of *Balmadies Plantations* that by virtue of a resettlement which took place in 1926, the *jenmom* rights were converted into *ryotwari* tenure. This Court on examination of the relevant standing orders reached the conclusion that the effect of the Resettlement of 1926 was to retain the *jenmom* estates and not to abolish the same and convert into *ryotwari* estates.[15]

14. In the said case, the Madras High Court had to deal with the rights of a jenmi whose lands were leased out to a third party by the Collector (State) without reference to the jenmi and when the tenant defaulted in the payment of revenue, property was attached and sold under the provisions of the Madras Revenue Recovery Act. The jenmi successfully challenged the legality of such a sale.

15. Para 11 of Balmadies (supra) …….. It would appear from the above that the effect of the resettlement of 1926 was to retain the janmam estates and not to abolish the same or to convert them into ryotwari estates. There was merely a change of nomenclature. Government janman lands were called the new holdings, while private janmam lands were called the old holdings. In respect of janmabhogam (janmi's share) relating to Government janman lands, the order further directed that the amount to be paid to the Government should include both the taram assessment and janmabhogam. It is difficult, in our opinion, to infer from the above that janmam rights in the lands in question were extinguished and converted into ryotwari estates. The use of the word Janmabhogam on the contrary indicates that the rights of janmis were kept intact.

33. But neither of the cases dealt with the question whether a *jenmi* is entitled either before or after the abovementioned settlement of 1926 to the subsoil rights or minerals in the land held by him. Therefore, we are required to decide the same.

34. In *Balmadies Plantations* case (supra) this Court took note of two facts - (1) that originally jenmis of Malabar area were absolute proprietors of the land; and (2) when Malabar area was annexed, the British expressly disclaimed the proprietorship of the soil. These conclusions were recorded on the basis of *Ashtamurthi* case (supra).

35. *Ashtamurthi* case (supra) itself relies upon an earlier decision of the Madras High Court in *Secretary of State v. Vira Rayan* [(1886) ILR 9 Mad 175][16] wherein the High Court found that the land in dispute appertains to the District of Malabar and recorded as follows:-

> *" ……and we agree with the Judge that there is no presumption in that district and in the tracts administered as part of it, that forest lands are the property of the Crown. At the commencement of the century it was the policy of the Government to allow all lands to become private estates where that was possible. Despatch of Lord Wellesley quoted in Baskarappa v. The Collector of North Canara [I.L.R., 3 Bom., 550]. The despatch and order of the Governor-Gneral in Council on the annexation of Malabar, dated the 31st December 1799 and the 18th June 1801, have not been adduced, but their purport appears from the despatch of the 19th*

16. It was an appeal decided by a Division Bench of the Madras High Court (Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar). The appeal arose out of a suit filed by the State seeking declaration that certain lands (forest lands) which were the subject matter of dispute in the said suit were the property of the government and a consequential injunction restraining the defendants from in any way interfering with the rights of the Government. The defendants asserted their proprietary rights over the lands in dispute.

July 1804, quoted in Vyakunta Bapuji v. Government of Bombay [12 Bom. H.C.R. 144]. It was intimated that it never could be desirable that the Government itself should act as the proprietor of the lands and should collect the rents from the immediate cultivators of the soil. When in 1808 the Board of Revenue suggested that an augmentation of revenue might be derived from waste lands reserved, they were informed that the Government did not look to any advantage of that nature beyond the benefit of increasing the amount of the public taxes in proportion to the existing taxes of the country (Fifth Report, Appendix 30, page 902. Revenue and Judicial Selection, Volume I, p. 842). It will be seen that at that time the Government so far from abrogating the Hindu law intended to assert no proprietary right to the waste, but limited itself to its claim to revenue. At the time Malabar came under British rule, all the forests were claimed as private property (I.R.R., 3 Bom. 586). In their despatch of 17th December 1813, relating to the settlement of Malabar, the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates Revenue Selection, Volume I, p. 511). Although a different policy was subsequently pursued in other districts, and, especially in more modern times, rules have been framed for the sale of waste lands, there is nothing to show that any such change was notified in Malabar up to a period much later than that at which there is considerable evidence to show that the respondents Nos. 1 and 2 were in possession of and recognised as proprietors of the lands they claim by Government officials…."

36. This Court in *Balmadies Plantations* case (supra) after taking note of the above legal position with reference to the *jenmom* lands of Malabar rejected the contention that as a result of the resettlement of 1926, *jenmom* rights stood

converted into *ryotwari* estate.[17]

37. We have already taken note of the legal position with respect to the minerals obtaining subsoil in the lands held under landlord tenures (*zamindari or inam estates*), and also the law of England, we find it difficult to believe with respect to *ryotwari* tenures in the British India and particularly the Madras province, the government assumed the ownership of the subsoil. On the contra, there is positive evidence in the Board Standing Order No. 10 dated 19.03.1888[18] (hereinafter referred to as BSO

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17. Para 11. …. It would appear from the above that the effect of the resettlement of 1926 was to retain the janmam estates and not to abolish the same or to convert them into ryotwari estates. There was merely a change of nomenclature. Government janmam lands were called the new holdings, while private janmam lands were called the old holdings. In respect of janmabhogam (janmi's share) relating to Government janman lands, the order further directed that the account to be paid to the Government should include both the term assessment and janmabhogam. It is difficult, in our opinion, to infer from the above that janmam rights in the lands in question were extinguished and converted into ryotwari estates. The use of the word 'Janmabhogam' on the contrary indicates that the rights of janmis were kept intact.

18. **RESOLUTION – dated 19th March 1888, No. 277.**

In supersession of the existing Standing Order, the following is

issued as Standing Order No. 10 :-

1. The State lays no claim to minerals-

G.O. 26th May, 1882, No. 511 (Notification, paragraph 1).	(a) In estates held on sanads of permanent settlement
G.O. 28th October	1882 No.1181(b) In enfranchised inam lands
G.O. 28th April 1881 No.861	(c) In religious service tenements confirmed under the inam rules on perpetual service tenure.

(d) In lands held on title – deeds, issued under the waste land rules, prior to 7th October, 1870, in which no reservation of the right of the State to minerals is made.

2. The right of the State in minerals is limited in the following cases to a share in the produce of the minerals worked, commuted into a money payment, if thought necessary, by Government, in like manner with and in addition to the land assessment :-

G.O. 8th October 1883 No.1248.	(a) In lands occupied for agricultural purposes under ryotwari pattas
G.O. 23rd January 1881 No.121	(b) In janmom lands in MalabarG.O. 16th December 1881 No.1384

Persons intending to work minerals in those lands should give notice of their intention to the Collector of the district, specifying the lands in which they intend to carry on mining operation and should pay in two half-yearly instalments a special assessment for minerals in addition to the land assessment at the following rates:-

No.10) that the State did not claim any proprietary right over the mineral wealth obtaining in lands held over a *ryotwari patta* or in *jenmom* lands in Malabar. The State/British in express terms declared by the said order dated 19.03.1888 that while "it lays no claim" at all to minerals

(a) In estates held on sanads of permanent settlement

(b) In enfranchised inam lands

(c) In religious service tenements confirmed under the inam rules on perpetual service tenure.

(d) In lands held on title - deeds, issued under the waste land rules, prior to 7th October, 1870, in which no reservation of the right of the State to minerals is made.

the State/British claimed a limited right in minerals w.r.t. lands

(a) occupied for agricultural purposes under RYOTWARI PATTAS",

(b) JENMOM LANDS IN MALABAR"

[emphasis supplied]

Per acre (Rs.)	Per acre (Rs.)
1. For mining for gold	5
2. For mining for metals other than gold	2
3. For mining for diamonds and other precious stones	15

4. For mining for coal, lime-stone or quarrying for building stone ... (Such rates as may be fixed by the Board from time to time

The rates will be doubled if mining operations are carried on without giving notice to the Collector. The special assessment will be entered in the patta granted for the land and collectedunder the provisions of Act II of 1834 Madras. No charge will be made for merely prospecting for minerals in patta lands if mines are not regularly worked. No remission will be granted in respect of any land rendered unfit for surface cultivation by the carrying on of miningoperations. This rule does not of course afeet in any way the right which all holders of lands on patta possess of digging wells in their lands and of disposing of the gravel and stones which may be thrown up in the course of such excavation.

Board's proceedings dated 10th July 1882 No.1751

38. The limited right claimed is "to a share in the produce of the minerals worked, if thought necessary by government." That right was exercised by the same order with reference to gold, diamonds and other metals and w.r.t. minerals like coal etc. it was left to the discretion of the government to be exercised from time to time. By necessary implication, it follows that the State recognised the legal right of the land holder to the subsoil metals and minerals - whatever name such right is called - proprietary or otherwise.

39. In view of BSO No. 10 referred to above, we need not unduly trouble ourselves with the metaphysical analysis whether *jenmom* rights still subsist in lands of Malabar area or whether they are converted into *ryotwari* lands. Apart from the legal implication of BSO No.10 with respect to Malabar, this Court had already opined that British never claimed proprietary rights over the soil and *jenmis* were recognised to be the absolute owners of the soil. It is obvious from the BSO No.10 that the British never claimed any proprietary right in any land in the Old Madras Province whether estate land and therefore both *ryotwari pattadars* and *jenmis* must also be held to be the proprietors of the subsoil rights/minerals until they are deprived of the same by some legal process. Even if we accept the conclusion recorded in the judgment under appeal that the lands in question have been converted to be lands held on *ryotwari* settlement, the conclusion recorded by us above w.r.t. subsoil/ mineral rights will still hold good for the reason that even in the lands held on *ryotwari patta* the British did not assert proprietary rights.

40. Nothing is brought to our notice which indicates that the British intended and in fact did deprive the *ryotwari* land holders of the right to subsoil/minerals. Subsequent to 19th March, 1888, no law to the contra is brought to our notice. Nor any law made by the Republic of India is brought to our notice. Though we notice laws to the contra w.r.t. the lands held under landlords tenures.

41. Article 294[19] of the Constitution provides for the succession by the Union of India or the corresponding State, as the case may be, of the property which vested in the British Crown immediately before the commencement of the Constitution. On the other hand, Article 297[20] makes an express declaration of vesting in the Union of India of all minerals and other things of value underlying the ocean.

> "297. All lands, minerals and other things of value underlying the ocean within the territorial waters or the continental shelf of India shall vest in the Union and be held for the purposes of the Union."
>
> [as originally enacted[21]]

19. 294 - As from the commencement of this Constitution –

(a) all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

(b) all rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State, Subject to any adjustment made or to be made by reasons of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

20. Section 297 was amended by the Constitution (Fortieth Amendment) Act, 1976.

21. **297 – Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union**

(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

The contradistinction between both the articles is very clear and, in our opinion, is not without any significance. The makers of the Constitution were aware of the fact that the mineral wealth obtaining in the land mass (territory of India) is not vested in the State in all cases. They were conscious of the fact that under the law, as it existed, proprietary rights in minerals (subsoil) could vest in private parties who happen to own the land. Hence the difference in the language of the two Articles.

42. The above conclusion of ours gets fortified from the fact that under the Mineral Concession Rules, 1960 framed by the Government of India in exercise of the powers conferred in Section 3 of the Mines & Minerals Regulation & Development Act, 1957, different procedures are contemplated and different sets of rules are made dealing with the grant of mining leases in respect of the two categories of lands in which the minerals vest, either in the Government or in a person other than the Government. While Chapter 4 of the said rules deals with the lands where the minerals vest in the Government, Chapter 5 deals with the lands where the minerals vest in a person other than the Government. Correspondingly, the Minor Mineral Concession Rules made by the State of Kerala also recognises such a distinction in Chapters V and VI.

43. In those areas of the Old Madras Province to which the Estates Land Act applied, the minerals came to be vested in the State by virtue of the subsequent statutory/declarations (which are already taken note of). But with reference to those areas where the above-mentioned Act had no application, such as the Malabar area of the Old Madras Province, which is now a part of the State of Kerala, or areas where the *ryotwari* system was in vogue, the proprietary right to the subsoil should vest in the holder of the land popularly called *pattadar* as no law in the pre or post constitutional period is brought to our notice which transferred such right to the State.

44. We must also hasten to add that even with reference to those areas of Old Madras Province, whether the ryots securing *pattas* pursuant to the abolition of the estates under the Estates Abolition Act, 1948 etc., would be entitled to subsoil rights or not is a question pending in other matters before this Court. Whether the *patta granted* pursuant to the provisions of the Estate Abolition Act etc., would entitle the *pattadar* to subsoil/ mineral rights or is confined only to surfacial rights is a matter on which we are not expressing any opinion in this case. We are only dealing with the legal rights of the *pattadars* holding lands under the *ryotwari* system of the Old Madras Province, i.e. other than the lands covered by the Estates Land Act - Inam Lands.

45. That leaves us with another aspect of the matter. We are required to examine the correctness of the conclusion recorded by the High Court on the basis of the four judgments referred to in para 12 (supra) that a *ryotwari pattadar* is not entitled to the subsoil (minerals) in his patta land.

46. The first decision relied upon is *Secretary of State v. Sri Srinivasachariar,* AIR 1921 PC 1. In our view, the reliance placed by the High Court on the abovementioned judgment is wholly misplaced. It was a case where the holder of shrotriem inam granted some 160 years prior to the decision "by the Government that existed prior to the British Government" claimed that the shrotriemdas had unfettered rights to quarry stone in the shrotriem village without payment of any royalty. The Privy Council held that the rights of the shrotriemdas depended upon the language and terms of the original grant. We have already noticed that the said judgment was considered and relied upon by this Court in *Duvvuru Balarami Reddy* case (supra). What is important in the present context is that the issue in *Sri Srinivasachariar* (supra) is not with reference to any claim of subsoil rights in a land held under *ryotwari patta*. Whatever was decided in that case is wholly inapplicable to the rights of a ryotwari pattadar. Nowhere it was laid down in the said

decision that irrespective of the nature of the tenure - all mineral wealth in this country vested in the Crown or the State.

47. The next case relied upon by the High Court is *T. Swaminathan (Dead) and Another v. State of Madras and Others,* AIR 1971 Mad 483. A passage[22] occurring in the said judgment was relied upon in support of the conclusion that a *ryotwari pattadar* has no right to the subsoil/minerals. It is unfortunate that the Madras High Court opined that it is a well established proposition that all minerals underground belong to the Crown and now to the State. Such a statement of law is recorded without any explanation whatsoever nor examination of any legal principle. From our discussion so far, we have already reached the conclusion that neither in England nor in this country, at least in the Old Madras Province, during the British regime, there was any such established proposition of law that all the minerals belong to the Crown. On the other hand, the available material only leads to an inevitable conclusion otherwise.

48. The next case relied upon by the Kerala High Court is *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo,* AIR 1916 PC 191. This decision once again dealt with the rights of an inamdar particularly an inam which was not part of the Old Madras Province. Therefore, the decision is wholly irrelevant in deciding the rights of a *ryotwari pattadar* especially in the Old Madras Province.

49. We are only sorry to notice that the next case relied upon by the Kerala High Court according to the judgment under appeal is ILR 1969 AP 736 titled *Kaliki Subbarami Reddy v.*

22. So, as a ryotwari pattadar, he has every right to the use of the surface of the soil, but his proprietary right, if any, in our view, does not extend to the minerals of the soil. It was a well established proposition that all minerals underground belonged to the Crown, and now to the State, except in so far as the State has parted with the same wholly or partly in favour of an individual or body.

Union of India. We searched in vain to secure this judgment. Though there is a case reported by the abovementioned cause title, which was decided in 1979 i.e. AIR 1980 AP 147 : 1980 (1) APLJ 117. At any rate, in the light of our earlier discussion, the observation[23] relied upon by the judgment under appeal, allegedly from the above case, should not make any difference.

50. Equally the observations[24] made in the case of *V. Gangarathinam v. State of Tamil Nadu,* 1990 TNLJ 374 is without any basis.

51. The other material which prompted the High Court to reach the conclusion that the subsoil/minerals vest in the State is (a) recitals of a patta which is already noted by us earlier (in para 12) which states that if minerals are found in the property covered by the patta and if the pattadar exploits those minerals, the pattadar is liable for a separate tax in addition to the tax shown in the patta and (2) certain standing orders of the Collector of Malabar which provided for collection of seigniorage fee in the event of the mining operation being carried on. We are of the clear opinion that the recitals in the patta or the Collector's standing order that the exploitation of mineral wealth in the patta land would attract additional tax, in our opinion, cannot in any way indicate the ownership of the State in the minerals. The power to tax is a necessary incident of sovereign authority (imperium) but not an incident of proprietary rights (dominium). Proprietary right is a compendium of rights consisting of various constituent, rights. If a person has only a share in the produce of some property, it can never be said that such property vests in such a person. In the instant

23. "Not a single case has been cited before us in which it was held that a ryotwari pattadar is the owner of sub-soil rights".

24. "from the extracts given above, we do not think that it is possible to arrive at any other conclusion except to hold that the State is the owner of the minerals underneath the surface. Therefore, we agree with the learned Advocate General that the State is the owner of the minerals".

case, the State asserted its 'right' to demand a share in the 'produce of the minerals worked' though the expression employed is right - it is in fact the Sovereign authority which is asserted. From the language of the BSO No.10 it is clear that such right to demand the share could be exercised only when the pattadar or somebody claiming through the pattadar, extracts/works the minerals - the authority of the State to collect money on the happening of an event - such a demand is more in the nature of an excise duty/a tax. The assertion of authority to collect a duty or tax is in the realm of the sovereign authority, but not a proprietary right.

52. On the other hand, it appears from the judgment under appeal that the State of Kerala itself produced the BSO No.10 referred to (supra). Unfortunately, neither the content of the said order nor the legal effect of the said order has been examined by the High Court and the High Court with reference to the said order made a cursory observation as follows:

> "The State has also produced the proceedings of the Board of Revenue, dated 19th March, 1888 as Ext.R1(L). By that proceedings, standing order No.10 is issued in supersession of the existing standing order. It categorises four kinds of lands. The first head is the estates held on sanads of permanent settlement, second is the enfranchised inam lands and the third is the religious service tenements conferred under the inam rules on perpetual service tenure and the fourth is the lands held on title-deeds, issued under the waste land rules, prior to 7th October 1870, in which no reservation of the right of the State to minerals is made."

53. The only other submission which we are required to deal with before we part with this matter is the argument of the learned counsel for the State that in view of the scheme of the Mines and Minerals (Development and Regulation) Act, 1957

which prohibits under Section 4[25] the carrying on of any mining activity in this country except in accordance with the permit, licence or mining lease as the case may be, granted under the Act, the appellants cannot claim any proprietary right in the sub-soil. In our view, this argument is only stated to be rejected.

54. Mines and Minerals Act is an enactment made by the Parliament to regulate the mining activities in this country. The said Act does not in any way purport to declare the proprietary rights of the State in the mineral wealth nor does it contain any provision divesting any owner of a mine of his proprietary rights. On the other hand, various enactments made by the Parliament such as Coking Coal Mines (Nationalisation) Act, 1972 and Coal Bearing Areas (Acquisition and Development) Act, 1957 make express declarations under Section 4 and 7 respectively[26] providing for acquisition of the mines and rights **in or over the land** from which coal is obtainable. If the understanding of the State of Kerala that in view of the

25. **4. Prospecting or mining operations to be under licence or lease : -** (1) No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, a mining lease, granted under this Act and the rules made thereunder]:

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement.

Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, the Atomic Minerals Directorate for Exploration and Research of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited, a Government Company within the meaning of Section 617 of the Companies Act, 1956.

26. **Section 4 of Coking Coal Mines (Nationalisation) Act, 1972** – 4(1) On the appointed day, the right, title and interest of the owners in relation to the coking coal mines specified in the First Schedule shall stand transferred to, and shall vest absolutely in, the Central Government, free from all incumbrances.

provisions of the Mines and Minerals Development (Regulation) Act, 1957, the proprietary rights in mines stand transferred and vest in the State, it would be wholly an unnecessary exercise on the part of the Parliament to make laws such as the ones mentioned above dealing with the nationalisation of mines.

55. Even with regard to the minerals which are greatly important and highly sensitive in the context of the national security and also the security of humanity like uranium - the Atomic Energy Act, 1962 only provides under Section 5[27] for prohibition or regulation of mining activity in such mineral. Under Section 10[28] of the Act, it is provided that the Government of India may provide for compulsory vesting in the Central Government of exclusive rights to work those minerals. The said Act does not in any way declare the proprietary right of the State.

56. Similarly, the Oilfields (Regulation and Development) Act, 1948 deals with the oilfields containing crude oil, petroleum

(2) For the removal of doubts, it is hereby declared that if, after the appointed day, any other coal mine is found, after an investigation made by the Coal Board, to contain coking coal, the provisions of the Coking Coal Mines (Emergency Provisions) Act, 1971, shall, until that mine is nationalized by an appropriate legislation apply to such mine.

Section 7 of Coal Bearing Areas (Acquisition and Development) Act, 1957 – 7(1) If the Central Government is satisfied that coal is obtainable in the whole or any part of the land notified under sub-section (1) of section 4, it may, within a period of two years from the date of the said notification or within such further period not exceeding one year in the aggregate as the Central Government may specify in this behalf, by notification in the Official Gazette, give notice of its intention to acquire the whole or any part of the land or of any rights in or over such land, as the case may be.

(2) if no notice to acquire the land or any rights in or over such land is given under sub-section (1) within the period allowed thereunder, the notification issued under sub-section (1) of section 4 shall cease to have effect on the expiration of three years from the date thereof.

27. Section 5 - Control over mining or concentration of substances containing uranium

(1) If the Central Government is satisfied that any person is mining or is about to mine any substance from which, in the opinion of the Central Government, uranium can be or may reasonably be expected to be, isolated or extracted, or is engaged or is about to be engaged in treating or

etc. which are the most important minerals in the modern world. The Act does not anywhere declare the proprietary right of the State.

57. For the above-mentioned reasons, we are of the opinion that there is nothing in the law which declares that all mineral wealth sub-soil rights vest in the State, on the other hand, the ownership of sub-soil/mineral wealth should normally follow the ownership of the land, unless the owner of the land is deprived of the same by some valid process. In the instant appeals, no such deprivation is brought to our notice and therefore we hold that the appellants are the proprietors of the minerals obtaining in their lands. We make it clear that we are not making any declaration regarding their liability to pay royalty to the State as that issue stands referred to a larger Bench.

R.P. Appeals disposed of.

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concentrating by any physical, chemical or metallurgical process any substance from which, in the opinion of the Central Government, uranium can be or may reasonably be expected to be, isolated or extracted, the Central Government may by notice in writing given to that person either --

(a) require him in conducting the mining operations or in treating or concentrating the substance aforesaid to comply with such terms and conditions and adopt such processes as the Central Government may in the notice, or from time to time thereafter, think fit to specify, or

(b) totally prohibit him from conducting the mining operations or treating or concentrating the substance aforesaid.

(2) Where any terms and conditions are imposed on any person conducting any mining operations or treating or concentrating any substance under cl. (a) of sub-section (1), the Central Government may, having regard to the nature of the terms and conditions, decide as to whether or not to pay any compensation to that person and the decision of the Central Government shall be final :

Provided that where the Central Government decides not to pay any compensation, it shall record in writing a brief statement giving the reasons for such decision.

(3) Where the Central Government decides to pay any compensation under sub-section (2), the amount thereof shall be determined in accordance with section 21 but in calculating the compensation payable, no account shall be taken of the value of any uranium contained in the substance referred to in sub-section (1).

(4) Where any mining operation or any process of treatment or concentration of any substance is prohibited under clause (b) of sub-section (1), the Central Government shall pay compensation to the person conducting the mining operations or using the process of treatment or concentration and the amount of such compensation shall be determined in accordance with section 21 but in calculating the compensation payable, no account shall be taken of the value of any uranium contained in the substance.

28. Section 10 - Compulsory acquisition of rights to work minerals

(1) Where it appears to the Central Government that any minerals from which in its opinion any of the prescribed substances can be obtained are present in or on any land, either in a natural state or in a deposit of waste material obtained from any underground or surface working, it may by order provide for compulsorily vesting in the Central Government the exclusive right, so long as the order remains in force, to work those minerals and any other minerals which it appears to the Central Government to be necessary to work with those minerals, and may also provide, by that order or a subsequent order, for compulsorily vesting in the Central Government any other ancillary rights which appear to the Central Government to be necessary for the purpose of working the minerals aforesaid including (without prejudice to the generality of the foregoing provisions)--

(a) rights to withdraw support;

(b) rights necessary for the purpose of access to or conveyance of the minerals aforesaid or the ventilation or drainage of the working;

(c) rights to use and occupy the surface of any land for the purpose of erecting any necessary buildings and installing any necessary plant in connection with the working of the minerals aforesaid;

(d) rights to use and occupy for the purpose of working the minerals aforesaid any land forming part of or used in connection with an existing mine or quarry, and to use or acquire any plant used in connection with any such mine or quarry; and

(e) rights to obtain a supply of water for any of the purposes connected with the working of the minerals aforesaid, or to dispose of water or other liquid matter obtained in consequence of working such minerals.

(2) Notice of any order proposed to be made under this section shall be served by the Central Government--

(a) on all persons who, but for the order, would be entitled to work the minerals affected; and

(b) on every owner, lessee and occupier (except tenants for a month or for less than a month) of any land in respect of which rights are proposed to be acquired under the order.

(3) Compensation in respect of any right acquired under this section shall be paid in accordance with section 21, but in calculating the compensation payable, no account shall be taken of the value of any minerals present in or on land affected by the order, being minerals specified in the order, as those from which in the opinion of the Central Government uranium or any concentrate or derivative of uranium can be obtained.

ROHIT CHAUHAN
v.
SURINDER SINGH & ORS.
(Civil Appeal No.5475 of 2013)

JULY 15, 2013

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

HINDU LAW:

'Coparcenary property' - 'Coparcener' - Held: Coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor - So long, on partition, an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property and if a son is subsequently born, the alienation made before the birth cannot be questioned - But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener - Therefore, in the instant case, sale deeds and release deed executed by the father after the birth of his son, to the extent of the entire property are illegal, null and void.

The plaintiff-appellant filed a suit for declaration that the alienation of suit property, viz. 8 Kanals of land by sale deed executed by his father (defendant no. 2) on 19.05.2000 in favour of defendant nos. 3 to 5 and of 96 Kanals of land by release deed dated 28.05.2004 in favour of defendant no. 1 was null and void in as much as the property under the release deed was the ancestral property received by defendant no. 2 under a family

partition and the property under the sale deeds was purchased by him from the joint family funds. The trial court decreed the suit, but the first appellate court reversed the decree holding that the property received by defendant no. 2 on partition lost the character of coparcenary property and became the self-acquired property of defendant no. 2. Plaintiff's second appeal was dismissed in limine.

Allowing the appeal, the Court

HELD: 1.1 Coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. [Para 8] [905-C-E]

1.2 So long, on partition, an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property and if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. [Para 8] [905-E-G]

M. Yogendra v. Leelamma N. **2009 (12) SCR 38 = (2009) 15 SCC 184 - relied on.**

Bhanwar Singh v. Puran, **2008 (2) SCR 775 = (2008) 3 SCC 87 - distinguished.**

1.3 In the instant case, it is an admitted position that the property which defendant no. 2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. In view of the settled legal position, therefore, after the birth the plaintiff, defendant no. 2 could have alienated the property only as Karta for legal necessity, which contingency did not arise in the instant case. Therefore, the sale deeds and the release deed executed by defendant no. 2 to the extent of entire coparcenary property are illegal, null and void. The judgment and decree of the lower appellate court as affirmed by the High Court is set aside and that of the trial court restored. [Para 10 and 12] [906-G-H; 907-A-B, D]

Case Law Reference:

2009 (12) SCR 38	**relied on**	**Para 8**
2008 (2) SCR 775	**distinguished**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5475 of 2013.

From the Judgment and Order dated 04.05.2011 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 1992 of 2011.

L. Nageshwar Rao, Mishra Saurabh for the Appellant.

Satinder S. Gulati, Kamaldeep Gulati and Gaurav Sharma for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Sole plaintiff Rohit Chauhan is the appellant before us. His grandfather Budhu had three sons, namely, Gulab Singh, Zile Singh and one Ram Kumar. Gulab Singh, father of the plaintiff, has been arrayed as defendant no. 2, whereas son of Zile Singh i.e. Surinder Singh figures as defendant no. 1 in the suit. In partition between Budhu and his three sons, defendant no. 2 got 1/4 share i.e., 72 Kanals of land. In the said partition Budhu also got 72 Kanals of land and he bequeathed 1/4 of his share i.e., 18 Kanals to each of his three sons and kept with himself 18 Kanals. After the death of Budhu, defendant no. 2 inherited 1/3 share i.e., 6 Kanals and in this way plaintiff's father Gulab Singh, defendant no. 2,got 96 Kanals of land. Defendant No.2 during his lifetime also acquired 8 Kanals of land from the income of the properties which he got in partition amongst his father and brothers. At the time of partition defendant no. 2 was unmarried. But later on, Gulab Singh was married to defendant no. 7, Rajesh Rani and from the wedlock the plaintiff as also defendant no. 6 were born. Plaintiff was born on 25th of March, 1982. Plaintiff alleged that his father defendant no. 2 executed two separate sale deeds on 19th of May, 2000 selling 8 Kanals of land acquired from joint family funds to defendant nos. 3 to 5. It is further allegation of the plaintiff that his father illegally gifted 96 Kanals of land in favour of defendant no. 1 Surinder Singh, the son of his real brother Zile Singh by way of release deed dated 28th of May, 2004. On the basis of the release deed and the sale deeds, the defendants claiming interest therein got their names mutated and attested in the revenue records. It is the case of the plaintiff that the property received by his father is ancestral property and, therefore, alienation of the same by him is null and void. On the basis of the aforesaid pleadings, the plaintiff prayed for declaration that the release deed, sale deeds and the mutation entries made on that basis are illegal, null and void and not binding on him, Varsha (defendant no. 6) and Rajesh Rani (defendant no. 7).

2. Defendant no. 1 contested the suit and, according to him, the plaintiff, his mother Rajesh Rani and minor sister Varsha were living separately from defendant No. 2 and there was no good relation between them. They were not even on talking terms. According to defendant no. 1, he and his family members were rendering service and giving honour to defendant no. 2 and he was residing with them as their family member. Defendant no. 1 further averred that out of love, affection and service rendered by him, defendant no. 2 was pleased and, as such, he executed a release deed in his favour and on that basis mutation entries were made. It is the plea of defendant no.1 that the land in question became the self acquired property of defendant no. 2 after partition and, therefore, he was competent to transfer the property in the manner he desired. Defendant no. 1 further alleged that the sale deed executed by defendant no. 2 in favour of defendant nos. 3 to 5 is legal and valid. Defendant no. 2 supported the case of defendant no. 1 and adopted the written statement filed by him. Defendant nos. 3 to 5 filed their separate written statements and supported the plea of defendant no. 1 and averred that the sale deeds and the release deed were validly executed. On the basis of the aforesaid pleading of the parties various issues have been framed including the following issues:

> "1.Whether the plaintiff is entitled to a decree for declaration to the effect that impugned release deed dt.28.5.2004 and mutation no.3365 entered and attested in lieu of impugned release deed and further two sale deeds dt.19.5.2000 bearing no.272/1 and 273/1 and mutation no.3110 and 3106 entered and attested on the basis of impugned two sale deeds and further revenue entries are wrong, illegal and not binding on the rights of the plaintiff and defendants no. 6 & 7?"

3. The trial court, on analysis of the materials placed on record and the legal position, came to the conclusion that the property which defendant no. 2 got by virtue of the partition

decree amongst his father and brothers was although separate property qua other relations but it attained the characteristics of coparcenary property after the plaintiff Rohit Chauhan was born. The finding recorded by the trial court in this regard reads as follows:

> "21. No doubt Gulab Singh got some of his share in the property described in para no. 1(a) of the plaint through his father Budhu vide mutation no. 3089 in which the father Budhu suffered a decree in favour of defendant no. 1 along with Zile Singh and Ram Kumar of 3/4th share but in the year 1969 when the said decree was passed Gulab Singh was unmarried and he had got alienated the land which had come to his share when Rohit Chauhan, Plaintiff came into existence i.e. on 25.3.1982. Meaning thereby that the property which Gulab Singh had got by the decree was although his separate property qua other relation but became JHF property immediately when Rohit Chauhan was born thereby getting characteristic of coparcenary property."

Accordingly, the trial court decreed the suit.

4. Defendant no. 1, aggrieved by the same, preferred appeal and it was his plea that the property received by defendant 2 on partition will become his separate property and requires to be treated as his self acquired property and, therefore, defendant no. 2 was free to deal with the property in the manner he liked. In other words, according to defendant no. 1, after partition the property falling in the share of defendant no. 2 lost its character as a coparcenary property and assumed the status of self acquired property. The aforesaid plea found favour with the lower appellate court and it held that the property which defendant no. 2 got on partition "lost the character of coparcenary property and became the self acquired property of Gulab Singh". The lower appellate court further held that once the property is held to be self acquired property of Gulab Singh,

he had every right to deal with the same in any manner he liked. Relevant portion of the judgment of the lower appellate court reads as follows:

> "13. In the light of above said precedents it can be readily concluded that only when the property which is received by a person from his ancestors by survivorship can be held to be ancestral/coparcenary property and any other property which although, might have been received from the ancestors by means of will or consent decree or a father partitioned the property, will loose its character as that of coparcenary property and will become self acquired property in the hands of person receiving it. Applying these precedents to the facts of the present case, this Court will conclude that approximately 96 Kanals of land was received by Gulab Singh from his father Budhu on the basis of consent decree or on the basis of will and not by survivorship and this property lost the character of coparcenary property and was self acquired property of Gulab Singh. The version of plaintiff/respondent no. 1 in the present case is that rest of the property was acquired by Gulab Singh with the funds originated from joint Hindu family property and the said property also assumed the character of joint Hindu family property, also cannot be sustained because the major chunk of land in the hands of Gulab Singh has been held to be non-ancestral property and rather self acquired property of Gulab Singh.
>
> 14. Once the property involved in the suit has been held to be self acquired property of Gulab Singh then Gulab Singh was having every right to deal with the same in any manner he liked and no embargo can be put on the rights of Gulab Singh as well as his rights to alienate the suit property are concerned and thus neither release deed nor sale deeds executed by Gulab Singh on the rights of Gulab Singh……."

5. Accordingly, the lower appellate court allowed the

appeal and set aside the judgment and decree of the trial court and dismissed the suit.

6. Plaintiff, aggrieved by the same, preferred second appeal and the High Court dismissed the second appeal in limine and, while doing so, observed as follows:

> "……Finding of the lower appellate court that the suit land is not proved to be ancestral or coparcenary property is fully justified by the documentary evidence and admitted facts……."

This is how the plaintiff is before us.

Leave granted.

7. Mr. L.Nageshwar Rao, learned Senior Counsel appearing on behalf of the plaintiff-appellant submits that at the time when the plaintiff's father Gulab Singh got the property in partition, it was his separate property vis-à-vis his relations but after the birth of the plaintiff on 25th of March, 1982, plaintiff acquired interest in the property as a coparcener. Mr. Satinder S. Gulati, learned Counsel appearing on behalf of the defendant-respondents, however, submits that once the property fell into the share of the plaintiff's father Gulab Singh, it lost the character of a coparcenary property and the said status will not change on the birth of the plaintiff. He points out that even if plaintiff Rohit Chauhan was born at the time of partition between defendant no. 2, his father and brothers, plaintiff would not have got any share under Section 8 of the Hindu Succession Act. In support of the submission he has placed reliance on a judgment of this Court in the case of *Bhanwar Singh v. Puran,* (2008) 3 SCC 87 and our attention has been drawn to the following passage from the said judgment:

> "13. Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary

property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed as Class I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stripes, as also tenants-in-common and not as joint tenants."

8. We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of *M. Yogendra v. Leelamma N.,* (2009) 15 SCC 184, in which it has been held as follows:

"29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."

9. Now referring to the decision of this Court in the case of *Bhanwar Singh* (supra), relied on by respondents, the same is clearly distinguishable. In the said case the issue was in relation to succession whereas in the present case we are concerned with the status of the plaintiff vis-à-vis his father who got property on partition of the ancestral property.

10. A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which defendant no. 2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant no. 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth

defendant no. 2 could have alienated the property only as Karta for legal necessity. It is nobody's case that defendant no. 2 executed the sale deeds and release deed as Karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale-deeds and release deed, the parties can work out their remedies in appropriate proceeding.

11. In view of what we have observed above, the view taken by the lower appellate court as affirmed by the High Court is erroneous in law.

12. In the result, we allow this appeal, set aside the judgment and decree of the lower appellate court as affirmed by the High Court and restore that of the trial court with the liberty aforementioned. In the facts and circumstances of the case, there shall be no order as to costs.

R.P. Appeal allowed.

CHRISTIAN MEDICAL COLLEGE VELLORE & ORS
v.
UNION OF INDIA AND ORS.
(T.C. (C) No. 98 of 2012 etc.)

JULY 18, 2013.

[ALTAMAS KABIR, CJI, ANIL R. DAVE AND VIKRAMAJIT SEN, JJ.]

EDUCATION/EDUCATIONAL INSTITUTIONS:

Medical and Dental education - Admission to MBBS, Post-Graduate Medical Courses, BDS and MDS courses - National Eligibility-cum-Entrance Test (NEET) introduced by Notification No. MCI-31(1)/2010-MED/49068 dated 21.12.2010 described as "Regulations on Graduate Medical Education (Amendment) 2010, (Part II)" amending Regulations on Graduate Medical Education 1997, Notification No. MCI. 18(1)/2010-MED/49070 dated 21.12.2010 described as "Post-graduate Medical Education (Amendment) Regulation, 2010 (Part II)" amending the Post-Graduate Medical Education Regulations, 2000 and two similar Notifications both bearing No. DE-22-2012 and dated 31.5.2012, as regards BDS and MDS courses - Held (per majority) (Anil R. Dave, J. dissenting): The Notifications and the 2010 (Amendment) Regulations whereby MCI introducing the single National Eligibility-cum-Entrance Test and the corresponding amendments in the Dentists Act, 1948 are ultra vires the provisions of Arts. 19(1)(g), 25, 26(a), 29(1) and 30(1) of the Constitution, since they have the effect of denuding the States, State-run Universities and all medical colleges and institutions, including those enjoying the protection of these constitutional provisions, from admitting students to their M.B.B.S., B.D.S. and Post-graduate courses, according to their own procedures, beliefs and dispensations, which is an

integral facet of the right to administer - MCI or DCI has no authority under the relevant Acts to take away the right of educational institutions to admit students - MCI is not empowered under 1956 Act to conduct NEET - Regulations cannot prevail over the constitutional guarantees under Arts. 19(1)(g), 25, 26, 29(1) and 30 of the Constitution -- Further, standard of education all over the country being not the same, and there being need of such doctors who may not be specialists, but are available as general physicians to treat the large number of people who live in the villages in difficult conditions, single entrance examination would not be apt -- Impugned Notifications are quashed - This will not, however, invalidate actions so far taken under the amended Regulations, including the admissions already given on the basis of the NEET conducted by MCI, DCI and other private medical institutions, and the same shall be valid for all purposes - Indian Medical Council Act, 1956 - s. 33 read with ss. 19 and 20 - Dentists Act, 1948 - s. 20 - Constitution of India, Arts. 19(1)(g), 25, 26(a), 29(1) and 30(1) - Seventh Schedule, List I, Entry 66 - List III, Entry 25.

CONSTITUTION OF INDIA, 1950:

Arts. 19(1)(g), 25, 26 and 30 - National Eligibility-cum-Entrance Test (NEET) for Medical and Dental courses - Held: (Per majority) (Anil R. Dave, J. dissenting): The course of action adopted by the MCI and the DCI would not qualify as a reasonable restriction, but would amount to interference with the rights guaranteed under Art. 19(1)(g) and, more particularly, Art.30, which is not subject to any restriction similar to Art. 19(6) of the Constitution - Admissions to educational institutions have been held to be part and parcel of their right to administer and the same cannot be regulated, except for the purpose of laying down standards for maintaining excellence of education being provided in such institutions.

INDIAN MEDICAL COUNCIL ACT, 1956:

s.19-A(2) - Furnishing of copies of regulations and amendments by MCI to States - Held: (Per majority) (Anil R. Dave, J. dissenting): Submission of draft amended Regulations to State Governments for their views is a pre-condition and cannot be said to be directory, since MCI has to take into consideration the comments, if any, received from any State Government in respect thereof, before submitting the same to Central Government for sanction.

ADMINISTRATIVE LAW:

Delegated Legislation/Subordinate legislation - MCI and DCI introducing NEET by amending the relevant Regulations, for admission to medical and dental courses - Held:(Per majority) (Anil R. Dave, J. dissenting): Freedoms and rights flowing from Arts. 19(1)(g), 25, 26, 29(1) and 30 of the Constitution cannot be superseded by Regulations framed by a statutory authority by way of delegated legislation -- The fact that such power was exercised by MCI and DCI with previous approval of Central Government, as contemplated u/s 33 of 1956 Act and u/s 20 of the 1948 Act, would not bestow upon the Regulations framed by MCI and DCI, which are in the nature of subordinate legislation, primacy over the Constitutional provisions.

WORDS AND PHRASES:

Expression 'regulate' - Connotation of - Explained.

The Medical Council of India (MCI) introduced single eligibility-cum-entrance examination, namely, National Eligibility-cum-Entrance Test (NEET) for MBBS course and Post Medical Courses by Notification No. MCI-31(1)/2010-MED/49068 dated 21.12.2010 described as "Regulations on Graduate Medical Education (Amendment) 2010, (Part II)" amending the "Regulations

on Graduate Medical Education, 1997", and Notification No.MCI.18(1)/2010-MED/49070 dated 21.12.2010 described as "Post-graduate Medical Education (Amendment) Regulation, 2010 (Part II)" amending the "Post Graduate Medical Education Regulations, 2000". Two similar Notifications both bearing No. DE-22-2012 and dated 31.5.2012 were published by the Dental Council of India (DCI) as regards BDS and MDS courses. All the four notifications were challenged in writ petitions before the High Courts. The said writ petitions were transferred to the Supreme Court and such transferred cases were heard and decided along with the writ petitions filed before it.

Allowing the transferred cases and writ petitions, the Court

HELD: (per Altamas Kabir, CJI for himself and for Vikramajit Sen, J.):

1.1 The impugned Notifications dated 21.12.2010 and 31.5.2012 and the amended Regulations directly affect the right of private institutions to admit students of their choice by conducting their own entrance examinations, as they have been doing all along. [para 134] [1004-B]

1.2 The direction contained in sub-s. (2) of s.19A of the Indian Medical Council Act, 1956 (the 1956 Act) makes it a pre-condition for the Regulations and all subsequent amendments to be submitted to the Central Government for sanction. The MCI is required to take into consideration the comments of any State Government within three months from furnishing of copies of draft Regulations and/or subsequent amendments thereto. There is nothing to show that the MCI ever sent the draft amended Regulations to the different State Governments for their views. Submission of the draft Regulations and

all subsequent amendments thereto cannot be said to be directory, since upon furnishing of the draft Regulations and all subsequent amendments thereto to all the State Governments, the MCI has to take into consideration the comments, if any, received from any State Government in respect thereof, before submitting the same to the Central Government for sanction. In the instant case, it is not a case of consultation, but a case of inputs being provided by the State Governments in regard to the Regulations to be framed by the MCI or the DCI. An invalid provision cannot be validated simply by acting on the basis thereof. [para 136-138] [1005-E-H; 1006-A-D]

State of U.P. Vs. Manbodhan Lal Srivastava **(1958) SCR 533- distinguished.**

1.3 The four Notifications dated 21.12.2010 and 31.5.2012 make it clear that all admissions to the M.B.B.S. and the B.D.S. courses and the respective Post-graduate courses, shall have to be made solely on the basis of the results of the respective NEET, thereby preventing the States and their authorities and privately-run institutions from conducting any separate examination for admitting students to the courses run by them. Although, Art. 19(6) of the Constitution recognizes and permits reasonable restrictions on the right guaranteed under Art. 19(1)(g), the course of action adopted by the MCI and the DCI would not qualify as a reasonable restriction, but would amount to interference with the rights guaranteed under Art. 19(1)(g) and, more particularly, Art.30, which is not subject to any restriction similar to Art. 19(6) of the Constitution. [para 141] [1007-A-C]

1.4 By purporting to take measures to maintain high educational standards to prevent maladministration, the MCI and the DCI cannot resort to the amended Regulations to circumvent the judicial pronouncements

in this regard. The Supreme Court has consistently held that the right to administer an educational institution would also include the right to admit students, which right could not be taken away on the basis of Notifications issued by the MCI and the DCI which had no authority, either under the 1956 Act or the 1948 Act, to do so. [para 142-143] [1007-G-H; 1008-A-B]

St. Stephen's College Vs. University of Delhi **1991 (3) Suppl. SCR 121 = (1992) 1 SCC 558;** *Islamic Academy of Education Vs. State of Karnataka* **2003 (2) Suppl. SCR 474 = (2003) 6 SCC 697;** *T. Varghese George Vs. Kora K. George* **2011 (12) SCR 1070 = (2012) 1 SCC 369; and** *T.M.A. Pai Foundation Vs. State of Karnataka* **2002 (3) Suppl. SCR 587 = (2002) 8 SCC 481 - relied on.**

1.5 From the various observations made in the decisions on this issue, commencing from the Kerala Education Bill case* to recent times, it is evident that admissions to educational institutions have been held to be part and parcel of the right of an educational institution to administer and the same cannot be regulated, except for the purpose of laying down standards for maintaining the excellence of education being provided in such institutions. In the case of aided institutions, it has been held that the State and other authorities may direct a certain percentage of students to be admitted other than by the method adopted by the institution. However, in cases of unaided institutions, the position is that except for laying down standards for maintaining the excellence of education, the right to admit students into the different courses could not be interfered with. In the case of aided minority institutions, it has been held that the authority giving aid has the right to insist upon the admission of a certain percentage of students not belonging to the minority community, so as to maintain the balance of Art. 19(2) and Art. 30(1) of the Constitution. Even with regard to unaided minority

institutions, the view is that while the majority of students to be admitted should be from the minority community concerned, a certain percentage of students from other communities should also be admitted to maintain the secular character of education in the country in what has been described as a "sprinkling effect". [para 157] [1016-E-H; 1017-A-C]

Kerala Education Bill* **(1959) S.C.R. 995; *D.A.V. College Vs. State of Punjab* **(1971) 2 SCC 269; and** *Ahmedabad St. Xavier's College Society Vs. State of Gujarat* **1975 (1) SCR 173 = (1974) 1 SCC 717 - referred to.**

1.6 The MCI and the DCI are creatures of statutes, having been constituted under the 1956 Act, and the Dentists Act, 1948 (the 1948 Act), and have, therefore, to exercise the jurisdiction vested in them by the statutes and they cannot wander beyond the same. Under s. 33 of the 1956 Act and s.20 of the 1948 Act, power has been reserved to the two Councils to frame Regulations to carry out the purposes of their respective Acts; and pursuant to such power the MCI and the DCI have framed the Regulations of 1997, 2000 and 2007, which set the standards for maintaining excellence of medical education in India. The right of the MCI and the DCI to prescribe such standards has been duly recognised by the Courts. However, such right cannot be extended to controlling all admissions to M.B.B.S., B.D.S. and Post-graduate courses being run by different medical institutions in the country. At best, a certain degree of control may be exercised in regard to aided institutions, where on account of the funds being provided by the Government, it may have a say in the affairs of such institutions. [para 143] [1008-B-F]

1.7 The rights of private individuals to establish and administer educational institutions under Art. 19(1)(g) of the Constitution are now well-established. The right to

admit students in the different educational and medical institutions is an integral part of the right to administer and cannot be interfered with except in cases of maladministration or lack of transparency. The impugned Regulations, which are in the nature of delegated legislation, will have to make way for the Constitutional provisions. [para 145] [1009-B-E]

1.8 The freedom and rights guaranteed under Arts. 19(1)(g), 25, 26 and 30 of the Constitution to all citizens to practise any trade or profession and to religious minorities to freedom of conscience and the right freely to profess, practise and propagate religion, subject to public order, morality and health and to the other provisions of Part III of the Constitution, and further to maintain institutions for religious and charitable purposes as guaranteed under Arts. 25 and 26, read with the rights guaranteed under Art. 30, are also well-established by various pronouncements of this Court. Over and above these freedoms and rights is the right of citizens having a distinct language, script or culture of their own, to conserve the same under Art. 29(1). [para 145] [1009-E-G]

1.9 Section 33(l) of the 1956 Act does not empower the MCI to hold the entrance examination, as has been purported to be done by the holding of the NEET. The power to frame regulations for the conduct of professional examinations is different from holding the examinations and the two cannot be equated. Nowhere in the 1956 Act nor in the Regulations, has the MCI been vested with any authority to either conduct examinations or to direct that all admissions into different medical colleges and institutions in India would have to be on the basis of one common National Eligibility-cum-Entrance Test, thereby effectively taking away the right of the different medical colleges and institutions, including those run by religious and linguistic minorities, to make admissions on the basis of their own rules and

procedures. The role attributed to and the powers conferred on the MCI and the DCI under the provisions of the 1956 and the 1948Act, do not contemplate anything different and are restricted to laying down standards which are uniformly applicable to all medical colleges and institutions in India to ensure the excellence of medical education in India. The role assigned to the MCI u/ss 10A and 19A (1) of the 1956 Act vindicates such a conclusion. This Court holds that the MCI is not empowered under the 1956 Act to conduct the NEET. [para 146, 161 and 162] [1010-A-D; 1020-A-C]

1.10 The right of the MCI to frame Regulations under Entry 66, List I of the Seventh Schedule to the Constitution is of no avail, since the freedoms and rights sought to be enforced by the petitioners flow from Arts. 19(1)(g), 25, 26, 29(1) and 30 which cannot be superseded by Regulations framed by a statutory authority by way of delegated legislation. The fact that such power was exercised by the MCI and the DCI with the previous approval of the Central Government, as contemplated u/s 33 of the 1956 Act and u/s 20 of the 1948 Act, would not bestow upon the Regulations framed by the MCI and DCI, which are in the nature of subordinate legislation, primacy over the Constitutional provisions. [para 147] [1010-F-H; 1011-A]

1.11 There is no material on record to even suggest that the linguistic minority institutions and other privately-run institutions, aided and unaided, have indulged in any malpractice in matters of admission of students or that they had failed the triple test referred to in P.A. Inamdar's **case. [para 148] [1011-D-E]**

P.A. Inamdar vs. State of Maharashtra **2005 (2) Suppl. SCR 603 = (2005) 6 SCC 537 - relied on.**

1.12 Art. 26(a) indicates that subject to public order,

morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes. The emphasis is not on religious purposes alone, but extends to charitable purposes also, which would include the running of a hospital to provide low-cost, but efficient medical care to all, which private missionary hospitals of different denominations are doing. So long as a private institution satisfies the triple test indicated in P.A. Inamdar's case, no objection can be taken to the procedure followed by it over the years in the matter of admission of students into its M.B.B.S. and Post-graduate courses in medicine and other disciplines. [para 149] [1011-H; 1012-A-C]

1.13 The concept of "Rag Bag" legislation would not apply, since the amendments to the Regulations of 1997, 2000 and 2007 were effected under Entry 66, List I of the Seventh Schedule and no recourse was taken to Entry 25 of the Concurrent List by the MCI and DCI while amending the said Regulations. [para 158] [1017-C-D]

2. As regards the impact of the Presidential Orders made under Art. 371D of the Constitution of India, special enactments have been made in the States of Andhra Pradesh and Tamil Nadu regarding admission of students in the different medical colleges and institutions being run in the said States. The said legislation are under Entry 25 of List III of the Seventh Schedule to the Constitution. Art. 371-D of the Constitution empowers the President to make special provisions with respect to the State of Andhra Pradesh, including making orders with regard to admission in educational institutions. Accordingly, the enactments made in the States of Andhra Pradesh and Tamil Nadu will remain unaffected by the impugned Regulations. [para 159] [1017-E-H; 1018-B]

3.1 Apart from the legal aspects, the practical aspect

of holding a single National Eligibility-cum-Entrance Test needs to be considered. The standard of education all over the country is not the same. Each State has its own system and pattern of education, including the medium of instruction. Children in the metropolitan areas enjoy greater privileges than their counter-parts in most of the rural areas as far as education is concerned, and the decision of the Central Government to support a single entrance examination would perpetuate such divide in the name of giving credit to merit. Given the large number of people who live in the villages in difficult conditions, the country today has more need of such doctors who may not be specialists, but are available as general physicians to treat those in need of medical care and treatment in the far flung areas of the country, which is the essence of what was possibly envisaged by the framers of the Constitution in including Art. 30 in Part III of the Constitution. [para 160] [1018-D-H; 1019-A-B]

3.2 The "Regulations on Graduate Medical Education (Amendment) 2010 (Part II)" and the "Post Graduate Medical Education (Amendment) Regulation, 2010 (Part II)", whereby the MCI introduced the single National Eligibility-cum-Entrance Test and the corresponding amendments in the Dentists Act, 1948, are ultra vires the provisions of Arts. 19(1)(g), 25, 26(a), 29(1) and 30(1) of the Constitution, since they have the effect of denuding the States, State-run Universities and all medical colleges and institutions, including those enjoying the protection of the above provisions, from admitting students to their M.B.B.S., B.D.S. and Post-graduate courses, according to their own procedures, beliefs and dispensations, which has been found by this Court in the T.M.A. Pai Foundation case, to be an integral facet of the right to administer. The impugned Notifications Nos. MCI-31(1)/2010-MED/49068, and MCI.18(1)/2010-MED/49070, both dated 21.12.2010, published by the Medical Council of India along with

Notification Nos. DE-22-2012 dated 31.5. 2012, published by the Dental Council of India and the amended Regulations sought to be implemented thereunder are quashed. This will not, however, invalidate actions so far taken under the amended Regulations, including the admissions already given on the basis of the NEET conducted by the Medical Council of India, the Dental Council of India and other private medical institutions, and the same shall be valid for all purposes. [para 161 and 163] [1019-F-H; 1020-D-F]

Indian Medical Association Vs. Union of India **2011 (6) SCR 599 = (2011) 7 SCC 179;** *Dr. Preeti Srivastava Vs. State of M.P.* **1999 (1) Suppl. SCR 249 = (1999) 7 SCC 120;** *Commr. H.R.E. Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* **1954 SCR 1005;** *Unni Krishnan Vs. State of U.P.* **(1993) 1 SCC 645;** *Ratilal Panachand Gandhi Vs. The State of Bombay & Others* **1954 SCR 1055;** *State of A.P. Vs. Lavu Narendranath* **(1971) 1 SCC 607;** *Indian Express Newspapers Vs. Union of India* **1985 (2) SCR 287 = (1985) 1 SCC 641;** *Deep Chand Vs. State of Uttar Pradesh and Others* **(1959) Suppl. 2 SCR 8;** *State of Orissa Vs. M.A. Tulloch & Co.* **(1964) 4 SCR 461;** *Ujagar Prints etc. Vs. Union of India* **1988 (3) Suppl. SCR 770 = (1989) 3 SCC 488;** *Ishwari Khetan Vs. State of U.P.* **1980 (3) SCR 331 = (1980) 4 SCC 136;** *Pradeep Jain Vs. Union of India* **1984 (3) SCR 942 = (1984) 3 SCC 654;** *Society for Unaided Private Schools of Rajasthan Vs. Union of India* **2012 (2) SCR 715 = (2012) 6 SCC 1;** *Rajan Purohit Vs. Rajasthan University of Health Sciences* **2012 (11) SCR 299 = (2012) 10 SCC 770;** *State of M.P. Vs. Nivedita Jain* **1982 (1) SCR 759 = (1981) 4 SCC 296;** *Ajay Kumar Singh Vs. State of Bihar* **(1994) 4 SCC 401;** *State of Karnataka Vs. H. Ganesh Kamath* **1983 (2) SCR 665 = (1983) 2 SCC 402;** *St. John's Teachers Training Institute Vs. Regional Director, National Council for Teacher Education* **2003 (1) SCR 975 = (2003) 3**

SCC 321; *Om Prakash Vs. State of U.P.* **2004 (2) SCR 900 = (2004) 3 SCC 402;** *State of Karnataka Vs. Dr. T.M.A. Pai Foundation & Ors.* **(2003) 6 SCC 790;** *Dr. Dinesh Kumar Vs. Motilal Nehru Medical Colleges, Allahabad & Ors.* **(1985) 3 SCC 727;** *Jagdish Sharan & Ors. Vs. Union of India & Ors.* **1980 (2) SCR 831 = (1980) 2 SCC 768;** *MCI Vs. State of Karnataka* **1998 (3) SCR 740 = (1998) 6 SCC 131;** *Bharati Vidyapeeth (Deemed University) and Ors. Vs. State of Maharashtra & Anr.* **2004 (2) SCR 775 = (2004) 11 SCC 755;** *Prof. Yashpal Vs. State of Chhattisgarh* **2005 (2) SCR 23 = (2005) 5 SCC 420;** *State of M.P. Vs. Gopal D. Teerthani* **2003 (1) Suppl. SCR 797 = (2003) 7 SCC 83;** *Harish Verma Vs. Rajesh Srivastava* **2003 (3) Suppl. SCR 833 = (2003) 8 SCC 69; and** *Medical Council of India Vs. Rama Medical College Hospital & Research Centre* **2012 (6) SCR 449 = (2012) 8 SCC 80;** *Gujarat University, Ahemadabad Vs. Krishna Ranganath Mudholkar* **(1963) Supp. 1 SCR 112;** *Harakchand Ratanchand Banthia Vs. Union of India* **1970 (1) SCR 479 =(1969) 2 SCC 166;** *ITC Vs. Agricultural Produce Market Committee* **2002 (1) SCR 441 = (2002) 9 SCC 232; and** *Banarasi Dass Vs. WTO* **1965(2) SCR 355;** *State of Punjab Vs. Devans Modern Breweries Ltd.* **2003 (5) Suppl. SCR 930= (2004) 11 SCC 26;** *Annamalai University Vs. Information & Tourism Department* **2009 (3) SCR 355 = (2009) 4 SCC 590;** *U.P. Power Corporation Vs. NTPC Ltd.* **2009 (3) SCR 1060 = (2009) 6 SCC 235;** *Veterinary Council of India Vs. Indian Council of Agricultural Research* **2000 (1) SCR 43 = (2000) 1 SCC 750;** *State of Kerala Vs. Very Rev. Mother Provincial* **1971 (1) SCR 734 = (1970) 2 SCC 417;** *Sri Sri Sri Lakshmana Yatendrulu Vs. State of A.P.* **1996 (1) SCR 929 = (1996) 8 SCC 705;** *Govt. of A.P. Vs. Mohd. Ghouse Mohinuddin* **2001 (2) Suppl. SCR 180 = (2001) 8 SCC 416;** *V. Jaganadha Rao Vs. State of A.P.* **2001 (5) Suppl. SCR 179 = (2001) 10 SCC 401; and** *NTR University of Health Sciences Vs. G. Babu Rajendra Prasad* **2003 (2) SCR 781 = (2003) 5 SCC 350;** *State of M.P. Vs. Gopal D. Tirthani* **2003 (1) Suppl. SCR 797 = (2003) 7 SCC 83 - cited.**

Per Anil R. Dave, J. (Dissenting)

1.1 The MCI has power to regulate medical education and similarly the DCI has also the power to regulate the education in the field of Dentistry. Sections 19A and 20 of the Indian Medical Council Act, 1956 (the Act) permit the MCI to prescribe the minimum standards of medical education. Section 33 of the Act also empowers the MCI to make regulations to carry out the purposes of the Act. Thus, the said provisions enable the MCI to regulate the system of medical education throughout the country. Meaning of the word 'to regulate' would also include controlling entry of undeserving or weak students into the profession, who cannot be groomed in normal circumstances as good doctors or dentists. The term 'regulate' would normally mean to control something by means of rules or by exercise of control over a system. It is an admitted fact that one of the functions of these apex bodies of the profession is to regulate the system of education. The MCI and the DCI are competent to exercise their right to regulate the education system under the provisions of the Act and under the provisions of the Dentists Act, 1948, which permit them to determine the standard of students who are to be admitted to these professional courses. [para 5 and 15] [1022-A-B; 1026-G-H; 1027-A-C]

1.2 The MCI and the DCI are entitled to regulate the admission procedure by virtue of the provisions of the respective Acts, which enable them to regulate and supervise the overall professional standards. [para 16] [1027-C-D]

1.3 The legal provisions which permit the MCI and the DCI, to conduct the NEET, so as to regulate admission of the students to medical and dental institutes, are in accordance with legal and Constitutional provisions. [para 17] [1027-D]

1.4 In view of entry 25 of List III of the Seventh Schedule to the Constitution, Union as well as the States have power to legislate on the subject of medical education, subject to the provisions of Entry 66 of List I of the Seventh Schedule, which deals with determination of standards in institutions for higher education. In the circumstances, a State has the right to control education, including medical education, so long as the field is unoccupied by any Union legislation. By virtue of Entry 66 in List I, the Union can make laws with respect to determination of standards in institutions for higher education. Similarly, subject to enactments, laws made with respect to the determination of standards in institutions for higher education under power given to the Union in Entry 66 of List I, the State can also make laws relating to education, including technical education and medical education. In view of the position clarified in the case of Dr. Preeti Srivastava, the NEET can be conducted under the supervision of the MCI as per the regulations framed under the Act. Regulations made under the 1956 Act and the Dentists Act, 1948 must be treated as part of the Act. Therefore, conducting the NEET is perfectly legal. [para 17-18] [1027-F-H; 1028-A-B, E]

Dr. Preeti Srivastava and Another vs. State of M.P. and Others **1999 (1) Suppl. SCR 249 = (1999) 7 SCC 120; and** *Veterinary Council of India vs. Indian Council of Agricultural Research,* **2000(1) SCR 43 = (2000) 1 SCC 750 - relied on - relied on.**

1.5 In the case of Dr. Preeti Srivastava, this Court has held that for the purpose of maintaining standards of education, it is necessary to see that the students to be admitted to higher educational institutions are of high caliber and therefore, in the process of regulating educational standards in the fields of medicine and dentistry also, the same principle should be followed and the apex professional bodies should be permitted to

conduct examinations in the nature of the NEET. [para 18] [1028-C-E]

2.1 In order to have doctors well versed in the subject of medicine and having proficiency in their field, there should be suitable and deserving students who should be imparted good medical education and there should be strict supervision over the education system. To achieve this ideal, the system should be such that it should have effective regulations at three different stages - The first stage is the admission of the students to medical colleges. The students who are admitted to the medical course should be suitable and should have the right aptitude so that they can be shaped well into the medical profession after being imparted proper education. The second stage is with regard to determination of syllabus and the manner of imparting education and for the said purpose, the regulating authorities should see that proper medical training is given to the students and for the said purpose sufficiently equipped hospitals should be there as teaching institutes. Thirdly and finally, the examinations, which the students have to pass to prove their worth as successful students should also be strictly regulated. If there is any lacuna or short-coming at any of these three stages, it would adversely affect the professional standards of the students passing out from the educational institutions as doctors. To maintain medical facilities, existence of trained and well groomed good doctors is a sine qua non. All these facts equally apply to dentists. [para 6-7] [1022-C-H; 1023-A, C]

2.2 By virtue of introduction of the NEET to be conducted under the supervision of the MCI, standards of the students at the stage of their admission to the medical colleges, be it for admission to the M.B.B.S. course or the post graduation studies in medical faculties, would be regulated. Similarly, for imparting education to

the students studying in the field of Dentistry, the DCI has to regulate admissions so as to see that eligible and suitable students are admitted to the different courses in the field of dentistry. [para 8] [1023-C-E]

2.3 The NEET would be a nationwide common examination to be held at different places in the country so that all students aspiring to have medical education, can appear in the examination and ultimately, on the basis of the result of the examination, suitability and eligibility of the students for admission to the medical profession can be determined. This system is a part of regulation whereby entry to the field of medical education is regulated in such a way that only eligible and suitable students are given admission to medical colleges.

There would not be any discrimination or influence in the process of selection. Though the students can be selected only on the basis of their merit, it would be open to the States to follow their reservation policy and it would also be open to the institutions based on religious or linguistic minority to select students of their choice, provided the students so selected have secured minimum marks prescribed at the NEET. From and among those students, who have secured prescribed qualifying marks, the institutions concerned, who want to give priority to the students belonging to a particular class or caste or creed or religion or region, etc. would be in a position to give preference to such students in the matter of their admission to the medical or dental college concerned. Thus, the purpose with which Arts. 25, 26, 29, and 30 are incorporated in the Constitution of India would be fully respected and implemented. [para 9-10] [1024-C-D; 1025-A-B]

2.4 Furthermore, centralization of the selection process in holding the NEET would help the students to appear at the examination from any corner of the nation.

The result of the examination would be published at the same time on one particular day and with the same standard. The process of selection would be equal, fair, just and transparent. The students would be benefited because they will not have to appear at different places on different days at different examinations for the same purpose. These factors, in practical life, would surely help the students, the profession and the institutions which are not money minded and are sincere in their object of imparting medical education to the aspiring students. The cost of appearing at the NEET would be much less as the aspiring students will not have to purchase several expensive admission forms and will not have to travel to different places. [para 11] [1025-B-D, F-H]

2.5 The policy with regard to the reservation can be very well implemented if the NEET is introduced because the NEET would determine standard or eligibility of a student who is to be imparted education in the field of medicine. The institution imparting medical education will have to see that the student to be admitted is having minimum standard of suitability and the institution will be at liberty to select students of its choice if it wants to promote a particular class of persons. [para 12] [1026-B-E]

2.6 Moreover, the policy with regard to reservation for certain classes, followed by the States would not be adversely affected. From the deserving eligible students, who have procured qualifying marks at the NEET and who belong to the reserved classes would be given preference so as to fulfill the policy with regard to reservation. Thus, the students belonging to the reserved classes would also not suffer on account of holding the NEET. In the circumstances, it cannot be said that introduction of the NEET would adversely affect the policy with regard to the reservation or the policy of the States pertaining to upliftment of downtrodden persons

belonging to certain classes. The apprehension that autonomy of the petitioner educational institutions would be lost if the NEET is permitted is also not well founded. The Government authorities or the professional bodies concerned would not be creating any hindrance in the administrative affairs of the institutions. [para 13,14 and 22] [1026-D-F; 1031-C-D]

3. The provision of forwarding the copies of the draft Regulations to State Governments, as required u/s 19A of the Act, as is evident from the language of the section, is not mandatory and therefore, non-supply of the draft regulations would not adversely affect the validity of the Regulations and the NEET. [para 18] [1028-F-G]

4.1 The rights guaranteed under Art. 19(1)(g) of the Constitution with regard to practising any profession or carrying on any occupation, a trade or business, are not unfettered. Art. 19(6) permits the State to enact any law imposing reasonable restrictions on the rights conferred by Art. 19(1)(g) in relation to the professional or technical qualifications necessary for practising any profession. The 1956 Act and the Dentists Act, 1948, including Regulations made thereunder, which regulate the professional studies cannot be said to be violative of the Constitutional rights guaranteed to the petitioners under Art. 19(1)(g). To be permitted to practise a particular profession, especially when the profession is such which would require highly skilled person to perform the professional duties, the State can definitely regulate the profession. Institutions engaged in business of imparting education cannot also have unfettered right of admitting undeserving students so as to make substandard doctors and dentists. The function with regard to regulating educational activity would be within the domain of the professional bodies and their decision must be respected so as to see that the society gets well

groomed bright doctors and dentists. Thus, the introduction of the NEET would not violate the right guaranteed to the petitioners under the provisions of Art. 19(1)(g). [para 20] [1029-D-H; 1030-A-D]

4.2 So far as the rights guaranteed to the petitioners under the provisions of Arts. 25, 26, 29 and 30 are concerned, none of the said rights would be violated by permitting the NEET. It is always open to the petitioners to select a student subject to his being qualified by passing the examination conducted by the highest professional body. This is to assure that the students who are to undergo the professional training are suitable for the same. Minorities -- be it religious or linguistic -- can impart training to students found worthy to be given education in the field of medicine or dentistry by the professional apex body. The Regulations and the NEET would not curtail or adversely affect any of the rights of such minorities as apprehended by the petitioners. [para 21] [1030-E-F; 1031-A-B]

4.3 It cannot be said that introduction of the NEET would either violate any of the fundamental or legal rights of the petitioners or even adversely affect the medical or dental profession. Introduction of the NEET would ensure more transparency and less hardship to the students eager to join the medical profession. Further, if only one examination in the country is conducted and admissions are given on the basis of the result of the said examination, unscrupulous businessmen operating in the field of education would be constrained to stop their corrupt practices and it would help a lot, not only to the deserving students but also to the nation in bringing down the level of corruption. [para 23] [1031-G-H; 1032-A, E-F]

4.4 Therefore, the petitioners are not entitled to any of the reliefs prayed for in the petitions. The impugned

notifications are not only legal in the eyes of law but are also a boon to the students aspiring to join medical profession. [para 24] [1032-G]

Case Law Reference:

As per CJI.

2002 (3) Suppl. SCR 587	cited	para 2
2003 (2) Suppl. SCR 474	cited	para 2
2005 (2) Suppl. SCR 603	relied on	para 2
2011 (6) SCR 599	cited	para 2
1999 (1) Suppl. SCR 249	cited	para 2
(1959] S.C.R. 995	referred to	para 13
1954 SCR 1005	cited	para 15
2002 (3) Suppl. SCR 587	relied on	para 16
1954 SCR 1005	cited	para 33
1954 SCR 1055	cited	para 34
1991 (3) Suppl. SCR 121	relied on	para 40
1985 (2) SCR 287	cited	para 46
(1959) Suppl. 2 SCR 8	cited	para 47
1988 (3) Suppl. SCR 770	cited	para 51
1980 (3) SCR 331	cited	para 51
1984 (3) SCR 942	cited	para 59
2012 (2) SCR 715	cited	para 69
2012 (11) SCR 299	cited	para 70
1982 (1) SCR 759	cited	para 72
(1994) 4 SCC 401	cited	para 72

1983 (2) SCR 665	**cited**	**para 74**
2003 (1) SCR 975	**cited**	**para 74**
2004 (2) SCR 900	**cited**	**para 75**
2011 (12) SCR 1070	**relied on**	**para 91**
(2003) 6 SCC 790	**cited**	**para 96**
1980 (2) SCR 831	**cited**	**para 104**
(1985) 3 SCC 727	**cited**	**para 104**
1998 (3) SCR 740	**cited**	**para 107**
2004 (2) SCR 775	**cited**	**para 110**
2005 (2) SCR 23	**cited**	**para 110**
2012 (6) SCR 449	**cited**	**para 110**
(1963) Supp. 1 SCR 112	**cited**	**para 110**
1998 (3) SCR 740	**cited**	**para 110**
1970 (1) SCR 479	**cited**	**para 110**
2002 (1) SCR 441	**cited**	**para 110**
1965 (2) SCR 355	**cited**	**para 110**
2003 (5) Suppl. SCR 930	**cited**	**para 110**
2009 (3) SCR 355	**cited**	**para 110**
2009 (3) SCR 1060	**cited**	**para 110**
2000 (1) SCR 43	**cited**	**para 111**
(1958) SCR 533	**distinguished**	**Para 113**
1975 (1) SCR 173	**referred to**	**para 116**
1971 (1) SCR 734	**cited**	**Para 120**

1996 (1) SCR 929	**cited**	**Para 120**
2001 (2) Suppl. SCR 180	**cited**	**para 123**
2001 (5) Suppl. SCR 179	**cited**	**para 123**
2003 (2) SCR 781	**cited**	**para 123**
2003 (1) Suppl. SCR 797	**cited**	**para 124**
(1971) 2 SCC 269	**referred to**	**para 153**

As per Dave, J.

1999 (1) Suppl. SCR 249	**relied on**	**para 17**
2000 (1) SCR 43	**relied on**	**para 19**

CIVIL ORIGINAL JURISDICTION : Transferred Case (Civil) No. 98 of 2012.

Under Article 139 of the Constitution of India.

WITH

T.C.(C) NO.99/2012
T.C.(C) NO.101/2012
T.C.(C) NO.100/2012
T.C.(C) NO.102/2012
T.C.(C) NO.103/2012
W.P.(C) NO.480/2012
T.C.(C) NO.104/2012
T.C.(C) NO.105/2012
W.P.(C) NO.468/2012
W.P.(C) NO.467/2012
W.P.(C) NO.478/2012
T.C.(C) NO.107/2012
T.C.(C) NO.108/2012

W.P.(C) NO.481/2012
W.P.(C) NO.464/2012
T.C.(C) NO.110/2012
T.C.(C) NOS.132-134/2012
T.C.(C) NOS.117-118/2012
T.C.(C) NOS.115-116/2012
T.C.(C) NOS.125-127/2012
T.C.(C) NOS.113-114/2012
T.C.(C) NOS.128-130/2012
T.C.(C) NOS.121-122/2012
T.C.(C) NO.112/2012
T.C.(C) NO.131/2012
T.C.(C) NOS.123-124/2012
T.C.(C) NO.111/2012
T.C.(C) NO.120/2012
T.C.(C) NO.119/2012
T.C.(C) NOS.135-137/2012
T.C.(C) NOS.138-139/2012
W.P.(C) NO.495/2012
W.P.(C) NO.511/2012
W.P.(C) NO.512/2012
W.P.(C) NO.514/2012
W.P.(C) NO.516/2012
W.P.(C) NO.519/2012
W.P.(C) NO.535/2012
T.C.(C) NO.142/2012 @ T.P.(C) NO.364/2012
W.P.(C) NO.544/2012
W.P.(C) NO.546/2012
W.P.(C) NO.547/2012

T.C.(C) NO.144/2012 @ T.P.(C) NO.1524/2012 & 1447/2012
T.C.(C) NO.145/2012
T.C.(C) NO.1/2013 @ T.P.(C) NO.1527/2012
T.C.(C) NOS.14-15/2013 @ T.P.(C) NOS.1672-1673/2012
T.C.(C) NO.76/2013 @ T.P.(C) NO.1702/2012
T.C.(C) NO.12-13/2013
T.C.(C) NO.4/2013
T.C.(C) NO.11/2013
T.C.(C) NOS.21-22/2013 @ T.P.(C) NO.1714-1715/2012
T.C.(C) NO.5/2013 @ T.P.(C) NO.1718/2012
W.P.(C) NO.2/2013
W.P.(C) NO.1/2013
T.C.(C) NO.60/2013 @ T.P.(C) NO.12/2013
W.P.(C) NO.13/2013
W.P.(C) NO.15/2013
W.P.(C) NO.16/2013
W.P.(C) NO.20/2013
T.C. (C) NO. 107/2013
T.C.(C) NO.2/2013 @ T.P.(C) NO.1532/2012
T.C.(C) NO.8/2013
T.C.(C) NO.3/2013 @ T.P.(C) NO.1533/2012
W.P.(C) NO.24/2013
T.C.(C) NO.9/2013
T.C.(C) NO.17/2013 @ T.P.(C) NO.1588/2012
W.P.(C) NO.483/2012
W.P.(C) NO.501/2012
W.P.(C) NO.502/2012
W.P.(C) NO.504/2012

W.P.(C) NO.507/2012

T.C.(C) NO.10/2013

T.C.(C) NO.7/2013 @ T.P.(C) NO.1644/2012

T.C.(C) NO.18/2013 @ T.P.(C) NO.1645/2012

T.C.(C) NO.75/2013 @ T.P.(C) NO.1647/2012

T.C.(C) NO.19/2013 @ T.P.(C) NO.1653/2012

T.C.(C) NO.20/2013 @ T.P.(C) NO.1654/2012

T.C.(C) NO.59/2013 @ T.P.(C) NO.1656/2012

T.C.(C) NO.53/2013 @ T.P.(C) NO.1658/2012

T.C.(C) NO.25/2013 @ T.P.(C) NO.1671/2012

T.C.(C) NO.23-24/2013 @ T.P.(C) NO.1697-1698/2012

T.C.(C) NO.58/2013 @ T.P.(C) NO.1/2013

W.P.(C) NO.27/2013

T.C.(C) NO.72/2013 @ T.P.(C) NO.58/2013

T.C.(C) NO.16/2013

T.C.(C) NO.61/2013

T.C.(C) NO.73/2013 @ T.P.(C) NO.75/2013

T.C.(C) NO.108/2013 @ T.P.(C) NO.79/2013

T.C.(C) NO.62/2013

W.P.(C) NO.47/2013

T.C.(C) NO.28-29/2013

T.C.(C) NO.30/2013

T.C.(C) NO.31-32/2013

T.C.(C) NO.33-36/2013

T.C.(C) NO.37-38/2013

T.C.(C) NO.39/2013

T.C.(C) NO.40/2013

T.C.(C) NO.41/2013

T.C.(C) NO.42/2013

T.C.(C) NO.43/2013

T.C.(C) NO.44/2013

T.C.(C) NO.45/2013

T.C.(C) NO.46/2013

T.C.(C) NO.47/2013

T.C.(C) NO.48/2013

T.C.(C) NO.49/2013

W.P.(C) NO.66/2013

W.P.(C) NO.76/2013

W.P.(C) NO.74/2013

T.C.(C) NOS.63-65/2013

T.C.(C) NOS.66-69/2013

T.C.(C) NOS.70-71/2013

W.P.(C) NO.41/2013

W.P.(C) NO.228/2013

Sidharth Luthra, ASG, L. Nageshwara Rao, A.K. Panda, Harish N. Salve, K. Parasaran, P. Vishwanatha Shetty, R. Venkataramani, Anoop George Chaudhuri, June Chaudhuri, Nidhesh Gupta, T.R. Andhiyarujina, Mukul Gupta, K.K. Venugopal, Madhu R. Naik, S. Gurukrishna Kumar, V. Giri, Ajit Kumar Sinha, K. Radhakrishnan, Uday U. Lalit, Subramonium Prasad, Dr. Manish Singhvi, AAG, Allanki Ramesh, G. Madhavi, Y. Rajesh Kumar, D. Geetha, Manju, C.S.N. Mohan Rao, Lingaraj Sarangi, Satyajit Behera, Pravin H. Parekh, E.R. Kumar, Aparajita Singh, Gayatri Goswami, Geethi Ara, Chetna, R. Bobde, Ritika Sethi, Vishal Prasad (for Parekh & Co.), G.N. Reddy, Sanjay Misra, Sangita Chauhan, Rakesh K. Sharma, Senthil Jagadeesan, K.K. Mani, Neeraj Shekhar, Ashutosh Thakur, Sadique Mohd., Sanjay R. Hegde, S. Nithin, Amit

Kumar Mishra, G. Umapathy, Satish Parasaran, M.A. Venkatasubranian, R. Mekhala, Amit Kumar, Meenakshi Arora, A. Ramesh, Y. Rajesh Kumar, Manju Jana, Shilpi, Lokesh Kumar Sharma, B. Balaji, Dr. Sushil Balwada, Shashi Kiran Shetty, Sharan Thakur, S. Udaya Kumar Sagar, Bina Madhavan, Praseena E. Joseph, Shivendra Singh (for Lawywer's Knit & Co.), R. Jagannath G., E.R. Sumathy, Naveen R. Nath, L.M. Bhat, Hetu Arora, Amrita Sharma, Darpan K.M., Rameshwar Prasad Goyal, Dharmendra Kumar Sinha, Jayanth Muth Raj, Malavika J.,Sureshan P., Radha Shyam Jena, Rajiv Yadav, Amit Anand Tiwari, Ashwarya Sinha, Jayesh Gaurav, Ambhoj Kumar Sinha, Ambar Qamaruddin, G.S. Kannur, Rajesh Kumar, Savita Danda, Lokesh Kumar, Nirada Das, Vaijayanthi Girish, P. George Giri, Gaurav Sharma, Surbi Mehta, Naveen Prakash, S. Chandra Shekhar, V.G. Pragasam, S.J. Aristotle, S. Prabu Ramasubramanian, Supriya Garg, Neelam Singh, Shodhan Babu, E.C. Agrawala, Abhijat P. Medh,V. Balachandran, Gopal Balwant Sathe, G. Umapathy, S. Gowthaman, Ranjith B., Shivaji M. Jadhav, Prity Kunwar, A. Venayagam Balan, K.K. Trivedi, Priyank Adyaru, K.V. Sreekumar, R.P. Goyal, K. Rajeev, L.R. Singh, Namita Choudhary, E.M.S. Anam, Dushyant Parashar, Ravindra Keshavrao Adsure, Shakil Ahmed Syed, Mohd. Parvez Dabas, S.A. Saud, Amit Kumar, Atul Kumar, Rekha Bakshi, Ashish Kumar, Ankit Rajagaria, Supriya Juneja, Gargi Khanna, Arjun Diwan, Akansha Tandan, V. Prabhakar, R. Chandrachud, Jyoti Prashar, Tara Chandra Sharma, Neelam Sharma, Rajeev Sharma, Ajay Sharma, Rupesh Kumar, G.S. Kannur, Vaijayanthi Girish, Ravi Shah, Rudreshwar Singh, Rakesh Gosain, Kaushik Poddar, Garvesh Kabra, Y. Raja Gopala Rao, R. Rakesh Sharma, Suruchi Aggarwal, Anjali Chauhan, Rishab Kaushik, Nandani Gupta, Hemantika Wahi, G.N. Reddy, B. Debojit,Shasank Babu, Sodhan Babu, Neelam Singh, Amitesh Kumar, Ravi Kant, C.S. Singh, Gopal Singh, Abhigya, Abhay Singh Kushwaha, Pradeep Kumar Dubey, Sarthak Mehrotra, Navin Chawala, Bina Gupta, Amit Anand Tiwari, Tejveer Singh Bhatia, Prathibha M. Singh, Surbhi Mehta, Gaurav Sharma, Farah Fathima (for Lawyers Knit & Co.), Arputham Aruna & Co., Abdhesh Choudhary, Rajiv Ranjan Dwivedi, Bhavani Shankar V. Gadnis, Sunita B. Rao, K.H. Nobin Singh, Sapam Biswajit Meitie, Irshad Ahmad for the appearing parties.

The Judgments of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Four notifications, two dated 21.12.2010 and the other two dated 31.5.2012, issued by the Medical Council of India and the Dental Council of India, are the subject matter of challenge in all these matters which have been heard together by us. Notification No. MCI-31(1)/2010-MED/49068 described as "Regulations on Graduate Medical Education (Amendment) 2010, (Part II)" has been published by the Medical Council of India to amend the "Regulations on Graduate Medical Education, 1997". Notification No.MCI.18(1)/2010-MED/49070 described as "Post-graduate Medical Education (Amendment) Regulation, 2010 (Part II)" has been issued by the said Council to amend the "Post Graduate Medical Education Regulations, 2000". Both the Regulations came into force simultaneously on their publication in the Official Gazette. The third and fourth Notifications both bearing No. DE-22-2012 dated 31.5.2012, relating to admission in the BDS and MDS courses published by the Dental Council of India, are similar to the notifications published by the MCI.

2. The four aforesaid Notifications have been challenged on several grounds. The major areas of challenge to the aforesaid Notifications are:

(i) The powers of the Medical Council of India and the Dental Council of India to regulate the process of admissions into medical colleges and institutions run by the State Governments, private individuals (aided and unaided), educational institutions run by religious and linguistic minorities, in the guise of laying down minimum standards of medical education, as provided for in Section 19A of the Indian Medical Council Act, 1956, and under Entry

66 of List I of the Seventh Schedule to the Constitution.

(ii) Whether the introduction of one National Eligibility-cum-Entrance Test (NEET) offends the fundamental right guaranteed to any citizen under Article 19(1)(g) of the Constitution to practise any profession or to carry on any occupation, trade or business?

(iii) Whether NEET violates the rights of religious and linguistic minorities to establish and administer educational institutions of their choice, as guaranteed under Article 30 of the Constitution?

(iv) Whether subordinate legislation, such as the right to frame Regulations, flowing from a power given under a statute, can have an overriding effect over the fundamental rights guaranteed under Articles 25, 26, 29(1) and 30 of the Constitution?

(v) Whether the exclusion of Entry 11 from the State List and the introduction of Entry 25 in the Concurrent List by the Constitution Forty Second (Amendment) Act, 1976, makes any difference as far as the Regulations framed by the Medical Council of India under Section 33 of the 1956 Act and those framed by the Dental Council of India under Section 20 of the Dentists Act, 1948, are concerned, and whether such Regulations would have primacy over State legislation on the same subject?

(vi) Whether the aforesaid questions have been adequately answered in *T.M.A. Pai Foundation Vs. State of Karnataka* [(2002) 8 SCC 481], and in the subsequent decisions in *Islamic Academy of Education Vs. State of Karnataka* [(2003) 6 SCC 697], *P.A. Inamdar Vs. State of Maharashtra* [(2005) 6 SCC 537] and *Indian Medical Association Vs. Union of India* [(2011) 7 SCC 179]? and

(vii) Whether the views expressed by the Constitution Bench comprised of Five Judges in *Dr. Preeti Srivastava Vs. State of M.P.* [(1999) 7 SCC 120] have any impact on the issues raised in this batch of matters?

3. In order to appreciate the challenge thrown to the four notifications, it is necessary to understand the functions and duties of the Medical Council of India under the Indian Medical Council Act, 1956, and the Dental Council of India constituted under the Dentists Act, 1948. The submissions advanced in regard to the MBBS and Post-graduate courses will apply to the BDS and MDS courses also.

4. The Indian Medical Council Act, 1933, was replaced by the Indian Medical Council Act, 1956, hereinafter referred to as "the 1956 Act", inter alia, with the following objects in mind :-

"(a) to give representation to licentiate members of the medical profession, a large number of whom are still practicing in the country;

(b) to provide for the registration of the names of citizens of India who have obtained foreign medical qualifications which are not at present recognized under the existing Act;

(c) to provide for the temporary recognition of medical qualifi-cations granted by medical institutions in countries outside India with which no scheme of reciprocity exists in cases where the medical practitioners concerned are attached for the time being to any medical institution in India for the purpose of teaching or research or for any charitable objects;

(d) to provide for the formation of a Committee of Post-

graduate Medical Education for the purpose of assisting the Medical Council of India to prescribe standards of post-graduate medical education for the guidance of universities and to advise universities in the matter of securing uniform standards for post-graduate medical education throughout India;

(e) To provide for the maintenance of an all-India register by the Medical Council of India, which will contain the names of all the medical practitioners possessing recognized medical qualifications."

5. The Medical Council of India, hereinafter referred to as "MCI", has been defined in Section 2(b) of the 1956 Act to mean the Medical Council of India constituted under the said Act. The Council was constituted under Section 3 of the Indian Medical Council Act, 1956. Section 6 of the aforesaid Act provides for the incorporation of the Council as a body corporate by the name of Medical Council of India, having perpetual succession and a common seal, with power to acquire and hold property, both movable and immovable, and to contract, and to sue and be sued by the said name.

6. The powers vested in the MCI are essentially recommendatory in nature. Section 10A, which was introduced in the 1956 Act by Amending Act 31 of 1993, with effect from 27th August, 1992, inter alia, provides that notwithstanding anything contained in the Act or any other law for the time being in force:-

(a) no person shall establish a medical college; or

(b) no medical college shall :-

(i) open a new or higher course of study or training (including a postgraduate course ofstudy or training) which would enable a student of such

course or training to qualify himselffor the award of any recognised medicalqualification; or

(ii) increase its admission capacity in any course of study or training (including a postgraduate course of study or training),

except with the previous permission of the Central Government obtained in accordance with the provisions of this section.

Under Section 10A the function of the MCI is purely recommendatory for the purpose of grant of permission by the Central Government to establish a new medical college or to introduce a new course of study.

7. Section 19A which was introduced into the 1956 Act by Act 24 of 1964 with effect from 16th June, 1964, provides for the Council to prescribe "minimum standards of medical education". Since Section 19A will have some bearing on the judgment itself, the same is extracted hereinbelow in full :-

"19A. Minimum standards of medical education - (1) The Council may prescribe the minimum standards of medical education required for granting recognised medical qualifications (other than postgraduate medical qualifications) by universities or medical institutions in India.

(ii) Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Council to all State Governments and the Council shall before submitting the regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid.

(3) The Committee shall from time to time report to the Council on the efficacy of the regulations and may

recommend to the Council such amendments thereof as it may think fit."

8. Section 20 of the 1956 Act, provides for a Post-graduate Medical Education Committee to assist the Medical Council of India to prescribe standards of post-graduate medical education for the guidance of the Universities. For the sake of reference, the relevant portions of Section 20 of the 1956 Act with which we are concerned, are also extracted hereinbelow :-

"20. Post-graduate Medical Education Committee for assisting Council in matters relating to post-graduate medical education - (1) The Council may prescribe standards of Postgraduate Medical Education for the guidance of Universities, and may advise Universities in the matter of securing uniform standards for Postgraduate Medical Education through out India, and for this purpose the Central Govt. may constitute from among the members of the Council a Postgraduate Medical Education Committee (hereinafter referred to as the Post-graduate Committee).

9. By the first of the two Notifications dated 21st December, 2010, being MCI-31(1)/2010-Med./49068, the Medical Council of India, in purported exercise of the powers conferred by Section 33 of the 1956 Act, made various amendments to the 1997 Regulations on Graduate Medical Education. The most significant amendment, which is also the subject matter of challenge in some of these writ petitions and transferred cases, is clause 5 in Chapter II of the Regulations. The relevant paragraph in the Amendment Notification reads as follows:

"6. In Chapter II, Clause 5 under the heading "Procedure for selection to MBBS Course shall be as follows" shall be substituted as under:-

I. There shall be a single eligibility cum entrance examination namely 'National Eligibility-cum-Entrance Test for admission to MBBS course' in each academic year. The overall superintendence, direction and control of National Eligibility-cum-Entrance Test shall vest with Medical Council of India. However, Medical Council of India with the previous approval of the Central Government shall select organization/s to conduct 'National Eligibility-cum-Entrance Test for admission to MBBS course.

II. In order to be eligible for admission to MBBS course for a particular academic year, it shall be necessary for a candidate to obtain minimum of 50% (Fifty Percent) marks in each paper of National Eligibility-cum-Entrance Test held for the said academic year. However, in respect of candidates belonging to Scheduled Casts, Scheduled Tribes and Other Backward Classes, the minimum percentage shall be 40% (Forty Percent) in each paper and in respect of candidates with locomotory disability of lower limbs, the minimum percentage marks shall be 45% (Forty Five Percent) in each paper of National Eligibility-cum-Entrance Test:

Provided when sufficient number of candidates belonging to respective categories fail to secure minimum marks as prescribed in National Eligibility-cum-Entrance Test in any academic year for admission to MBBS Course, the Central Government in consultation with Medical Council of India may at its discretion lower the minimum marks required for admission to MBBS Course for candidates belonging to respective categories and marks so lowered by the Central Government shall be applicable for the said year only.

III. The reservation of seats in medical colleges for respective categories shall be as per applicable laws prevailing in States/ Union Territories. An all India merit list as well as State-wise merit list of the eligible candidates shall be prepared on the basis of the marks obtained in

National Eligibility-cum-Entrance Test and candidates shall be admitted to MBBS course from the said lists only.

IV. No candidate who has failed to obtain the minimum eligibility marks as prescribed in Sub Clause(ii) above shall be admitted to MBBS Course in the said academic year.

V. All admissions to MBBS course within the respective categories shall be based solely on marks obtained in the National Eligibility-cum-Entrance Test.

(Dr. P. Prasannaraj)
Additional Secretary
Medical Council of India"

10. Similarly, by virtue of Notification No. MCI.18(1)/2010-Med./49070, in purported exercise of the powers conferred by Section 33 of the 1956 Act, the Medical Council of India, with the previous approval of the Central Government, made similar amendments to the Postgraduate Medical Education Regulations, 2000, providing for a single eligibility cum entrance examination. For the sake of reference, the portion of the notification which is relevant for our purpose is extracted hereinbelow:

"No. MCI.18(1)/2010-Med./49070. - In exercise of the powers conferred by Section 33 of the Indian Medical Council Act, 1956(102 of 1956), the Medical Council of India with the previous approval of the Central Government hereby makes the following regulations to further amend the "Postgraduate Medical Education Regulations, 2000", namely:-

1. (i) These Regulations may be called the Postgraduate Medical Education (Amendment) Regulations, 2010 (Part-II)".

(ii) They shall come into force from the date of their

publication in the Official Gazette.

2. In the "Postgraduate Medical Education Regulations, 2000", the following additions /modifications / deletions / substitutions, shall be as indicated therein:-

3. Clause 9 under the heading 'SELECTION OF POSTGRADUATE STUDENTS' shall be substituted as under:-

"9. Procedure for selection of candidate for Postgraduate courses shall be as follows:

I. There shall be a single eligibility cum entrance examination namely 'National Eligibility-cum-Entrance Test for admission to Postgraduate Medical Courses' in each academic year. The overall superintendence, direction and control of National Eligibility-cum-Entrance Test shall vest with Medical Council of India. However, Medical Council of India with the previous approval of the Central Government shall select organization/s to conduct 'National Eligibility-cum-Entrance Test for admission to Postgraduate courses'."

Two similar Notifications both bearing No.DE-22-2012 dated 31.5.2012, were published by the Dental Council of India for the same purpose.

11. The challenge to these Notifications has thrown up various issues, which include the powers of the Central and the State Governments to legislate on matters relating to education under Entry 66 of List I of the Seventh Schedule to the Constitution and Entry 25 of List III which was introduced by way of the Constitution (Forty-second Amendment) Act, 1976, having particular regard to the fact that the previous Entry No. 11 in the State List, was omitted by the said amendment, doing away with education as a State subject and denuding the State of its powers to legislate on matters relating to education except

in accordance with Entry 25 of the Concurrent List. In fact, what has been pointed out on behalf of some of the parties is that by omitting Entry 11 from the State List and including Entry 25 in the Concurrent List of the Seventh Schedule, the Union Government acquired the authority to also legislate on matters relating to education, which it did not have previously.

12. Another common submission, which is of great significance as far as these matters are concerned, was with regard to the adverse impact of the single entrance examination on the fundamental right guaranteed to all citizens under Article 19(1)(g) of the Constitution to practise any profession, or to carry on any occupation, trade or business. The provisions of Article 30, preserving the right of both religious and linguistic minorities, to establish and administer educational institutions of their choice, were also highlighted by learned counsel for some of the Petitioners.

13. The major challenge, however, was with regard to the MCI's attempt to regulate admissions to the M.B.B.S. and Post-graduate Courses in all medical colleges and medical institutions in the country run by the different State Governments and by private agencies falling within the ambit of Article 19(1)(g) and in some cases Article 30 of the Constitution as well by introducing NEET. One of the facets of such challenge was the inter-play of Article 29(2) and Article 30(1), as also Article 30(2) of the Constitution. Various authorities have been cited on behalf of the different parties, harking back to the Presidential Reference in the *Kerala Education Bill* case [(1959] S.C.R. 995], and the subsequent views, which have been expressed on most of the aforesaid issues by various combinations of Judges, which include combinations of Eleven-Judges, Nine-Judges, Seven-Judges, Five-Judges and Three-Judges, of this Court. While most of the decisions touch upon the main theme in these matters regarding the right of either the Central Government or the State Government or the MCI to regulate admissions into medical colleges, the issue raised

before us concerning the authority of the MCI and the DCI to conduct an All India Entrance Examination, which will form the basis of admissions into the M.B.B.S. as well as Post-graduate Courses in all medical colleges and institutions all over the country, could not be considered in the earlier judgments. As a result, after the introduction of NEET, admissions to the M.B.B.S. and Post-graduate courses and the BDS and MDS courses can be made only on the basis of the Select List prepared in accordance with the results of the All India Entrance Test, which would not only eliminate a large number of applicants from admission to the medical colleges, but would also destroy the very essence of Articles 25, 26, 29(1) and 30 of the Constitution, since admission is one of the more important functions of an institution.

14. The submissions in these cases were commenced by Mr. Harish Salve, learned senior counsel appearing for the Christian Medical College, Vellore, and the Christian Medical College, Ludhiana, the Petitioners in Transferred Cases (C) Nos. 98-99 of 2012. Mr. Salve's submissions were supplemented by Mr. K. Parasaran, Dr. Rajiv Dhawan, Mr. K.K. Venugopal and Mr. R. Venkataramani, learned senior counsel, and several others appearing for some of the religious and linguistic minorities referred to in Article 30 of the Constitution.

15. Mr. Salve submitted that the two Notifications both dated 21st December, 2010, incorporating amendments in the Regulations on Graduate Medical Education, 1997 and the Post-Graduate Medical Education Regulations, 2000, and introducing a single National Eligibility-cum-Entrance Test (NEET) for admission to the MBBS course and the Post-graduate course in each academic year throughout the country, had been challenged by the Petitioners before the Madras High Court, in Writ Petition Nos.24109 of 2011 and 24110 of 2011. Mr. Salve urged that the said amendments stifled and stultified the fundamental rights guaranteed to religious minorities under Articles 25, 26, 29(1) and 30 of the Constitution of India. Mr.

Salve submitted that Article 25 secures to every person, subject to public order, health and morality and to the other provisions of Part-III of the Constitution, freedom of conscience and the right freely to profess, practise and propagate religion. The said right guarantees to every person freedom not only to entertain such religious belief, but also to exhibit his belief in such outward acts as he thought proper and to propagate or disseminate his ideas for the edification of others. Mr. Salve urged that this proposition was settled by this Court as far back as in 1954 by a Bench of Seven-Judges in *Commr., H.R.E. Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [1954 SCR 1005].

16. Mr. Salve submitted that subject to public order, morality and health, Article 26 of the Constitution guarantees to every religious denomination or a section thereof, the right to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion. Mr. Salve urged that in regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. Mr. Salve submitted that Article 30(1) of the Constitution gives religious and linguistic minorities the right to establish and to administer educational institutions of their choice, which was reiterated and emphasised in *T.M.A. Pai Foundation Vs. State of Karnataka* [(2002) 8 SCC 481], decided by a Bench of Eleven Judges.

17. Mr. Salve submitted that the Christian Medical College, Vellore, hereinafter referred to as "CMC Vellore", was established 113 years ago as a one-bed clinic by one Dr. Ida Sophia Scudder, the daughter of an American Medical Missionary. She started training Compounders (Health Assistants) in 1903 and Nurses in 1909, and was able to establish a Missionary Medical School for women leading to the Licentiate in Medical Practice in 1918 which was upgraded to the MBBS course affiliated to the Madras University.

Admission was thrown open to men for the MBBS course in 1947. As the college grew, from 1948 it started admitting students by an All-India Entrance Examination, followed by an in-depth interview. By 1950, the affiliation to the University was confirmed and the intake was increased to 60 under-graduate MBBS students in 1964, which has now increased to 100 MBBS students. To meet the needs of the local population, a large number of Higher Speciality Courses, Post-graduate Medical Courses, Allied Health Sciences Courses and Courses in Nursing, have also been developed over the years.

18. Currently, there are 11 Post-graduate Medical Diploma Courses, 23 Post-graduate Medical Degree Courses and 17 Higher Specialty Courses approved by the Medical Council of India and affiliated to the Tamil Nadu Dr. MGR Medical University. Today, the CMC Vellore, a minority, unaided, non-capitation fee educational institution, is run by the Petitioner Association comprised of 53 Christian Churches and Christian Organizations belonging to the Protestant and Orthodox traditions. **The stated object of the Petitioner Association, as mentioned in its Memorandum of Association, Constitution and the Bye-laws is "the establishment, maintenance and development of a Christian Medical College and Hospitals, in India, where women and men shall receive education of the highest grade in the art and science of medicine and of nursing, or in one or other of the related professions, to equip them in the spirit of Christ for service in the relief of suffering and the promotion of health".**

19. Out of 100 seats available for the under-graduate MBBS Course, 84 are reserved for candidates from the Christian community and the remaining are available for selection in the open category with reservation for candidates belonging to the Scheduled Castes and Scheduled Tribes. Similarly, 50% of the Post-graduate seats are reserved for Christian candidates and the remaining 50% are available for

open selection on an All-India basis. Mr. Salve submitted that all students selected for the MBBS course are required to sign a bond agreeing to serve for a period of two years in areas of need, upon completion of their courses. Similarly, Post-graduate students selected in the Christian minority category have also to give a similar undertaking.

20. Mr. Salve submitted that the Medical Colleges and institutions run by the Writ Petitioners charge fees which are subsidised and are even lower than the fees charged by Government Medical Colleges. Liberal scholarships are given by the College to those who have difficulty in making the payments, which include boarding, lodging and University charges (which are considerably higher). Learned counsel submitted that the institution was established by a Christian minority doctor in response to her religious beliefs and the command of Jesus Christ exhorting His disciples and followers to heal the sick and has evolved an admission process for both its undergraduate and post graduate courses in order to ensure that the selected candidates are suitable for being trained according to the ideology professed at Vellore. Mr. Salve urged that the selection process is comprised of an All India Entrance Test followed by a searching interview and special test devised in 1948. Such process has been improved and fine-tuned over the years so that the candidates are not only trained as health professionals, but to also serve in areas of need in difficult circumstances.

21. It was pointed out that this system of admission resorted to by the Petitioner has successfully reflected the ideals with which the medical college was founded and a survey conducted in 1992 established the fact that the majority of graduates and post-graduates, who have passed out from the college, have been working in India for more than 10 years after their graduation and the majority among them were working in non-metropolitan areas of the country. This evaluation remained the same, even during surveys conducted in 2002 and 2010,

and is in striking contrast to similar surveys carried out by other medical institutions of equal standard, where only a small number of graduates have been working in non-metropolitan areas.

22. Mr. Salve submitted that in 1993, an attempt was made by the Government of Tamil Nadu to interfere with the admission process in the institution by a letter dated 7th May, 1993, directing the Petitioner to implement the scheme framed by this Court in the case of *Unni Krishnan Vs. State of U.P.* [(1993) 1 SCC 645], insofar as the undergraduate course in Nursing was concerned. The Petitioner-institution filed Writ Petition No.482 of 1993 before this Court challenging the State Government's attempts to interfere with the admission process of the institution as being contrary to and in violation of the rights guaranteed to it under Article 30 of the Constitution. In the pending Writ Petition, various interim orders were passed by the Constitution Bench of this Court permitting the institution to take resort to its own admission procedure for the undergraduate course in the same manner in which it had been doing in the past. The said Writ Petition was heard in 2002, along with the *T.M.A. Pai Foundation* case (supra), wherein eleven questions had been framed.

While hearing the matters, the Chief Justice formulated five issues to encompass all the eleven questions, on the basis of which the hearing was conducted, and the same are extracted below:

"1. Is there a fundamental right to set up educational institutions and, if so, under which provision?

2. Does *Unni Krishnan* case [(1993) 4 SCC 111] require reconsideration?

3. In case of private institutions (unaided and aided), can there be government regulations and, if so, to what extent?

4. In order to determine the existence of a religious or linguistic minority in relation to Article 30, what is to be the unit - the State or the country as a whole?

5. To what extent can the rights of aided private minority institutions to administer be regulated?"

Out of the eleven questions framed by the Bench, Questions 3(b), 4 and 5(a) are extremely relevant for deciding the questions raised in the Writ Petition filed by the Petitioner-institution. For the sake of reference, the said three Questions are extracted hereinbelow:

"Q3(b). To what extent can professional education be treated as a matter coming under minorities rights under Article 30?

Q4. Whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated?

Q5(a). Whether the minority's rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?"

23. Mr. Salve submitted that the answer given by the Eleven-Judge Bench to the first Question is that Article 30(1) re-emphasises the right of religious and linguistic minorities to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

24. The answer to the second Question is that, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards, admission of students to unaided minority educational institutions cannot be regulated

by the State or University concerned. Mr. Salve pointed out that a note of caution was, however, introduced and it was observed that the right to administer, not being an absolute right, there could be regulatory measures for ensuring proper educational standards and maintaining the excellence thereof, particularly in regard to admissions to professional institutions. It was further held that a minority institution does not cease to be so, when it receives grant-in-aid and it would, therefore, be entitled to have a right to admit students belonging to the minority group, but at the same time it would be required to admit a reasonable number of non-minority students so that rights under Article 30(1) were not substantially impaired and the rights of a citizen under Article 29(2) of the Constitution were not infringed. However, the concerned State Governments would have to notify the percentage of non-minority students to be admitted in the institution. Amongst students to be admitted from the minority group, inter se merit would have to be ensured and, in the case of aided professional institutions, it could also be submitted that in regard to the seats relating to non-minority students, admission should normally be on the basis of the common entrance test held by the State agency, followed by counselling wherever it exists.

25. In reply to the third Question, it was held that a minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure would have to be fair and transparent and the selection of students in professional and higher educational colleges should be on the basis of merit. The procedure selected for admission by the minority institution ought not to ignore the merit of students for admission while exercising the right to admit students by the colleges aforesaid, as in that event, the institution will fail to achieve excellence. The said procedure should not amount to maladministration.

26. Some of the issues decided in the T.M.A. Pai Foundation case came up for clarification in the *Islamic*

Academy of Education case (supra) and for further interpretation in *P.A. Inamdar's* case (supra), before a Bench of Seven-Judges, wherein the Petitioner-Association was duly represented. The Hon'ble Judges reiterated the views expressed in the *T.M.A. Pai Foundation* case that there cannot be any reservation in private unaided institutions, which had the right to have their own admission process, if the same was fair, transparent, non-exploitative and based on merit. Mr. Salve referred to paragraph 125 of the judgment in *P.A. Inamdar's* case (supra), which is relevant for our purpose, and reads as follows:

> "125. As per our understanding, neither in the judgment of *Pai Foundation* [(2002) 8 SCC 481] nor in the Constitution Bench decision in *Kerala Education Bill* [1959 SCR 995] which was approved by Pai Foundation, is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation [(2002) 8 SCC 481]. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution of India. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions

> available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit."

27. Mr. Salve submitted that after this decision, the Petitioner Institution continued to admit students to its various graduate and post-graduate courses by following its own admission procedure, as it had been doing for the last several decades. Mr. Salve submitted that the Committee set up by the Government of Tamil Nadu has permitted the Institution to follow its own admission procedure for undergraduate M.B.B.S. course for the academic year 2012-2013.

28. While matters were thus poised, the Medical Council of India framed the impugned amended Regulations, which, according to Mr. Salve, not only violated the fundamental rights guaranteed under Articles 25, 26 and 30 of the Constitution to minority run institutions, but if implemented, would destroy the very objective with which the hospital had been set up in response to Christ's mission of healing the sick. Mr. Salve submitted that the impugned Notifications were inconsistent with the law laid down by the Supreme Court in its various decisions dealing with the rights of unaided, non-capitation fee minority institutions to admit students of their choice.

29. Mr. Salve submitted that right from the decision in *Unni Krishnan's* case (supra), when the State Government first sought to interfere with the admission process adopted by the Petitioner Institution, this Court has, by virtue of different interim and final orders, held that there could be no reservation of seats in institutions like the ones run by the Petitioner, which are wholly unaided and have always been permitted to admit students of their choice, in keeping with their status as minority unaided professional institutions. It was urged that Clause 9(vi) of the Post-Graduate Notification, which provides for reservation, is ultra vires the provisions of Article 30(1) of the

Constitution. Furthermore, when the State Government tried to reserve 50% of the seats in the Under-graduate courses, this Court granted a stay which continues to be operative.

30. Mr. Salve submitted that the question of reservation of seats in minority institutions, which has been introduced by the impugned amendments, both in respect of the Under-graduate and the Post-Graduate courses, does violence to the rights conferred on minorities under Article 30(1) of the Constitution of India, as interpreted by this Court in various judgments starting from 1957 till 2002, when the question was finally decided by an Eleven-Judge Bench in the *T.M.A. Pai Foundation* case (supra). Even the reservation created for NRIs in *Unni Krishnan's* case (supra) case was declared to be ultra vires the Constitution of India.

31. It was urged that in a recent decision of this Court in the *Indian Medical Association* case (supra), it has, inter alia, been held that the level of regulation that the State could impose under Article 19(6) on the freedoms enjoyed pursuant to Sub-Clause (g) of Clause (1) of Article 19 by non-minority educational institutions, would be greater than what could be imposed on minority institutions under Article 30(1) thereof, which continued to maintain their minority status by admitting students mostly belonging to the minority community to which the minority institutions claim to belong, except for a sprinkling of non-minority students, an expression which has been used in *P.A. Inamdar's* case and earlier cases as well. Mr. Salve contended that the Petitioner Institution, from its very inception reserved up to 85% of its seats in the Under-graduate courses and 50% of the Post-Graduate seats for Christian students exclusively. In the remaining 15% of the seats in the Under-graduate courses, reservations have been made for Scheduled Castes and Scheduled Tribes candidates.

32. Mr. Salve contended that the impugned Notifications and the amendments to the MCI Regulations sought to be introduced thereby are contrary to the judgments delivered by

the Constitution Bench. Learned counsel submitted that till the amendments were introduced, the concerned institutions had been conducting their own All India Entrance Tests for admission to the MBBS and Post-Graduate medical courses. Mr. Salve urged that there has been no complaint of maladministration as far as the institutions run by the Petitioner Association are concerned.

33. It was further submitted that all the Petitioners in this batch of cases are either religious minority educational institutions or linguistic minority institutions; non-minority self-financing colleges, self-financing "Deemed to be Universities" under Section 3 of the University Grants Commission Act and the State Governments which run State medical colleges. However, it is the Christian Medical College, Vellore, which is among the very few institutions that fall in the first category. The learned counsel urged that without demur, the Christian Medical College, Vellore, has been consistently rated among the top ten medical colleges in the country and usually ranked first or second. The excellence of patient care and academic training has been recognised, both at the national and international levels, and its contribution to health research has also been recognised as pioneering work by both national and international research funding agencies. Mr. Salve submitted that a part of the teachings of Jesus Christ, as documented in the Gospels, which form part of the New Testament, was to reach out to and to heal the sick, which command has been institutionalised by the Petitioner ever since it was established as a one-bed mission clinic-cum-hospital in 1900. Mr. Salve submitted that the activities of the Petitioner Institution clearly attract the provisions of Article 25 of the Constitution and through the Christian Medical College, Vellore, its activities are designed to achieve the avowed objective of providing human resources for the healing ministry of the Church. The activity of running medical courses and allied health sciences and nursing courses, in order to ensure constant supply of doctors and other para-medical staff to those hospitals, engaged in the healing

of the sick, are acts performed by the Petitioner in furtherance of its religious faith and beliefs. It was submitted that in the decision of the Constitution Bench of Seven Hon'ble Judges in the case of *Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954 SCR 1005), this Court held that Article 25 of the Constitution, protects not only the freedom of religious opinion, but also acts done in pursuance of religious beliefs, as is clear from the expression "practice of religion".

34. Mr. Salve also referred to the decision in the case of *Ratilal Panachand Gandhi Vs. The State of Bombay & Others,* reported in 1954 SCR 1055, which was also a decision rendered by a Constitution Bench of this Court relying upon the decision in the *Shirur Mutt* case (supra), wherein similar sentiments were expressed. Various other decisions on the same issue were also referred to, which, however, need not detain us.

35. Mr. Salve further urged that the Petitioner Institution is still one of the largest tertiary care hospitals in the country, where patients come from all over India for expert treatment. The medical college combines both medical treatment and education which, besides being a religious activity, is also a charitable activity, thereby bringing it within the ambit of Article 26(a) and (b) of the Constitution. Mr. Salve submitted that, in fact, the said activities had been recognised by this Court in the *T.M.A. Pai Foundation* case (supra), wherein in paragraph 26, it was held as follows :-

> "26. The right to establish and maintain educational institutions may also be sourced to Article 26(a), which grants, in positive terms, the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognised head of charity. Therefore, religious denominations or sections thereof, which do not fall within the special categories carved out in Article 29(1) and 30(1), have the right to establish and maintain religious and educational institutions."

36. Today the Petitioner has in place a selection process for admission to its Under-graduate and Post-graduate courses, by which it seeks to select candidates imbibed in the spirit of Christ for the purpose of healing the sick and to dedicate their lives to serve the needy, both in the Petitioner Institution and also in far flung areas, where people have no ready access to medical care, through the Christian Mission Hospitals run by the members of the Petitioner Association. Mr. Salve submitted that the doctors, who are the product of the Petitioner Institution, are not only well-trained in medicine, but have also been imparted with values in the treatment of the sick and the needy in keeping with the teachings of Christ, who looked on everybody with compassion. Mr. Salve urged that the admission process has proved to be highly successful and effective, and in the case of *St. Stephen's College Vs. University of Delhi* [(1992) 1 SCC 558], this Court upheld the same as it was found to meet the objectives for which the Institution itself had been established, despite the fact that it was an aided minority institution. Mr. Salve pointed out that in paragraph 54 of the judgment, this Court had occasion to deal with the expression "management of the affairs of the institution" and it was held that this management must be free from control so that the founder or their nominees could mould the Institution as they thought fit and in accordance with the ideas of how the interests of the community in general and the institution in particular could be served.

37. As far as unaided, non-capitation fee, religious minority institutions are concerned, Mr. Salve submitted that so long as the admission procedure adopted is fair, transparent and non-exploitative and there is no complaint of maladministration, it would be grossly unjust and unconstitutional to interfere with the administration of such an institution, in complete violence of the

freedoms guaranteed under Articles 25, 26 and 30 of the Constitution. Mr. Salve submitted that if the National Eligibility-cum-Entrance Test was to be applied and followed in the case of minority institutions protected under Article 30 of the Constitution, it would result in complete denudation of the freedoms and rights guaranteed to such institutions under the Constitution, as it would run counter to the very principles on which admissions in such institutions are undertaken.

38. Mr. Salve submitted that neither Section 10A nor Section 19A of the 1956 Act, which were inserted in the principal Statute by amendment, contemplate that the MCI would itself be entitled to conduct entrance tests for admission into different medical colleges and hospitals in India. Learned counsel submitted that the main purpose of constituting the MCI was to ensure excellence in the field of medical education and for the said purpose, to regulate the standards of teaching and the infrastructure available for establishment of a new medical college or to introduce a new course of study in an existing college. What is made clear from Section 10A is that no new medical college could be established and recognised by the Central Government without the recommendation of the Medical Council of India. Such recognition would be dependent upon inspection and satisfaction that the proposed new medical college satisfied all the conditions stipulated by the Medical Council of India for starting a new medical college. Section 19A, which was inserted into the principal Act much before Section 10A, speaks of the minimum standards of medical education, other than post-graduate medical qualification, which the Medical Council of India may prescribe as being required for grant of recognition to medical institutions in India.

39. Mr. Salve urged that while Section 33 of the 1956 Act empowered the Council, with the previous sanction of the Central Government, to make Regulations to carry out the purposes of the Act and clause (l) empowered the Council to make Regulations with regard to the conduct of professional examinations, qualifications of examiners and the conditions of

admission to such examinations, the same did not empower the Council to actually conduct the examinations, which continues to be the prerogative of the institution concerned.

40. Mr. Salve submitted that in *State of A.P. Vs. Lavu Narendranath*[(1971) 1 SCC 607], this Court had considered the validity of a test held by the State Government for admission to medical colleges in the State of Andhra Pradesh and had held that although the Andhra University Act, 1926, prescribed the minimum qualification of passing HSC, PUC, ISC examinations for entry into a higher course of study, owing to the limited number of seats, the Government, which ran the medical colleges, had a right to select students out of the large number of candidates who had passed the entrance examination prescribed by it. It was also held that merely because the Government had supplemented the eligibility rules by a written test in the subjects with which the candidates were already familiar, there was nothing unfair in the test prescribed nor did it militate against the powers of the Parliament under Entry 66 of List I, which is not relatable to a screening test prescribed by the Government or by a University for selection of students out of a large number of students applying for admission to a particular course of study. This Court held that such a test necessarily partakes of the character of an eligibility test as also a screening test. Mr. Salve urged that in such a situation, minimum qualifying marks were necessary, but the said question has not been addressed at all in *Lavu Narendranath's* case (supra), since it did not arise in that case.

41. Mr. Salve submitted that the Petitioner Institution has been supplementing the primary duty enjoined on the State under Articles 21 and 47 of the Constitution in providing health care to the people in different parts of the country, including the rural and remote areas, through the several hospitals run by Christian Churches and organizations. Any interference with the manner in which these minority institutions are being administered, except where the standards of excellence are

compromised, would not only strike at the very reason for their existence, but would disturb the health care services being provided by them. Mr. Salve submitted that the MCI, which is a creature of Statute, cannot travel beyond the powers vested in it by the Statute and its attempt to regulate and control the manner in which admissions are to be undertaken in these institutions, by introducing a single entrance examination, goes against the very grain of the fundamental rights vested in the religious and linguistic minorities to establish and administer educational institutions of their choice and to impart their religious values therein, so long as the same was not against the peace and security of the State.

42. Mr. Salve urged that the amended provisions of the MCI Regulations as impugned, were liable to be struck down as being contrary to the provisions of Articles 25, 26 and 30 of the Constitution, read with Sections 10A and 19A of the Indian Medical Council Act, 1956.

43. Having heard Mr. Harish Salve on the rights claimed by religious minority medical institution enjoying the protection of Articles 25, 26, 29(1) and 30 of the Constitution, we may now turn to the submissions made by Mr. K. Parasaran, learned Senior Advocate, appearing on behalf of the Vinayaka Missions University, run by a linguistic minority, also enjoying the rights guaranteed under Article 19(1)(g) and the protection of Article 30 of the Constitution.

44. Mr. Parasaran began by reiterating Mr. Salve's submission that while minority institutions enjoyed the fundamental rights guaranteed to any other individual or institution under Article 19(1)(g) of the Constitution, in addition, linguistic minorities, like religious minorities, enjoy the special protection afforded under Article 30 of the Constitution. Mr. Parasaran submitted that just as in the case of religious minorities, linguistic minorities also have the right to establish and administer educational institutions of their choice, which included the right to admit students therein.

45. Mr. Parasaran submitted that the impugned Regulations are ultra vires, unconstitutional and violative of Article 19(1)(g) of the Constitution, not only in respect of institutions run by minorities, but also to all institutions covered by NEET. Mr. Parasaran submitted that if the Indian Medical Council Act, 1956, is to be understood to empower the MCI to nominate the students for admission, it would be invalid, since the said Act and the amendments to the Act, which are relevant for the present cases, were enacted before the 42nd Constitution Amendment, whereby Entry 11 was removed from List II of the Seventh Schedule and was relocated as Entry 25 in List III of the said Schedule, came into force on 3rd January, 1977.

46. Mr. Parasaran also urged that as was held by this Court in *Indian Express Newspapers Vs. Union of India* [(1985) 1 SCC 641], even if the Regulations are accepted to be subordinate legislation, the same were also open to challenge:

(a) on the ground on which plenary legislation is questioned.

(b) on the ground that it does not conform to the statute under which it is made.

(c) on the ground that it is contrary to some other statute as it should yield to plenary legislation, and/or

(d) that it is manifestly unreasonable.

47. Mr. Parasaran submitted that in *Deep Chand Vs. State of Uttar Pradesh and Others* [(1959) Suppl. 2 SCR 8] wherein the validity of certain provisions of the Uttar Pradesh Transport Service (Development) Act, 1955, came to be considered on the passing of the Motor Vehicles (Amendment) Act, 1956, the majority view was that the entire Act did not become wholly void under Article 254(1) of the Constitution, but continued to be valid in so far as it supported the Scheme

already framed under the U.P. Act.

48. Mr. Parasaran contended that a standard must have general application and inter se merit does not relate to standards, but is a comparison of an assessment of merit among the eligible candidates.

49. Mr. Parasaran submitted that the legislative power under Entry 11 of List II stood transferred to List III only by virtue of the Forty-second Amendment with effect from 3rd January, 1977 and the power so acquired by virtue of the amendment, could not validate an Act enacted before the acquisition of such power. Mr. Parasaran urged that while the Indian Medical Council Act was enacted in 1956, Section 19A on which great reliance was placed by Mr. Nidhesh Gupta, learned Advocate appearing for the MCI, was brought into the Statute Book on 16th June, 1964. Consequently the 1956 Act, as also the Regulations, are ultra vires, except to the extent covered by Entry 66 of List I, which is confined to "co-ordination and determination of standards".

50. Referring to the decision of this Court in *State of Orissa Vs. M.A. Tulloch & Co.* [(1964) 4 SCR 461], Mr. Parasaran contended that as the State's powers of legislation are subject to Parliamentary legislation under Entry 66 of List I, when Parliament legislates, to that extent alone the State is denuded of its legislative power. A denudation of the power of the State legislature can be effected only by a plenary legislation and not by subordinate legislation. The Regulations, which are not plenary in character, but have the effect of denuding the power of the State legislature, are, therefore, ultra vires.

51. Another interesting submission urged by Mr. Parasaran was that the principle of "Rag Bag" legislation, as was explained by this Court in *Ujagar Prints etc. Vs. Union of India* [(1989) 3 SCC 488], cannot be invoked by combining the Entries in List I and List III in cases where the field of legislation in List III is expressly made subject to an Entry in List I. In such

cases, while enacting a legislation on a subject in List III, Parliament is also subject to the Entry in List I in the same way as the State legislature, as the field of legislation in the Concurrent List is the same as far as the Parliament and the State legislatures for admission of students to professional courses, are concerned. Mr. Parasaran urged that the decision in *Preeti Srivastava's* case (supra) has to be interpreted harmoniously with the decision in *M.A. Tulloch's* case (supra), *Ishwari Khetan Vs. State of U.P.* [(1980) 4 SCC 136] and *Deep Chand's* case (supra), as otherwise the findings in *Preeti Srivastava's* case (supra) would be rendered per incuriam for not taking note of the fact that the power of Parliament under Entry 25 of List III was an after acquired power. Mr. Parasaran emphasised the fact that the reasoning in *Preeti Srivastava's* case (supra) related only to the question of the State's power to prescribe different admission criteria to the Post-graduate courses in Engineering and medicine and cannot be held to govern the admission of students to the said courses. Learned counsel submitted that the decision in *Preeti Srivastava's* case (supra) has to be confined only to eligibility standards for admission and not to issues relating to admission itself. Mr. Parasaran also pointed out that in *Preeti Srivastava's* case (supra), the decision in *Deep Chand's* case (supra) had not been considered and the fact that Parliament had no power to legislate with regard to matters which were then in Entry 11 of List II had been overlooked. The Court, therefore, erroneously proceeded on the basis of the powers given to Parliament by virtue of Entry 25 of List III by the Forty-second Amendment. Mr. Parasaran urged that to the extent it is inconsistent with the decision in the *T.M.A. Pai Foundation* case (supra), as to the right of admission by private institutions, the decision in *Preeti Srivastava's* case (supra) will have to yield to the principles laid down by the larger Bench in the *T.M.A. Pai Foundation* case (supra). Mr. Parasaran submitted that the effect of the impugned Regulations in the context of the prevailing law is that private institutions may establish educational institutions at huge costs and provide for teaching and lectures, but without

any right, power or discretion to run the college, even to the extent of admitting students therein. Mr. Parasaran contended that by the introduction of NEET the States and Universities in States stand completely deprived of the right to deal with admissions, which has the effect of destroying the federal structure of the Constitution.

52. Mr. Parasaran urged that the executive power of the State, which is co-extensive with the legislative power with regard to matters in the Concurrent List, cannot be taken away except as expressly provided by the Constitution or by any law made by Parliament. It was urged that the power of subordinate legislation or statutory power conferred by a Parliamentary legislation cannot be exercised to take away the legislative power of the State legislature, which could only be done by plenary legislation under Article 73 of the Constitution. Mr. Parasaran submitted that the impugned Regulations, not being plenary legislation, are unconstitutional and ultra vires the Constitution.

53. Mr. Parasaran submitted that the impugned Regulations provide that if sufficient number of candidates in the respective categories fail to secure minimum marks as prescribed in NEET, held both for Post-graduate and graduate courses, the Central Government, in consultation with the Medical Council of India, may at its discretion lower the minimum marks for admission, which itself indicates that the Regulations are concerned not with determination of standards, but with admissions.

54. Mr. Parasaran further submitted that the Scheme framed in *Unni Krishnan's* case (supra) completely excluded the discretion of the institution to admit students and the same was, therefore, overruled in the *T.M.A. Pai Foundation* case as having the effect of nationalising education in respect of important features viz. right of a private unaided institution to give admission and to fix the fees. Mr. Parasaran submitted that the impugned Regulations suffer from the same vice of a

complete take-over of the process of admission, which rendered the impugned Regulations unconstitutional.

55. Mr. Parasaran further urged that minorities, whether based on religion or language, also have a fundamental right under Article 19(1)(g), like any other citizen, to practise any profession, or to carry on any occupation, trade or business in the interest of the general public, but subject to reasonable restrictions that may be imposed by the State on the exercise of such rights. In addition, minorities have the right guaranteed under Article 30 to establish and administer educational institutions of their choice. Considering the right of both minority and non-minority citizens to establish and administer educational institutions, this Court had in the *T.M.A. Pai Foundation* case (supra) held that the said right includes the right to admit students and to nominate students for admission and even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the said purpose, must be left with the educational institutions concerned. Mr. Parasaran submitted that in the *T.M.A. Pai Foundation* case (supra), this Court, inter alia, observed that the fixing of a rigid fee structure, compulsory nomination of teachers and staff for appointment or nominating students for admission would be unreasonable restrictions.

56. Mr. Parasaran also urged that the right of minority institutions under Article 30 is in the national interest and as indicated in the decision in *Unni Krishnan's* case (supra), the hard reality that emerges is that private educational institutions are a necessity in the present-day circumstances. It is not possible today without them because the Governments are in no position to meet the demand, particularly in the sectors of medical and technical education, which call for substantial investments and expenses. Mr. Parasaran submitted that the impugned Regulations were not in the national interest and would only discourage good private institutions being established by people dedicated to the cause of providing

health care to all sections of the citizens of this country and, in particular, the marginalized sections in the metropolitan and rural areas.

57. Mr. Parasaran then urged that 50% of the total seats available, as per Clause VI of the Post-Graduate Medical Education Regulations, were to be filled up by the State Governments or the Authorities appointed by them. The remaining 50% seats are to be filled up by the concerned medical colleges and institutions on the basis of the merit list prepared according to the marks obtained in NEET. Mr. Parasaran submitted that there is a similar provision in the 1997 Regulations applicable to the Graduate M.B.B.S. course. Noticing the same, this Court in *P.A. Inamdar's* case (supra) categorically indicated that nowhere in the *T.M.A. Pai Foundation* case (supra), either in the majority or in the minority views, could any justification be found for imposing seat sharing quota by the State on unaided private professional educational institutions. Clarifying the position this Court observed that fixation of percentage of quota are to be read and understood as consensual arrangements which may be reached between unaided private professional institutions and the State. Mr. Parasaran urged that the Regulations providing for a quota of 50% are, therefore, invalid.

58. Mr. Parasaran urged that in *P.A. Inamdar's* case (supra), this Court had held that private institutions could follow an admission procedure if the same satisfied the triple test of being fair, transparent and non-exploitative. It is only when an institution failed the triple test, could the State interfere and substitute its own fair and transparent procedure, but the same cannot become a procedure by destroying the very right of the private institutions to hold their own test in the first instance. Mr. Parasaran urged that the purpose of a common entrance test is to compute the equivalence between different kinds of qualifications and to ensure that those seeking entry into a medical institute did not have to appear for multiple tests, but

it could not justify the extinguishing of the right to admit and to reject candidates on a fair, transparent and non-exploitative basis from out of the eligible candidates under NEET. Mr. Parasaran reiterated that ultimately it is the institutions which must have the right to decide the admission of candidates.

59. Mr. Parasaran submitted that in *Pradeep Jain Vs. Union of India* [(1984) 3 SCC 654], this Court has held that university-wise distribution of seats is valid. The learned Judges fully considered the mandate of equality and pointed out the need to take into account different considerations relating to differing levels of social, economic and educational development of different regions, disparity in the number of seats available in different States and the difficulties that may be faced by students from one region, if they get a seat in another region. This Court held that an All India Entrance Examination would only create a mirage of equality of opportunity and would, in reality, deprive large sections of underprivileged students from pursuing higher education. Though attractive at first blush, an All India Entrance Examination would actually be detrimental to the interests of the students hoping for admission to the M.B.B.S. and Post-graduate courses.

60. Mr. Parasaran submitted that since all judgments on the subject were by Benches which were of lesser strength as compared to the *T.M.A. Pai Foundation* case (supra), all other decisions of this Court, both before and after the decision in the *T.M.A. Pai Foundation* case (supra), would, therefore, have to be read harmoniously with the principles enunciated in the *T.M.A. Pai Foundation* case (supra). In case some of the cases cannot be harmoniously read, then the principles laid down in the *T.M.A. Pai Foundation* case (supra) will have primacy and will have to be followed. Mr. Parasaran submitted that the observations as to standard and merit in *Preeti Srivsatava's* case (supra) and in *P.A. Inamdar's* case (supra), have to be understood as conforming to the decision in the

T.M.A. Pai Foundation case (supra). Mr. Parasaran submitted that the flourish of language in the judgments of Benches of lesser strength cannot be read so as to dilute the ratio of the decision of Benches of larger strength. Mr. Parasaran urged that consequently the right to admit students by unaided private institutions, both aided and unaided minority institutions, as part of their right to administer the institution, as guaranteed under Articles 19(1)(g), 25, 26, 29(1) and 30 of the Constitution, cannot be taken away even by way of plenary jurisdiction, which the impugned Regulations are not.

61. Mr. Parasaran submitted that in the case of aided non-minority institutions, the State may by Regulation provide for a larger role for the State in relation to matters of admission. Mr. Parasaran urged that the impugned Regulations being only regulatory in character, they cannot destroy the right itself.

62. Dr. Rajiv Dhawan, learned senior counsel, who appeared on behalf of Yenepoya University in Transferred Case Nos. 135-137 of 2012 and also for the Karnataka Religious and Linguistic Minority Professional Colleges Association in Transferred Case Nos. 121-122 of 2012, submitted that although the issues involved in the said cases have already been argued in extenso by Mr. Salve and Mr. Parasaran, as part of the main issue, it has to be decided whether NEET violates the fundamental right guaranteed to minorities, both religious and linguistic, to impart medical education, as explained in the *T.M.A. Pai Foundation* case (supra) and other subsequent decisions and even if found to be intra vires, is it manifestly unjust and arbitrary? It was further urged that it would also have to be decided whether the doctrine of severability, reading down and proportionality, could be effected to the impugned Regulations.

63. Dr. Dhawan urged that the *T.M.A. Pai Foundation* case (supra) resolved several issues where there was still some doubt on account of decisions rendered in different cases. Dr. Dhawan urged that it was held that the decision in

the *Unni Krishnan's* case (supra) was wrong to the extent that "free seats" were to go to the privileged and that education was being nationalised which took over the autonomy of institutions. It was also observed that the expanding needs of education entailed a combined use of resources both of the Government and the private sector, since the imparting of education was too large a portfolio for the Government alone to manage.

64. Dr. Dhawan urged that the other issue of importance, which was also decided, was the right of autonomy of institutions which were protected under Article 30 of the Constitution, which, inter alia, included the right to admit students.

It was also settled that unaided institutions were to have maximum autonomy while aided institutions were to have a lesser autonomy, but not to be treated as "departmentally run by government".

65. Dr. Dhawan submitted that the decision in the *T.M.A. Pai Foundation* case (supra) also settled the issue that affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition. Learned Senior Counsel submitted that surrendering the total process of selection to the State was unreasonable, as was sought to be done in the Scheme formulated in *Unni Krishnan's* case (supra). The said trend of the decisions was sought to be corrected in the *T.M.A. Pai Foundation* case (supra) where it was categorically held that minority institutions had the right to "mould the institution as they think fit", bearing in mind that "minority institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have a right to choose and select the students who can be admitted in their course of study." It is for this reason that in the *St. Stephen's College* case (supra), this Court upheld the Scheme whereby a cut-off percentage was fixed for admission after which the students were interviewed and, thereafter,

selected. It was also laid down that while the educational institutions cannot grant admission on its whims and fancies and must follow some identifiable or reasonable methodology of admitting students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/ modalities can always be prescribed for holding the entrance test in a fair and transparent manner.

66. Again in paragraphs 158 and 159 of the judgment in the *T.M.A. Pai Foundation* case (supra), it has been very picturesquely expressed that India is a kaleidoscope of different peoples of different cultures and that all pieces of mosaic had to be in harmony in order to give a whole picture of India which would otherwise be scarred. Their Lordships very poetically indicated that each piece, like a citizen of India, plays an important part in the making of the whole. The variations of the colours as well as different shades of the same colour in a map are the result of these small pieces of different shades and colours or marble, but even when one small piece of marble is removed, the whole map would be disfigured, and the beauty of the mosaic would be lost.

67. Referring to the separate decision rendered by Ruma Pal, J., in the *T.M.A. Pai Foundation* case (supra), Dr. Dhawan submitted that the learned Judge had also artistically distinguished Indian secularism from American secularism by calling Indian secularism "a salad bowl" and not a "melting pot".

68. Dr. Dhawan urged that a combined reading of the decision in *Islamic Academy's* case (supra) and *P.A. Inamdar's* case (supra) suggests that (i) no unaided institutions can be compelled to accept reservations made by the State, except by voluntary agreement; and (ii) the right to (a) admit and select students of their choice by pursuing individual or

associational tests and (b) fix fees on a non-profit basis is a right available to all educational institutions, but the admissions were to be made on a fair, transparent and non exploitative method, based on merit.

69. On Article 15(5) of the Constitution, Dr. Dhawan contended that the same was included in the Constitution by the Constitution (93rd Amendment) Act, with the object of over turning the decision in *P.A. Inamdar's* case (supra) on voluntary reservations. Dr. Dhawan submitted that the said provision would make it clear that the State reservations do not apply to "minority institutions" enjoying the protection of Article 30 and it is on such basis that in the *Society for Unaided Private Schools of Rajasthan Vs. Union of India* [(2012) 6 SCC 1], this Court held that a minority institution could not be forced to accept the statutory reservation also. Dr. Dhawan urged that the impact of the *T.M.A. Pai Foundation* case (supra) and subsequent decisions is that all institutions, and especially minority institutions, have the constitutional right to select and admit students of their choice and conduct their own tests, subject to minimum standards which could be enhanced but not lowered by the States.

70. Dr. Dhawan also referred to the issue of equivalence between various Boards and uniformity and convenience. Learned counsel submitted that the distinction was recognized in the case of *Rajan Purohit Vs. Rajasthan University of Health Sciences* [(2012) 10 SCC 770], wherein it was observed that the problem of equivalence could be resolved by the college or group of colleges, either by finding a method of equivalence to reconcile difference of standards between various Boards, or by the college or group of colleges evolving a Common Entrance Test to overcome the problem of equivalence. Dr. Dhawan submitted that the said issue had been addressed in the *T.M.A. Pai Foundation* (supra), which continues to hold the field in respect of common issues. Dr. Dhawan urged that consistent with the views expressed in the

T.M.A. Pai Foundation case (supra) and the importance of autonomy and voluntarism, the same could not be impinged upon by nationalizing the process of admission itself for both the purposes of eligibility and selection, unless a college failed to abide by the triple requirements laid down in *P.A. Inamdar's* case (supra).

71. In regard to the decision in *Lavu Narendranath's* case (supra), which had been relied upon by Mr. K. Parasaran, Dr. Dhawan contended that the same was based upon the understanding that Entry 66 of List I had no relation with tests for screening and selecting students prescribed by the States or Universities for admission, but only to coordinate standards. The scope of the said Entry did not deal with the method of admission, which was within the constitutional powers of the State and the Universities. Dr. Dhawan submitted that the decision rendered in *Preeti Srivastava's* case (supra) also expressed similar views regarding laying down of standards for admission into the Post-graduate medical courses, which meant that government and universities had exclusive control over admission tests and the criteria of selection in higher education, subject to minimum standards laid down by the Union, unless Union legislation, relatable to Entry 25 of List III, was passed to override the States' endeavours in this regard.

72. Dr. Dhawan contended that the demarcation sought to be made in *Lavu Narendranath's* case (supra) found favour in subsequent cases, such as in the case of *State of M.P. Vs. Nivedita Jain* [(1981) 4 SCC 296], wherein a Bench of Three Judges took the view that Entry 66 of List I of the Seventh Schedule to the Constitution relates to "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions". The said sentiments were reiterated by this Court in *Ajay Kumar Singh Vs. State of Bihar* [(1994) 4 SCC 401]. However, in *Preeti Srivastava's* case (supra), the Constitution Bench overruled the decision in the said two cases. But, as urged by Dr. Dhawan,

by holding that Entry 66 of List I was not relatable to a screening test prescribed by the Government or by a University for selection of students from out of a large number for admission to any particular course of study, the Constitution Bench also accepted that the powers of the MCI under List I, Entry 66, did not extend to selection of students. Dr. Dhawan urged that although Preeti Srivastava's case (supra) had been confined to its facts, it went beyond the same on account of interpretation of the scope of List I, Entry 66 and extending the same to the admission process, simply because admission also related to standards and upon holding that the Union Parliament also had the power to legislate for the MCI in the matter of admission criteria under Entry 25, List III.

Dr. Dhawan submitted that the two aforesaid issues had the potentiality of denuding the States and the private institutions, including minority institutions enjoying the protection of Article 30, of their powers over the admission process and in the bargain upset the Federal balance.

73. The validity of the impugned Regulations was also questioned by Dr. Dhawan on the ground that Sections 19A and 20 of the 1956 Act authorises the MCI to prescribe the minimum standards of medical education required for granting recognised medical qualifications in India, but copies of the draft regulations and of all subsequent amendments thereof are required to be furnished by the Council to all State Governments and the Council, before submitting the Regulations or any amendment thereto to the Central Government for sanction, is required to take into consideration the comments of any State Government received within three months from the furnishing of copies of the said Regulations. Dr. Dhawan submitted that such consultation was never undertaken by the MCI before the Regulations were amended, which has rendered the said Regulations invalid and by virtue of the decisions rendered in *Lavu Narendranath's* case (supra) and *Preeti Srivastava's* case (supra), they cannot be reinstated by virtue of Entry 25 List III.

74. Dr. Dhawan urged that while the power of the MCI to frame Regulations is under Section 33 of the 1956 Act, the role of the MCI is limited to that of a recommending or a consulting body to provide standards which are required to be maintained for the purpose of running the medical institution, and would not include admission of students to the Under-graduate and the Post-graduate courses. Dr. Dhawan urged that the said powers could not have been extended to controlling admissions in the medical colleges and medical institutions run by the State and private authorities. Dr. Dhawan submitted that as was held by this Court in *State of Karnataka Vs. H. Ganesh Kamath* [(1983) 2 SCC 402], "It is a well-settled principle of interpretation of statutes that the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto." While accepting that delegated legislation is necessary, Dr. Dhawan urged that it must remain within the contours of the rule or regulation-making power and the purpose for which it is given, as was held by this Court in *St. John's Teachers Training Institute Vs. Regional Director, National Council for Teacher Education* [(2003) 3 SCC 321].

75. Dr. Dhawan also questioned the vires of the amended provisions of the MCI Rules on the ground of unreasonableness and arbitrariness and urged that in both cases the Court would be justified in invoking the doctrine of proportionality, as was observed by this Court in *Om Prakash Vs. State of U.P.* [(2004) 3 SCC 402]. Dr. Dhawan submitted that the only way in which the impugned Regulations could possibly be saved is by reading them down to bring them in conformity with the constitutional legislation and the law laid down by the Supreme Court.

76. Dr. Dhawan urged that admission of students in all the medical institutions in India on the basis of a single eligibility-cum-entrance examination, was not only beyond the scope of

the powers vested in the Medical Council of India to make Regulations under Section 33 of the 1956 Act, but the same were also arbitrary and unreasonable, not having been framed in consultation with the States and without obtaining their response in respect thereof. More over, the same runs counter to the decision of this Court in the *T.M.A. Pai Foundation* case (supra) making it clear that the MCI was only a regulatory and/or advisory body having the power to lay down the standards in the curricula, but not to interfere with the process of admission, which would be the obvious fall-out of a single NEET conducted by the MCI. Dr. Dhawan concluded on the note that uniformity for its own sake is of little use when the end result does not achieve the objects for which the Regulations have been introduced.

77. Appearing for Sri Ramachandra University in Transferred Case Nos.1 & 3 of 2013, Mr. Ajit Kumar Sinha, learned Senior Advocate, questioned the vires of the impugned regulations more or less on the same grounds as canvassed by Mr. Salve, Mr. K. Parasaran and Dr. Dhawan. Mr. Sinha also reiterated the fact that in *Preeti Srivastava's* case (supra), this Court did not notice the decision in *Deep Chand's* case (supra) and overlooked the fact that Parliament had no power to legislate with regard to matters which were then in Entry 11 of List II of the Seventh Schedule. Mr. Sinha submitted that the decision in Preeti Srivastava's case (supra) must, therefore, be held to be per incuriam.

78. Mr. Sinha urged that neither Section 19A nor Section 2(h) contemplates the holding of a pre-medical entrance test for admission into all medical institutions in the country, irrespective of who had established such institutions and were administering the same. Mr. Sinha urged that the impugned Regulations were liable to be struck down on such ground as well, as it sought to unlawfully curtail the powers of the persons running such medical institutions in the country.

79. Mr. P.P. Rao, learned Senior Advocate, who initially

appeared for the State of Andhra Pradesh in Transferred Case No.102 of 2012, submitted that as far as the State of Andhra Pradesh is concerned, admission into educational institutions was governed by a Presidential Order dated 10th May, 1979, issued under Article 371D of the Constitution, inter alia, providing for minimum educational qualifications and conditions of eligibility for admission to the MBBS, B.Sc. Course, etc. Mr. Rao submitted that being a special provision it prevails in the State of Andhra Pradesh over other similar legislations.

80. Subsequently, Mr. L. Nageshwara Rao, learned Senior Advocate, appeared for the State of Andhra Pradesh in the said Transferred Case and also in Transferred Cases Nos.100 and 101 of 2012, 103 of 2012, Transfer Petition (C) Nos.1671 and 1645 of 2012 and Writ Petition (C) No.464 of 2012. In addition, Mr. Nageswara Rao also appeared for the State of Tamil Nadu in Transferred Case Nos.110 and 111 of 2012 and for the Tamil Nadu Deemed University Association in Transferred Cases Nos. 356 and 357 of 2012 and Writ Petition (C) No.27 of 2013.

81. Continuing from where Mr. P.P. Rao left off, Mr. Nageswara Rao submitted that in conformity with the aforesaid Presidential Order, the State of Andhra Pradesh enacted the A.P. Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, defining, inter alia, "local area", "local candidate", "educational institutions" and "relevant qualifying examinations". Mr. Rao pointed out that Section 5 of the Act provides for reservation in non-State- Wide Universities and Education Institutions in favour of local candidates while Section 6 provides for reservation in State-wide Universities and State-wide Educational Institutions for local candidates. Mr. Rao submitted that the impugned Notification of the Medical Council of India cannot be given effect to in view of the Presidential Order made under Article 371D of the Constitution and the 1983 Act enacted in pursuance of the said Order.

82. Mr. Rao submitted that if the Medical Council of India could or should hold a National Eligibility-cum-Entrance Test, it would have the effect of denuding the State and the educational institutions of their right to establish and administer educational institutions which enjoy the protection of Articles 19(1)(g), 25, 26 and 30 of the Constitution.

83. With regard to the State of Tamil Nadu and the Deemed University Association, Mr. Rao confined his submissions to Entry 25 of List III, in relation to Entry 66 of List I. Mr. Rao reiterated the submissions made earlier that the subject matter of Entry 66 of List I is for "coordination and determination of standards" in institutions for higher education and that the determination of standards also falls within Entry 25 of List III only when coordination and determination of standards are dealt together with the State enactment made subject to legislation under Entry 66 of List I. Mr. Rao submitted that the denudation of the legislative power of the State Legislature could only be by plenary legislation made under Entry 66 of List I read with Article 246 of the Constitution and not by subordinate legislation which renders the impugned regulations ultra vires the aforesaid provisions of the Constitution.

84. While dealing with the aforesaid questions, Mr. Rao also submitted that the Notification contemplates the conducting of a common entrance test for all the dental colleges throughout India, without considering the different streams of education prevalent in India such as CBSE, ICSE, State Boards, etc., prevailing in different States. The different standards of education prevalent in different States had not been taken into consideration and in such factual background, the holding of a Single Common Entrance Test for admission to the B.D.S. and the M.D.S. courses in all the dental colleges throughout India, would lead to violation of Article 14 of the Constitution, since there is no intelligible object sought to be achieved by such amended regulations.

85. Mr. Rao also questioned the provision made by the amendment dated 15th February, 2012, to the Notification dated 21st December, 2010, reserving admission to Post-graduate Diploma Courses for Medical Officers in the Government Service, who acquired 30% marks, as being wholly unrelated to merit in the entrance examination and, therefore, making such reservation arbitrary and irrational. Mr. Rao submitted that there is no rationale in giving this benefit only to whose who are serving in Government/public authorities with regard to service in remote/difficult areas. Mr. Rao urged that the Government of Tamil Nadu has consistently opposed the proposal to apply the National Eligibility-cum-Entrance Test to determine admission to different medical colleges and institutions. Mr. Rao submitted that when the Notification was first issued on 27th December, 2010, the Government of Tamil Nadu challenged the same by way of Writ Petition No. 342 of 2011 and in the said Writ Petition, the High Court stayed the operation of the Notification for UG NEET Entrance Examination in so far as it related to the State of Tamil Nadu, and the stay continues to be in force. Mr. Rao urged that in respect of Tamil Nadu there are many constitutional issues, as Tamil Nadu had abolished the Common Entrance Test based on the Tamil Nadu Admission in Professional Educational Institutions Act, 2006, which was given effect to after receiving the President's assent under Article 254(2) of the Constitution.

86. Mr. Rao submitted that the introduction of NEET by virtue of the amended Regulations would run counter to the policy of the State Government which has enacted the aforesaid Act by abolishing the practice of holding an All India Entrance Test for admission to the professional courses in the State. Mr. Rao submitted that the decision regarding admission to the Post-graduate Medical and Dental Examinations would be the same as that for admission in Under-graduate courses.

87. Mr. Rao contended that the MCI had no jurisdiction to issue the impugned Notifications as the Council lacks the

competence to amend the State Act which had been enacted in 2006 and the validity whereof has been upheld by the High Court. Mr. Rao repeated and reiterated the submissions earlier made with regard to the vires of the impugned Regulations and prayed for proper directions to be issued to allow the State of Tamil Nadu to continue its existing system of admission to both Under-graduate and Post-graduate courses.

88. Learned senior counsel, Mr. R. Venkataramani, appearing for the Government of Puducherry, in T.C. No. 17 of 2013, adopted the submissions made by Mr. Salve, Mr. Parasaran and Dr. Dhawan. Mr. Venkataramani submitted that the Notifications, whereby the impugned Regulations were sought to be introduced by the Medical Council of India, were beyond the scope of the powers conferred under Section 33 of the 1956 Act, rendering them ultra vires and invalid. Mr. Venkataramani submitted that the failure of the MCI to consult the Government of Puducherry, as was required under Sections 19A and 20 of the 1956 Act, before amending the Regulations and notifying the same, rendered the same invalid. Mr. Venkataramani also reiterated the submission made earlier that there are different streams of education prevailing in different States, having different syllabi, curriculum, Board of Examinations and awarding of marks and it would be unreasonable to conduct a single examination by taking recourse to a particular stream of education which would have the effect of depriving effective participation of other students educated in different streams.

89. Mr. Venkataramani submitted that this Court had consistently held that unaided educational institutions are free to devise their own admission procedures and that the impugned Regulations were against social justice and would impinge on the rights of unaided educational institutions as well as the institutions enjoying the protection of Article 30 of the Constitution in the Union Territory of Puducherry.

90. Appearing for the Karnataka Private Medical and

Dental Colleges' Association consisting of Minority and Non-Minority private unaided Medical Colleges and educational institutions in the State of Karnataka, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the Association had filed several Writ Petitions before the Karnataka High Court challenging the validity of the Notifications dated 21.12.2010 and 5.2.2012, by which the Medical Council of India has attempted to foist a Common Entrance Test (NEET) on all medical institutions in the country, which have been transferred to this Court for consideration along with other similar matters where the issues were common.

91. Mr. Venugopal reiterated that the imposition of NEET was contrary to the decisions of this Court in the *T.M.A. Pai Foundation* case (supra) and in *P.A. Inamdar's* case (supra). Mr. Venugopal contended that the right of the Members of the Association to carry on the business and vocation of imparting medical education had been upheld not only in the two aforesaid cases, but also in the *Islamic Academy of Education* case (supra) and in *T. Varghese George Vs. Kora K. George* [(2012) 1 SCC 369], *Society for Unaided Private Schools of Rajasthan* case (supra) and *Rajan Purohit's* case (supra).

Mr. Venugopal urged that the aforesaid right has been based on the fact that a non-minority professional college has the same fundamental right which is also possessed by a minority institution under Article 19(1)(g) of the Constitution, but is subject to reasonable restrictions under Article 19(6) of the Constitution.

92. Mr. Venugopal also voiced the issues common to all these cases as to whether it would be open to the Government or the MCI, a creature of the Indian Medical Council Act, 1956, to regulate the admission of students to all medical colleges and institutions. Mr. Venugopal urged that since the question had been troubling the Courts in the country for a considerable period of time, a Bench of Eleven (11) Judges was constituted to settle the above issues and other connected issues and to

put a quietus to the same. The said Bench heard a number of matters in which the issue had been raised and it delivered its verdict in what is referred to as the *T.M.A. Pai Foundation* case (supra), answering all the questions raised. Certain common issues contained in the judgment came up for consideration later and were subsequently referred to a Bench of Seven Judges in *P.A. Inamdar's* case (supra) where the issue was finally put to rest.

93. Mr. Venugopal firmly urged that in dealing with the issues raised in these matters, none of the decisions rendered by this Court in the past were required to be re-opened and the said issues will have to be considered and decided by this Court by merely testing their validity against the ratio of the earlier judgments, and, in particular, the decision in the *T.M.A. Pai Foundation* case (supra).

94. Mr. Venugopal's next submission was with regard to the provisions of the Karnataka Professional Educational Institutions (Regulation of Admission and Fixation of Fee) (Special Provisions) Act, 2011, hereinafter referred to as the "Karnataka Act of 2011", which provides for a consensual arrangement between the State Government and the Petitioner Association for filling up the seats in the unaided medical colleges being taken over by the State Government to the extent agreed upon between the parties. The said Act also regulates the fees to be charged in these private institutions. Mr. Venugopal urged that the said Act still holds the field, since its validity has not been challenged. As a result, the impugned Regulation, now made by the Medical Council of India, purportedly under Section 33 of the 1956 Act, cannot prevail over the State law. Mr. Venugopal submitted that the impugned Regulations are, therefore, of no effect in the State of Karnataka.

95. Mr. Venugopal also urged that having regard to the decision of this Court in the *T.M.A. Pai Foundation* case (supra) and the other decisions referred to hereinabove, the

impugned Notifications imposing NEET as a special vehicle for admission into medical colleges denuding the State and the private medical institutions from regulating their own procedure, must be held to be ultra vires Section 33 of the 1956 Act.

96. Mr. Venugopal reiterated the submissions made on behalf of the other Petitioners and concluded on the observations made in paragraph 3 of the decision of this Court in *State of Karnataka Vs. Dr. T.M.A. Pai Foundation & Ors.* [(2003) 6 SCC 790], which made it clear that all statutory enactments, orders, schemes, regulations would have to be brought in conformity with the decision of the Constitution Bench in the *T.M.A. Pai Foundation* case (supra), decided on 31.10.2002. Mr. Venugopal submitted that it, therefore, follows that the Regulations of 2000, 2010 and 2012, to the extent that they are inconsistent with the decision in the *T.M.A. Pai Foundation* case (supra), would be void and would have to be struck down.

97. Mr. G.S. Kannur, learned Advocate, who appeared in support of the application for intervention, being I.A. No.3, in Transferred Case No.3 of 2013, repeated the submissions made by Mr. K. Parasaran, Dr. Dhawan and Mr. L. Nageshwar Rao, that the existence of various Boards in a particular State is bound to cause inequality and discrimination if the Common Entrance Test was introduced as the only criteria for admission into any medical college or institution in the country.

98. Appearing for the Christian Medical College Ludhiana Society and the medical institutions being run by it, Mr. V. Giri, learned Senior Advocate, reiterated the submissions made by Mr. Harish Salve, on behalf of the Christian Medical College Vellore Association, but added a new dimension to the submissions made by submitting that the impugned Regulations had been issued by the Board of Governors, which had been in office pursuant to the supersession of the Medical Council, under Section 3A of the 1956 Act. Mr. Giri submitted that the Board of Governors, which was only an ad hoc body brought

into existence to exercise the powers and perform the functions of the Council under the Act pending its reconstitution, was not competent as an Ad hoc body to exercise the delegated legislative power under Section 33 of the said Act and to discharge the functions of the Medical Council, as contemplated under Section 3 of the 1956 Act.

99. Mr. Giri urged that though Section 33 of the 1956 Act confers power on the Medical Council of India to make Regulations generally for carrying out the purposes of the Act, it also enumerates the different functions of the Council and its powers and duties which are referable to the substantial provisions of the Act itself. Learned counsel pointed out that clause (l) deals with the conduct of professional examinations, qualification of examiners and conditions of admission to such examinations. Mr. Giri urged that Sections 16 to 18 of the above Act deals with the substantive power available to the Medical Council of India to require of every University or Medical Institution information as to the courses of study and examinations and if necessary, to take steps for inspecting the same. Accordingly, the Regulation-making power contemplated under Section 33 of the 1956 Act is referable to the substantive functions to be discharged by the Council under Sections 16 to 18 of the Act. Mr. Giri contended that no provision in the Act contemplates that the Council may actually conduct the examinations. Relying on the views expressed in the *T.M.A. Pai Foundation* case (supra), Mr. Giri urged that the impugned Regulations were in direct violation of the rights guaranteed to a minority educational institutions under Article 19(1)(g) read with Articles 25, 26, 29(1) and 30 of the Constitution.

100. Mr. Giri submitted that the Petitioner is a minority educational institution admitting students from the minority community in a fair, transparent and non-exploitative manner, based on inter se merit, and cannot be subjected to the NEET for the purposes of admission to the Under-graduate MBBS and Post-graduate degrees in medicine. Reemphasising Mr.

Salve's submissions, Mr. Giri submitted that the activity of running medical, allied health sciences and nursing courses, in order to ensure constant supply of doctors and other para-medical staff to the hospitals and other facilities engaged in the healing of the sick, are acts done in furtherance of the Petitioner's religious faith, which stand protected under Articles 25, 26 and 30 of the Constitution.

101. Mr. Giri submitted that the Government of Punjab, in its Department of Medical Education and Research, vide its Notification No. 5/7/07.3HBITI/2457 dated 21.05.2007, for admission to MBBS, BDS, BAMS and BHMS courses and vide Notification No. 5/8/2007-3HB3/1334 dated 21.03.2007, for admission in Post-graduate Degree/ Diploma courses in the State of Punjab, excluded the Christian Medical College and Christian Dental College, Ludhiana, from the admission process conducted by Baba Farid University of Health Sciences, Faridkot, on behalf of the State Government for various Under-graduate and Post-graduate Medical Degree courses. Mr. Giri submitted that the impugned Regulations, being ultra vires the provisions of Articles 19(1)(g) and Articles 25, 26, 29(1) and 30 of the Constitution, having been promulgated by an ad hoc body, were liable to be struck down.

102. Mr. K. Radhakrishnan, learned Senior Advocate, appeared for the Annoor Dental College and Hospital, situated in the State of Kerala, adopted the submissions made by the other counsel and urged that the submissions advanced, as far as medical colleges and institutions are concerned, apply equally to dental colleges, which are under the authority of the Dental Council of India and is governed by the Dentists Act, 1948. Mr. Radhakrishnan submitted that the impugned Regulations were also ultra vires the Dentists Act, 1948, Section 20 whereof empowers the Dental Council of India to prescribe conditions for admission to the courses for training of dentists and dental hygienists, but does not authorize the Dental Council of India or any agency appointed by it to conduct

admission tests for selection of students for the BDS and MDS courses. Mr. Radhakrishnan also urged that the impugned Regulations which attempted to enforce NEET, were ultra vires the provisions of the Dentists Act, 1948, as also the relevant provisions of the Constitution and are, therefore, liable to be struck down.

103. Transferred Case No.8 of 2013 which arises out of Writ Petition No.5939 (M/S) of 2012, was filed by the U.P. Unaided Medical Colleges Welfare Association and Others. Appearing for the said Association, Mr. Guru Krishnakumar, learned Senior Advocate, while adopting the submissions already made, reiterated that the functional autonomy of institutes is an integral right under Article 19(1)(g) of the Constitution, as clearly set out in the decision rendered in the *T.M.A. Pai Foundation* case (supra). Learned Senior counsel submitted that the fundamental right guaranteed under Article 19(1)(g) includes the right to admit students in the privately run professional colleges, including medical, dental and engineering colleges, and viewed from any angle, the impugned Regulations were impracticable, besides causing violence to Article 19(1)(g) of the Constitution. Mr. Guru Krishnakumar submitted that the impugned Regulations and the Notifications promulgating the same, were liable to be struck down.

104. Mr. C.S.N. Mohan Rao, learned Advocate, who appeared for the Writ Petitioner, Vigyan Bharti Charitable Trust in Writ Petition (C) No.15 of 2013, submitted that the Petitioner was a registered charitable trust running two medical colleges and a dental college in the State of Odisha. The various submissions made by Mr. Rao were a repetition of the submissions already made by Mr. Harish Salve and others. Mr. Rao, however, referred to a Two-Judge Bench decision of this Court in *Dr. Dinesh Kumar Vs. Motilal Nehru Medical Colleges, Allahabad & Ors.* [(1985) 3 SCC 727], wherein, while considering the question of admission to medical colleges and

the All India Entrance Examination, it was, inter alia, held that it should be left to the different States to either adopt or reject the National Eligibility Entrance Test proposed to be conducted by the Medical Council of India. Mr. Rao submitted that as stated by Justice V. Krishna Iyer in the case of *Jagdish Sharan & Ors. Vs. Union of India & Ors.* [(1980) 2 SCC 768], merit cannot be measured in terms of marks alone, but human sympathies are equally important. The heart is as much a factor as the head in assessing the social value of a member of the medical profession.

105. In Writ Petition (Civil) No.535 of 2012, Saveetha Institute of Medical and Technical Sciences, a Deemed University, declared as such under Section 3 of the University Grants Commission Act, 1956, has questioned the impugned Notifications and the amended Clauses of the MCI Regulations on the same grounds as in the earlier cases. Mr. Jayanth Muth Raj, learned Advocate appearing for the Petitioner, repeated and reiterated the submissions made earlier in regard to the law as laid down in the *T.M.A. Pai Foundation* case (supra) and in *P.A. Inamdar's* case (supra) and urged that the impugned Notifications had been issued in violation of the decisions rendered in the said two cases and in other subsequent cases indicating that private institutions had the right to evaluate their admission procedure based on principles of fairness, transparency and non-exploitation. Mr. Muth Raj submitted that in the absence of any consensual arrangement in the case of the Petitioner, the MCI or the Dental Council of India could not compel the Petitioner to accept the National Eligibility-cum-Entrance Test on the basis of the impugned Regulations. Learned counsel submitted that to that extent, the impugned amended Regulations and the Notifications issued to enforce the same were ultra vires Articles 14, 19(1)(g) and 26 of the Constitution and were liable to be struck down.

106. Writ Petition (Civil) No.495 of 2012 and Transfered Case No.108 of 2012 involve common questions regarding the

conducting of NEET in English and Hindi in the State of Gujarat, where the medium of instructions under the Gujarat Board of Secondary Education is Gujarati. The submissions made both on the behalf of the Petitioners and the State of Gujarat were ad idem to the extent that Entry 66 of List I restricts the legislative powers of the Central Government to "co-ordination and determination of standards of education". Thus, as long as the Common Entrance Examination held by the State or the other private institutions did not impinge upon the standards laid down by Parliament, it is the State which can, in terms of Entry 25 of List III, prescribe such a Common Entrance Test in the absence of any Central Legislation relatable to Entry 25 of List III. Mr. K.K. Trivedi, learned Advocate, appearing for the Petitioners submitted that the impugned Regulations and Notifications were, ultra vires Section 33 of the 1956 Act, since prescribing a Common Entrance Test is not one of the stated purposes of the Act and were, therefore, liable to be struck down.

107. Appearing for the Medical Council of India, Mr. Nidhesh Gupta, learned Senior Advocate, submitted that the Medical Council of India Act, 1956, is traceable to Entry 66 of List I, as was held in *MCI Vs. State of Karnataka* [(1998) 6 SCC 131]. In paragraph 24 of the said decision it was categorically indicated that the Indian Medical Council Act being relatable to Entry 66 of List I, prevails over any State enactment to the extent the State enactment is repugnant to the provisions of the Act, even though the State Acts may be relatable to Entry 25 or 26 of the Concurrent List.

108. Mr. Gupta submitted that Entry 66 in List I empowers the Central Government to enact laws for coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Learned counsel also urged that Section 19-A (1) of the Indian Medical Council Act, 1956, provides that the Council may prescribe the minimum standards of medical education required for granting

recognised medical qualifications (other than postgraduate medical qualifications) by universities or medical institutions in India. Mr. Gupta submitted that Section 20 relating to post-graduate medical education could also prescribe similar standards of Postgraduate Medical Education for the guidance of Universities. Mr. Gupta submitted that Section 33 of the 1956 Act, empowers the Medical Council of India, with the previous approval of the Central Government to make Regulations, and provides that the Council may make Regulations generally to carry out the purposes of the Act, and, without prejudice to the generality of this power, such Regulations may provide for "any other matter for which under the Act provision may be made by Regulations". Mr. Gupta urged that it is the accepted position that standards of education are to be determined by the MCI. The questions which have been posed on behalf of the Petitioners in these various matters, challenging the vires of the Regulations, are whether the power of determination of standards of education includes the power to regulate the admission process and determine the admission criteria, and whether the determination of standards of education also include the power to conduct the examinations.

109. Responding to the two questions, Mr. Gupta submitted that once the 1997 Regulations were accepted by the various Medical Colleges and Institutions as being in accordance with law and the powers vested under Entry 66 of List I, the first issue stands conceded, since the 1997 Regulations prescribing the eligibility criteria for admission in medical courses had been accepted and acted upon by the medical institutions. In addition to the above, Mr. Gupta contended that Section 33(l) of the 1956 Act vested the MCI with powers to frame regulations to provide for the conduct of professional examinations, qualifications of examiners and the conditions of admission to such examinations. Mr. Gupta submitted that, under the said provision, it can be said that the MCI was within its rights to conduct the NEET and stipulate the

qualifications of examiners and the conditions of admission to such examinations.

110. Mr. Gupta submitted that it would be incorrect to say that standards of education can have no direct impact on norms of admission. Learned senior counsel pointed out that in paragraph 36 of the judgment in *Preeti Srivastava's* case (supra), it had been indicated that the standards of education are impacted by the caliber of students admitted to the institution and that the process of selection and the criteria for selection of candidates has an impact on the standards of medical education. Mr. Gupta submitted that the views expressed by this Court in the decisions rendered in *Nivedita Jain's* case (supra) and that of *Ajay Kumar Singh's* case (supra), which had taken a contrary view, were overruled in *Preeti Srivastava's* case (supra). Mr. Gupta also relied on the decision of this Court in *Bharati Vidyapeeth (Deemed University) and Ors. Vs. State of Maharashtra & Anr.* [(2004) 11 SCC 755], wherein while following the decision in *Preeti Srivastava's* case (supra), it was reiterated that prescribing standards would include the process of admission. Mr. Gupta submitted that the said decision had, thereafter, been followed in *Prof. Yashpal Vs. State of Chhattisgarh* [(2005) 5 SCC 420]; *State of M.P. Vs. Gopal D. Teerthani* [(2003) 7 SCC 83], *Harish Verma Vs. Rajesh Srivastava* [(2003) 8 SCC 69] and in *Medical Council of India Vs. Rama Medical College Hospital & Research Centre* [(2012) 8 SCC 80]. Learned senior counsel urged that the expression "standard" used in Entry 66 of List I has been given a very wide meaning by this Court in *Gujarat University, Ahemadabad Vs. Krishna Ranganath Mudholkar* [(1963) Supp. 1 SCR 112] and accordingly anything concerned with standards of education would be included within Entry 66 of List I and would be deemed to be excluded from other Lists. Mr. Gupta also placed reliance on *MCI Vs. State of Karnataka* [1998 (6) SCC 131], wherein it was held that it was settled law that while considering the amplitude of the entries in Schedule VII of the Constitution, the

widest amplitude is to be given to the language of such Entries. Mr. Gupta urged that without prejudice to the contention that Entry 66 of List I directly permits the admission process and the examination itself being regulated and/or conducted by the MCI, even if the Entries did not directly so permit, the MCI was entitled to regulate the said functions since even matters which are not directly covered by the Entries, but are ancillary thereto, can be regulated. Mr. Gupta submitted that in *Krishna Ranganath Mudholkar's* case (supra), it was held that power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters, which can fairly and reasonably be said to be comprehended in that subject. Reference was also made to the decisions of this Court in *Harakchand Ratanchand Banthia Vs. Union of India* [(1969) 2 SCC 166]; *ITC Vs. Agricultural Produce Market Committee* [(2002) 9 SCC 232]; and *Banarasi Dass Vs. WTO* [1965 (2) SCR 355], wherein the same principle has been reiterated. Mr. Gupta submitted that Regulations validly made become a part of the Statute itself, as was indicated in *State of Punjab Vs. Devans Modern Breweries Ltd.* [(2004) 11 SCC 26]; *Annamalai University Vs. Information & Tourism Department* [(2009) 4 SCC 590] *U.P. Power Corporation Vs. NTPC Ltd.* [(2009) 6 SCC 235] and the *St. Johns Teachers Training Institute* case (supra). According to Mr. Gupta, the NEET Regulations having been validly made and the requisite legislation being available in Sections 19A, 20 and 23 of the Indian Medical Council Act, 1956, the NEET Regulations must be deemed to be part of the Act itself.

111. Regarding the MCI's power to conduct the NEET, Mr. Gupta urged that once it had been held in *Preeti Srivastava's* case (supra) that the standard of education is impacted by the process of selection, the power to determine the said process of selection is implicit. In fact, Mr. Gupta submitted that the aforesaid question stands concluded by the judgment of this Court in *Veterinary Council of India Vs. Indian Council of Agricultural Research* [(2000) 1 SCC 750], wherein, while considering the provisions of the Veterinary Council of India Act which were materially the same as those of the Indian Medical Council Act, it was held relying on the judgment in *Preeti Srivastava's* case (supra) that the Veterinary Council of India was competent to and had the requisite powers to hold the All India Entrance Examination.

112. Mr. Gupta urged that this Court had repeatedly emphasised how profiteering and capitation fee and other malpractices have entered the field of medical admissions, which adversely affect the standards of education in the country. Such malpractices strike at the core of the admission process and if allowed to continue, the admission process will be reduced to a farce. It was to put an end to such malpractices that the MCI introduced NEET and was within its powers to do so.

113. On the necessity of furnishing draft Regulations to the State Governments, as stipulated under Section 19A(2) and for Committees under Section 20, Mr. Gupta urged that the same was merely directory and not mandatory. Referring to the decision of this Court in *State of U.P. Vs. Manbodhan Lal Srivastava* [1958 SCR 533], learned counsel submitted that this Court while considering the provisions of Article 320(3) of the Constitution, which provides for consultation with the Union Public Service Commission or the State Public Service Commission, held that the said requirement in the Constitution was merely directory and not mandatory. Drawing a parallel to the facts of the said case with the facts of the present set of cases, Mr. Gupta urged that the provisions of Section 19A(2) must be held to be directory and not mandatory and its non-compliance could not adversely affect the amended Regulations and the Notifications issued in pursuance thereof.

Mr. Gupta submitted that before amending the Regulations, detailed interaction had been undertaken with the State Governments at various stages. Learned counsel submitted that as far back as on 14.9.2009, 5.2.2010 and 4.8.2010, letters

had been written to various State Governments and the responses received were considered. There were joint meetings between the various State representatives and the other concerned parties and the concerns of most of the State Governments were fully addressed.

114. On the question of federalism and the powers of the State under Article 254 of the Constitution, Mr. Gupta contended that since the MCI derived its authority from Entry 66 of List I, it is a subject which is exclusively within the domain of the Union. Mr. Gupta submitted that all the arguments advanced on behalf of the Petitioners were on the erroneous assumption that the Regulations had been made under Entry 25 of List III. Mr. Gupta pointed out that in paragraph 52 of the judgment in *Preeti Srivastava's* case (supra), this Court had held that the impugned Regulations had been framed under Entry 66, List I and that the Regulations framed by the MCI are binding and the States cannot in exercise of powers under Entry 25 of List III make Rules and Regulations which are in conflict with or adversely impinge upon the Regulations framed by the MCI for Post-graduate medical education. Mr. Gupta urged that since the standards laid down by the MCI are in exercise of powers conferred by Entry 66 of List I, the same would prevail over all State laws on the same subject.

115. Mr. Gupta also urged that the ratio of *Lavu Narendranath's* case (supra) had been misunderstood on behalf of the Petitioners and the arguments raised on behalf of Yenepoya University was based on the ratio that Entry 66 of List I is not relatable to a screening test prescribed by the Government or by a University for selection of students from out of a large number applying for admission to a particular course of study. Mr. Gupta pointed out that the ratio of the decision in *Preeti Srivastava's* case (supra) and in *Lavu Narendranath's* case (supra) show that the Government which ran the colleges had the right to make a selection out of a large number of candidates and for this purpose they could prescribe a test of

their own which was not contrary to any law. It was urged that in the said case, there was no Central legislation occupying the field. Mr. Gupta urged that NEET is not a mere screening test, but an eligibility test which forms the basis of selection. Mr. Gupta submitted that any test which might be prescribed by a State Government would be against the law in the present case, being in the teeth of the NEET Regulations.

116. With regard to the submissions made on behalf of the minority institutions enjoying the protection of Article 30, Mr. Gupta contended that reliance placed on behalf of CMC, Vellore, on the judgment in the *Ahmedabad St. Xavier's College Society Vs. State of Gujarat* [(1974) 1 SCC 717], was entirely misplaced, and, in fact, the said judgment supports a test such as NEET. Mr. Gupta submitted that on a proper analysis of the said judgment and in particular the judgment delivered by Chief Justice Ray, (as His Lordship then was), it would be evident that even in the said judgment the right of religious and linguistic minorities to establish and administer educational institutions of the choice of the minorities had been duly recognised. Chief Justice Ray also observed that if the scope of Article 30(1) is made an extension of the right under Article 29(1) as a right to establish and administer educational institutions for giving religious instruction or for imparting education in their religious teachings or tenets, the fundamental right of minorities to establish and administer educational institutions of their choice would be taken away. It was also observed in the judgment that every section of the public, the majority as well as minority, has rights in respect of religion as contemplated in Articles 25 and 26 of the Constitution. Mr. Gupta urged that the whole object of conferring the right on minorities under Article 30 is to ensure that there would be equality between the majority and the minority. It was urged that it is for the aforesaid reason that whenever the majority community conferred upon itself a special power to overrule or interfere with the administration and management of the minority institutions, the Supreme Court struck down the said power. Mr.

Gupta submitted that whenever an attempt was made to interfere with the rights guaranteed to religious and linguistic minorities, as in the *St. Xavier's* case (supra), the same being arbitrary and unreasonable, was struck down. Reliance was also placed on the decision in the case of Rev. Father W. Proost, and in the case of Rt. Rev. Bishop S.K. Patro, where the impugned order of the Secretary to the Government dated 22nd May, 1967, set aside the order passed by the President of the Board of Secondary Education. Mr. Gupta urged that in the very initial stage of judicial consideration in these matters, in *State of Kerala Vs. Very Rev. Mother Provincial* [(1970) 2 SCC 417], the impugned provisions required nominees of the University and the Government to be included in the Governing Body. The same being a direct infringement on the rights of the minorities to establish and administer institutions of their choice, the impugned provision was struck down.

117. Mr. Gupta submitted that in each of the aforesaid cases, an attempt was made by the majority to take over the management and to impose its substantive views. Learned counsel submitted that NEET does nothing of the sort, since it did not infringe any of the rights guaranteed either under Article 19(1)(g) or Articles 25, 26, 29 and 30 of the Constitution. Mr. Gupta urged that the various questions raised on behalf of the Petitioners herein have been fully answered in *P.A. Inamdar's* case (supra). They also meet the tests prescribed in the *St. Xavier's* case (supra) as well. Mr. Gupta urged that Justice Khanna in paragraph 105 of the judgment observed that Regulations which are calculated to safeguard the interests of teachers would result in security of tenure and would attract competent persons for the posts of teachers and are, therefore, in the interest of minority educational institutions, and would not violate Article 30(1) of the Constitution. Mr. Gupta urged that by the same reasoning, Regulations which are in the interest of the students and will attract the most meritorious students, are necessarily in the interest of the minority institutions and do

not, therefore, violate their rights under Article 30(1) of the Constitution.

118. Mr. Gupta submitted that in the *St. Xavier's* case (supra), Justice Khanna had indicated in his separate judgment the dual tests of reasonableness and of making the institution an effective vehicle of education for the minority community and others who resort to it. Mr. Gupta submitted that NEET meets the test of reasonableness and fully assists in making the institution an effective vehicle of education, since it ensures admission for the most meritorious students and also negates any possibility of admissions being made for reasons other than merit within each category. Mr. Gupta submitted that, in fact, in paragraph 92 of the judgment, Justice Khanna had observed that "a regulation which is designed to prevent maladministration of an educational institution cannot be said to offend Clause (1) of Article 30". Mr. Gupta re-emphasized that NEET was not in any way against the rights vested in educational institutions, being run by the minorities, but it was in the interest of such minorities to have their most meritorious students in the best institutes.

119. Dealing with the various tests referred to on behalf of the Petitioners in the different cases, Mr. Gupta submitted that the ratio in the *T.M.A. Pai Foundation* case (supra) also supports the NEET Regulations. Mr. Gupta contended that the right of minority institutions to admit students was not being denied, inasmuch as, the concerned institutes could admit students of their own community, but from the list of successful candidates who appear for the NEET. Mr. Gupta submitted that in the aforesaid judgment it was also observed that merit is usually determined by a common entrance test conducted by the institution or in case of professional colleges, by government agencies. Mr. Gupta submitted that it had also been emphasized that Regulations in national interest are to apply to all educational institutions, whether run by a minority or non-minorities and that an exception to the right under Article 30 is

the power of the State to regulate education, educational standards and allied matters. Mr. Gupta submitted that in the *T.M.A. Pai Foundation* case (supra), it had been indicated that regulatory measures for ensuring educational standards and maintaining excellence thereof are no anathema to the protection conferred by Article 30(1).

120. Mr. Gupta submitted that the admission process followed by CMC, Vellore, failed to meet any of the tests relating to transparency and fairness and lack of arbitrariness. Mr. Gupta pointed out that, in the case of a candidate for admission in the Under-graduate or Post-graduate courses in the said institution, a candidate cannot be selected unless he is sponsored by the Diocese and the competition is limited to the particular candidates, who had been sponsored by a particular Diocese, which Mr. Gupta submitted is violative of Article 14 of the Constitution and also the principles of merit.

Mr. Gupta urged that as far as the application of Articles 25 and 26 of the Constitution in matters relating to establishment and administration of educational institutions is concerned, the same has to be read in relation to matters of religion and with respect to religious practices which form an essential and integral part of religion. Learned counsel submitted that the rights protected under Articles 25 and 26 are available to individuals and not to organized bodies, such as CMC, Vellore, or other minority run institutions, as had been held by this Court in *Sardar Vs. State of Bombay* [1962 Supp. (2) SCR 496], wherein it was observed that the right guaranteed by Article 25 is an individual right. The said view was subsequently endorsed in *Sri Sri Sri Lakshmana Yatendrulu Vs. State of A.P.* [(196) 8 SCC 705]. Mr. Gupta submitted that, having regard to the above, the various associations and minorities, which had challenged the impugned Regulations, were not entitled to do so and their applications were liable to be dismissed.

121. Mr. Gupta submitted that the impugned Regulations

would apply equally to "Deemed Universities", declared to be so under Section 3 of the University Grants Commission Act, 1956, hereinafter referred to as the "UGC Act", since it cannot be argued that the Deemed University will not follow any rules at all. Mr. Gupta pointed out that in the Bharati Vidyapeeth's case (supra), this Court had held that the standards prescribed by statutory authorities, such as the Medical Council of India, governed by Entry 66 of List I of the Seventh Schedule to the Constitution, must be applied, particularly when the Deemed Universities seek recognition of the medical courses taught by them, under the provisions of the 1956 Act. Mr. Gupta submitted that the Deemed Universities cannot take the benefit of recognition under the 1956 Act, but refuse to follow the norms prescribed therein.

Mr. Gupta pointed out that it had inter alia been indicated in paragraph 24 of the affidavit filed on behalf of the Commission that the Commission was also of the view that all the constituent medical colleges of "Deemed Universities" may be asked to comply with the Notification dated 21.12.2010, issued by the Medical Council of India, in view of Article 6.1 in the UGC (Institutions Deemed to be Universities) Regulations, 2010, which states that:

> "Admission of students to all deemed to be universities, public or private, shall be made strictly on merit based on an All India examination as prescribed by the Regulations and in consistence with the national policy in this behalf, from time to time."

122. On the percentile system of grading, which had been touched upon by Dr. Dhawan, it was submitted that the said system of ranking/ grading was being followed internationally in many of the premier institutions around the globe.

123. Adverting to the submissions made by Mr. L. Nageshwara Rao, on behalf of the States of Andhra Pradesh and Tamil Nadu, regarding the enactment of the A.P.

Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983, on the basis of the Presidential Order dated 10th May, 1979, made under Article 371-D of the Constitution, Mr. Gupta submitted that neither the said Article nor the Presidential Order was concerned with standards of education. Mr. Gupta urged that a reading of Sub-clause (1) of Article 371-D of the Constitution makes it clear that it confers powers on the President to make an Order with regard to the State of Andhra Pradesh "for equitable opportunities and facilities for the people belonging to different parts of the State". Mr. Gupta urged that the State legislation providing for State level entrance examination is not relatable to Article 371-D and, as such, the State legislation had to yield to the Union legislation, which Mr. Gupta urged had been the consistent view taken in *Govt. of A.P. Vs. Mohd. Ghouse Mohinuddin* [(2001) 8 SCC 416]; *V. Jaganadha Rao Vs. State of A.P.* [(2001) 10 SCC 401]; and *NTR University of Health Sciences Vs. G. Babu Rajendra Prasad* [(2003) 5 SCC 350].

124. As to the weightage of marks being given up to a maximum of 30%, to government servants serving in remote areas, Mr. Gupta said that the same had been upheld by this Court in *State of M.P. Vs. Gopal D. Tirthani* [(2003) 7 SCC 83].

125. Replying to the submissions made on behalf of some of the other Petitioners and, in particular, on behalf of the Christian Medical College, Ludhiana, in Writ Petition No. 20 of 2012, Mr. Gupta urged that Section 3B of the 1956 Act empowers the Board of Governors to exercise the powers and discharge the functions of the Council and, accordingly, even if the appointment of the members of the Board of Governors was ad hoc in nature, it made no difference to their working and discharging the functions of the Council.

126. Mr. Gupta urged that private bodies and religious and linguistic minorities have a fundamental right to establish and administer medical institutions or other institutions of their

choice under Articles 19(1)(g) and 30 of the Constitution, but such right was not unfettered and did not include the right to maladminister the respective institutions. Learned counsel urged that in the name of protection under Articles 25, 26 and 30 of the Constitution, an institution run by a religious or linguistic minority did not have the right to lower the standards of education set by the Medical Council of India or to recruit staff, who were not properly qualified, or to deprive the students of the necessary infrastructure to run such courses. Accordingly, the MCI was within its jurisdiction to lay down proper standards and to also conduct an All-India Entrance Examination to eliminate any possibility of malpractice. Mr. Gupta urged that the several Writ Petitions filed on behalf of both States and private individuals and religious and linguistic minorities are, therefore, liable to be dismissed with appropriate costs.

127. Mr. Sidharth Luthra, learned Additional Solicitor General, appearing for the Union of India, in the Ministry of Health and Family Welfare, at the very outset, submitted that the Union of India fully supported the stand of the MCI. Mr. Luthra urged that the impugned Notifications amending the Regulations in regard to the introduction of NEET for both graduate medical education and post-graduate medical education had been validly made under powers conferred upon the MCI under Section 33 of the 1956 Act, upon obtaining the previous sanction of the Central Government, as required under the said Section. Mr. Luthra submitted that there was a definite rationale behind holding a single examination. The learned ASG urged that the NEET Regulations had been framed by the MCI, after due deliberations with the Central Government and, broadly speaking, the logic behind enacting the said Regulations were to introduce uniformity of standards, merit and transparency and to lessen the hardship of aspiring students. Mr. Luthra urged that the NEET and the amending Regulations, which had been impugned, were not ultra vires since the 1956 Act is relatable to Entry 66 of the Union List and prevails over any State enactment, even though the State Acts may be

relatable to Entry 25 or 26 of the Concurrent List, to the extent the provisions of the State Acts were repugnant to the Central legislation. Mr. Luthra urged that Regulations framed under Section 33 of the 1956 Act, with the previous sanction of the Central Government, have statutory status and the said Regulations were framed to carry out the purposes of the said Act.

128. Mr. Luthra repeated Mr. Gupta's submission that the rights of the minorities preserved under Article 30 were not adversely affected or prejudiced in any way, as had been explained in *P.A. Inamdar's* case (supra). The learned ASG submitted that NEET had been introduced in the national interest to ensure that meritorious students did not suffer the problem of appearing in multiple examinations conducted by various agencies which also resulted in different standards for admission, which had the effect of compromising merit. Mr. Luthra urged that the earlier system of multiple examinations was neither in the national interest nor in the interest of maintaining the standards of medical education, nor did it serve the interest of poor/middle class students who had to buy forms of several examinations and travel across the country to appear in multiple examinations. It was urged that any Regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority groups. It was also urged that such a Regulation must necessarily be read into Article 30 of the Constitution. Mr. Luthra referred to the views expressed in that behalf in Paragraph 107 of the judgment in the *T.M.A. Pai Foundation* case (supra). The learned ASG submitted that the amended Regulations do not restrict or in any manner take away the rights of the minority institutions under Articles 19(1)(g) and 30 of the Constitution to admit students from their community.

129. Mr. Luthra reiterated the submissions made by Mr. Gupta that the right conferred on the religious and linguistic minorities to administer educational institutions of their choice,

is not an absolute right and may be regulated in certain special circumstances.

130. The learned ASG also urged that the merit list to be published on the results of the NEET, will contain all the details of each candidate, including the State, category, minority status, caste and tribal status in front of his/her name and rank so that there would be no hindrance whatsoever in implementing the constitutional principles of reservation and minority rights and merit. Furthermore, the transparency in the process of admission would also be fully achieved.

131. On the question of different mediums of instruction in schools throughout the country, Mr. Luthra submitted that the NEET - UG would be conducted in multiple languages, such as English, Hindi, Telegu, Assamese, Gujarati, Marathi, Tamil and Bengali, and hence, the submissions made that NEET was not being conducted in the regional languages, is misleading.

132. One other important aspect touched upon by Mr. Luthra is with regard to the syllabus for NEET, which would be based on the CBSE syllabus. The learned ASG submitted that the syllabus for NEET had been prepared by the MCI, after obtaining feedback from different stake-holders, including the National Board and State Boards, across the country. Mr. Luthra submitted that the Regulations have been amended to implement the provisions of the Act so as to meet the difficulties, which had been raised by some of the States. The learned ASG submitted that the NEET Regulations were clearly within the competence and jurisdiction of the Medical Council in the discharge of its obligations to carry out the purposes of the Act, as had been enjoined in the different decisions of this Court and, in particular, in *Preeti Srivastava's* case (supra). The learned ASG urged that the objections which had been sought to be taken on behalf of the various Petitioners, including the State Governments, with regard to the holding of the NEET examination, were wholly misconceived and were liable to be rejected.

133. Various issues of singular importance, some of which have been considered earlier, arise out of the submissions made on behalf of the respective parties questioning the vires of the amended regulations relating to Under-graduate and Post-graduate medical education, namely,

(i) The validity of the MCI Regulations and the DCI Regulations and the amendments effected therein with regard to Under-graduate and Post-graduate courses of medicine in medical and dental colleges and institutions in the light of Section 19A(2) of the Indian Medical Council Act, 1956, and the corresponding provisions in the Dentists Act, 1948.

(ii) The jurisdiction and authority of the MCI and the DCI to conduct a single National Eligibility-cum-Entrance Test for admission to the M.B.B.S., B.D.S. and Post-graduate courses in both the disciplines.

(iii) The rights of the States and private institutions to establish and administer educational institutions and to admit students to their M.B.B.S., B.D.S. and Post-graduate courses;

(iv) The impact of NEET on the rights guaranteed to religious and linguistic minorities under Article 30 of the Constitution.

(v) Do the impugned Regulations come within the ambit of Entry 66, List I, of the Seventh Schedule to the Constitution?;

(vi) The effect of Presidential orders made under Article 371D of the Constitution of India.

134. Despite the various issues raised in this batch of cases, the central issue relates to the validity of the amended Regulations and the right of the MCI and the DCI thereunder to introduce and enforce a common entrance test, which has the

effect of denuding the State and private institutions, both aided and unaided, some enjoying the protection of Article 30, of their powers to admit students in the M.B.B.S., B.D.S. and the Post-graduate Courses conducted by them. There is little doubt that the impugned Notifications dated 21.12.2010 and 31.5.2012, respectively, and the amended Regulations directly affect the right of private institutions to admit students of their choice by conducting their own entrance examinations, as they have been doing all along. Attractive though it seems, the decision taken by the MCI and the DCI to hold a single National Eligibility-cum-Entrance Test to the M.B.B.S., B.D.S. and the Post-graduate courses in medicine and dentistry, purportedly with the intention of maintaining high standards in medical education, is fraught with difficulties, not the least of which is the competence of the MCI and the DCI to frame and notify such Regulations. The ancillary issues which arise in regard to the main issue, relate to the rights guaranteed to citizens under Article 19(1)(g) and to religious and linguistic minorities under Article 30 of the Constitution, to establish and administer educational institutions of their choice.

135. Doubts have been raised regarding the competence of the MCI and the DCI to amend the 1997 and 2000 Regulations, or the 2007 Regulation and to issue the impugned Notifications to cover all the medical institutions in the country, which have their own procedures relating to admissions to the M.B.B.S., B.D.S. and Post-graduate Courses which passed the triple test indicated in *P.A. Inamdar's* case (supra). The validity of the MCI Regulations of 1997 and 2000 and the DCI Regulations of 2007 and the amendments effected therein has been questioned with reference to Sections 19A(2) and 20 of the 1956 Act and Section 20 of the 1948 Act. While empowering the MCI and the DCI to prescribe minimum standards of medical education required for granting recognised medical qualifications, it has also been stipulated that the copies of the draft Regulations and all subsequent amendments thereof are to be furnished by the Council to all

the State Governments and the Council shall, before submitting the Regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of such copies. The said provisions do not appear to have been complied with by the MCI or the DCI, which rendered the Regulations and the amendments thereto invalid. On behalf of the MCI an attempt was made to justify the omission by urging that the directions were only directory and not mandatory. In support of such a contention reliance was placed on *Manbodhan Lal Srivastava's* case (supra), wherein the provisions of Article 320(3) of the Constitution providing for consultation with the Union Public Service Commission or the State Public Service Commission, were held to be directory and not mandatory. A submission was also made that before the Regulations were amended, MCI had interacted with the State Governments and letters had also been exchanged in this regard and the responses were taken into account by the Council while amending the Regulations.

136. We are afraid that the said analogy would not be applicable to the facts of these cases. The direction contained in Sub-section (2) of Section 19A of the 1956 Act makes it a pre-condition for the Regulations and all subsequent amendments to be submitted to the Central Government for sanction. The Council is required to take into consideration the comments of any State Government within three months from the furnishing of copies of the draft Regulations and/or subsequent amendments thereto. There is nothing to show that the MCI ever sent the draft amended Regulations to the different State Governments for their views. The submission of the draft Regulations and all subsequent amendments thereto cannot be said to be directory, since upon furnishing of the draft Regulations and all subsequent amendments thereto by the Council to all the State Governments, the Council has to take into consideration the comments, if any, received from any

State Government in respect thereof, before submitting the same to the Central Government for sanction.

137. The fact situation in *Manbodhan Lal Srivastava's* case (supra) was different from the fact situation in this batch of cases. Article 320(3) of the Constitution provides for consultation by the Central or State Government with regard to the matters enumerated therein. In the instant case, it is not a case of consultation, but a case of inputs being provided by the State Governments in regard to the Regulations to be framed by the MCI or the DCI. Realising the difficulty, Mr. Gupta had argued that since the 1997 and 2000 Regulations had been acted upon by the concerned parties, the same must be held to have been accepted and the validity thereof was no longer open to challenge.

138. Mr. Gupta's aforesaid submissions cannot be accepted, inasmuch as, an invalid provision cannot be validated simply by acting on the basis thereof.

139. Mr. Gupta has also urged that the MCI derived its authority for framing the Regulations and/or effecting amendments thereto from Entry 66, List I, which is within the domain of the Central Government. Accordingly, the same would have primacy over all State laws on the subject.

140. Mr. Gupta's said submission finds support in *Preeti Srivastava's* case (supra), wherein it has been held that the Regulations framed by the MCI is binding upon the States having been framed under Entry 66, List I of the Seventh Schedule to the Constitution. But, where does it take us as far as these cases are concerned which derive their rights and status under Articles 19(1)(g), 25, 26, 29(1) and 30 of the Constitution? Can the rights guaranteed to individuals and also religious and linguistic minorities under the said provisions of the Constitution, be interfered with by legislation and that too by way of delegated legislation?

141. The four impugned Notifications dated 21.12.2010 and 31.5.2012 make it clear, in no uncertain terms, that all admissions to the M.B.B.S. and the B.D.S. courses and their respective Post-graduate courses, shall have to be made solely on the basis of the results of the respective NEET, thereby preventing the States and their authorities and privately-run institutions from conducting any separate examination for admitting students to the courses run by them. Although, Article 19(6) of the Constitution recognizes and permits reasonable restrictions on the right guaranteed under Article 19(1)(g), the course of action adopted by the MCI and the DCI would not, in our view, qualify as a reasonable restriction, but would amount to interference with the rights guaranteed under Article 19(1)(g) and, more particularly, Article 30, which is not subject to any restriction similar to Article 19(6) of the Constitution. Of course, over the years this Court has repeatedly observed that the right guaranteed under Article 30, gives religious and linguistic minorities the right to establish and administer educational institutions of their choice, but not to maladminister them and that the concerned authorities could impose conditions for maintaining high standards of education, such as laying down the qualification of teachers to be appointed in such institutions and also the curriculum to be followed therein. The question, however, is whether such measures would also include the right to regulate the admissions of students in the said institutions.

142. The first, second, third and fourth issues referred to hereinabove in paragraph 133, are intermingled and are taken up together for the sake of convenience. The aforesaid issues have been considered and answered by this Court in the *Ahmedabad St. Xavier's College Society* case (supra), *St. Stephen's College* case (supra), *Islamic Academy* case (supra), *P.A. Inamdar's* case (supra) and exhaustively in the *T.M.A. Pai Foundation* case (supra). Can, therefore, by purporting to take measures to maintain high educational standards to prevent maladministration, the MCI and the DCI resort to the amended MCI and DCI Regulations to circumvent

the judicial pronouncements in this regard? The answer to such question would obviously have to be in the negative.

143. The Supreme Court has consistently held that the right to administer an educational institution would also include the right to admit students, which right, in our view, could not be taken away on the basis of Notifications issued by the MCI and the DCI which had no authority, either under the 1956 Act or the 1948 Act, to do so. The MCI and the DCI are creatures of Statute, having been constituted under the Indian Medical Council Act, 1956, and the Dentists Act, 1948, and have, therefore, to exercise the jurisdiction vested in them by the Statutes and they cannot wander beyond the same. Of course, under Section 33 of the 1956 Act and Section 20 of the 1948 Act, power has been reserved to the two Councils to frame Regulations to carry out the purposes of their respective Acts. It is pursuant to such power that the MCI and the DCI has framed the Regulations of 1997, 2000 and 2007, which set the standards for maintaining excellence of medical education in India. The right of the MCI and the DCI to prescribe such standards has been duly recognised by the Courts. However, such right cannot be extended to controlling all admissions to the M.B.B.S., the B.D.S. and the Post-graduate Courses being run by different medical institutions in the country. At best, a certain degree of control may be exercised in regard to aided institutions, where on account of the funds being provided by the Government, it may have a say in the affairs of such institutions.

144. These questions have already been considered and decided in the *T.M.A. Pai Foundation* case (supra), wherein, it was categorically held that the right to admit students being an essential facet of the right of a private medical institution, and, in particular, minority institutions which were unaided, non-capitation fee educational institutions, so long as the process of admission to such institutions was transparent and merit was adequately taken care of, such right could not be interfered with.

Even with regard to aided minority educational institutions it was indicated that such institutions would also have the same right to admit students belonging to their community, but, at the same time, it should also admit a reasonable number of non-minority students which has been referred to as the "sprinkling effect" in the *Kerala Education Bill* case (supra).

145. The rights of private individuals to establish and administer educational institutions under Article 19(1)(g) of the Constitution are now well-established and do not require further elucidation. The rights of unaided and aided religious and linguistic minorities to establish and administer educational institutions of their choice under Article 19(1)(g), read with Article 30 of the Constitution, have come to be crystalised in the various decisions of this Court referred to hereinabove, which have settled the law that the right to admit students in the different educational and medical institutions is an integral part of the right to administer and cannot be interfered with except in cases of maladministration or lack of transparency. The impugned Regulations, which are in the nature of delegated legislation, will have to make way for the Constitutional provisions. The freedom and rights guaranteed under Articles 19(1)(g), 25, 26 and 30 of the Constitution to all citizens to practise any trade or profession and to religious minorities to freedom of conscience and the right freely to profess, practise and propagate religion, subject to public order, morality and health and to the other provisions of Part III of the Constitution, and further to maintain institutions for religious and charitable purposes as guaranteed under Articles 25 and 26 of the Constitution, read with the rights guaranteed under Article 30 of the Constitution, are also well-established by various pronouncements of this Court. Over and above the aforesaid freedoms and rights is the right of citizens having a distinct language, script or culture of their own, to conserve the same under Article 29(1) of the Constitution.

146. Nowhere in the 1956 Act nor in the MCI Regulations,

has the Council been vested with any authority to either conduct examinations or to direct that all admissions into different medical colleges and institutions in India would have to be on the basis of one common National Eligibility-cum-Entrance Test, thereby effectively taking away the right of the different medical colleges and institutions, including those run by religious and linguistic minorities, to make admissions on the basis of their own rules and procedures. Although, Mr. Gupta has contended that Section 33(l) of the 1956 Act entitles the MCI to make regulations regarding the conduct of professional examinations, the same, in our view, does not empower the MCI to actually hold the entrance examination, as has been purported to be done by the holding of the NEET. The power to frame regulations for the conduct of professional examinations is a far cry from actually holding the examinations and the two cannot be equated, as suggested by Mr. Gupta.

147. Although, the controversy has been extended to include the amendments made to the Entries in the Second and Third Lists of the Seventh Schedule to the Constitution and the deletion of Entry 11 from the State List and the introduction of Entry 25 in the Concurrent List, on behalf of the MCI it has been reiterated that the impugned Notifications and amended Regulations had been made under Entry 66 of List I by the MCI acting on its delegated authority and would, therefore, have an overriding effect over any State law on the subject.

As already indicated hereinbefore, the right of the MCI to frame Regulations under Entry 66, List I, does not take us anywhere, since the freedoms and rights sought to be enforced by the Petitioners flow from Articles 19(1)(g), 25, 26, 29(1) and 30 of the Constitution which cannot be superseded by Regulations framed by a Statutory authority by way of delegated legislation. The fact that such power was exercised by the MCI and the DCI with the previous approval of the Central Government, as contemplated under Section 33 of the 1956 Act and under Section 20 of the 1948 Act, would not bestow

upon the Regulations framed by the MCI and DCI, which are in the nature of subordinate legislation, primacy over the Constitutional provisions indicated above. A feeble attempt has been made by Mr. Gupta to suggest that admission into institutions run by the Christian Church depended on selection of students by the Diocese. This procedure, according to Mr. Gupta, was against the concept of recognition of merit.

148. In our judgment, such a stand is contrary to the very essence of Articles 25, 26, 29(1) and 30 of the Constitution. In view of the rights guaranteed under Article 19(1)(g) of the Constitution, the provisions of Article 30 should have been redundant, but for the definite object that the framers of the Constitution had in mind that religious and linguistic minorities should have the fundamental right to preserve their traditions and religious beliefs by establishing and administering educational institutions of their choice. There is no material on record to even suggest that the Christian Medical College, Vellore, or its counter-part in Ludhiana, St. John's College, Bangalore, or the linguistic minority institutions and other privately-run institutions, aided and unaided, have indulged in any malpractice in matters of admission of students or that they had failed the triple test referred to in *P.A. Inamdar's* case (supra). On the other hand, according to surveys held by independent entities, CMC, Vellore and St. John's Medical College, Bangalore, have been placed among the top Medical Colleges in the country and have produced some of the most brilliant and dedicated doctors in the country believing in the philosophy of the institutions based on Christ's ministry of healing and caring for the sick and maimed.

149. Although, there is some difference of opinion as to the right to freedom of religion as guaranteed under Article 25 of the Constitution being confined only to individuals and not organizations in regard to religious activities, Article 26(a) very clearly indicates that subject to public order, morality and health, every religious denomination or any section thereof shall have

the right to establish and maintain institutions for religious and charitable purposes. The emphasis is not on religious purposes alone, but extends to charitable purposes also, which would include the running of a hospital to provide low-cost, but efficient medical care to all, which the CMC, Vellore, and other private missionary hospitals of different denominations are doing. So long as a private institution satisfies the triple test indicated in *P.A. Inamdar's* case (supra), no objection can be taken to the procedure followed by it over the years in the matter of admission of students into its M.B.B.S. and Post-graduate courses in medicine and other disciplines. Except for alleging that the admission procedure was controlled by the Church, there is nothing even remotely suggestive of any form of maladministration on the part of the medical institutions being run by the Petitioner Association.

150. This brings us to the issue regarding the impact of the NEET on the right of the religious and linguistic minorities in view of the provisions of Article 30(1) of the Constitution. Although, the said question has been dealt with to some extent while dealing with the other issues, certain aspects thereof still need to be touched upon. As has been mentioned hereinbefore, having regard to the provisions of Article 19(1)(g) of the Constitution, the provisions of Article 30 would have been redundant had not the framers of the Constitution had some definite object in mind in including Article 30 in the Constitution. This Court has had occasion in several matters to consider and even deal with the question. In the *Ahmedabad St. Xavier's College Society* case (supra), it was held that the right under Article 30(1) is more in the nature of protection and was intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institutions of their choice. While the aforesaid observations help in understanding the intention of the Constituent Assembly in including Article 30 in the Constitution as a fundamental right untrammeled by any restrictions, as in the case of other fundamental rights, the real

spirit of the said Article has been captured by Justice V. Krishna Iyer in *Jagdish Sharan's* case (supra), wherein His Lordship observed that merit cannot be measured in terms of marks alone, but human sympathies are equally important. His Lordship's further observations that the heart is as much a factor as the head in assessing the social value of a member of the medical profession, completes the picture. This, in fact, is what has been attempted to be conveyed by Mr. Harish Salve, appearing for the CMC Vellore, while submitting that under Article 30 of the Constitution an educational institution must be deemed to have the right to reject a candidate having superior marks as against a candidate who having lesser marks conformed to the beliefs, aspirations and needs of the institution for which it was established.

151. One of the eleven questions which came to be considered by the Eleven Judge Bench in the T.M.A. Pai Foundation case, namely, Question 5(a), was whether the minority's rights to establish and administer educational institutions of their choice would include the procedure and method of admission and selection of students. While dealing with one of the five issues reformulated by the Chief Justice as to whether there can be Government regulations in case of private institutions and, if so, to what extent, it was indicated in the majority judgment that the right to establish and administer broadly comprises various rights, including the right to admit students in regard to private unaided non-minority educational institutions. It was further observed that, although, the right to establish an educational institution can be regulated, such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in-charge of management, and that the fixing of a rigid fee structure, dictating the formation and composition of the Governing Body, compulsory nomination of teachers and staff for appointment or nominating students for admissions, would be unacceptable restrictions.

152. As far as private unaided professional colleges are concerned, the majority view was that it would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. In that context, it was suggested that it would be permissible for the University or the Government at the time of granting recognition, to require a private unaided institution to provide for merit-based selection, while, at the same time, giving the management sufficient discretion in admitting students, which could be done by reserving a certain percentage of seats for admission by the management out of those students who had passed a common entrance test held by itself, while the rest of the seats could be filled up on the basis of counselling by the State agency, which would take care of the poorer and backward sections of society.

153. However, as far as the aided private minority institutions are concerned, the inter-play between Article 30 and Article 29(2) of the Constitution was taken note of in the majority decision and after considering the various decisions on the said issue, including the decision in *D.A.V. College Vs. State of Punjab* [(1971) 2 SCC 269] and the *Ahmedabad St. Xavier's College Society* case (supra), reference was made to the observations made by Chief Justice Ray, as His Lordship then was, that, in the field of administration, it was not reasonable to claim that minority institutions would have complete autonomy. Checks on the administration would be necessary in order to ensure that the administration was efficient and sound and would serve the academic needs of the institution. Reference was also made to the concurring judgment of Khanna, J., wherein the learned Judge, inter alia, observed that the right conferred upon religious and linguistic minorities under Article 30 is to establish and administer educational institutions of their choice. Administration connotes management of the affairs of the institution and such management must be free of control so that the founders or their nominees could mould the institution as they thought fit and in accordance with the ideas of how the interest of the community

in general and the institution in particular would be best served. The learned Judge was of the view that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of such institutions, but such regulations could not impinge upon the minority character of the institution and a balance had to be maintained between the two objectives - that of ensuring the standard of excellence of the institution and that of preserving the right of minorities to establish and administer their educational institutions.

154. The learned Judges also approved the view taken in the *St. Stephen's College* case (supra) regarding the right of aided minority institutions to give preference to students of its own community for admission. Their Lordships, however, had reservations regarding the rigidity of percentage of students belonging to the minority community to be admitted.

155. While answering Question 4 as to whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated, the learned Judges held that admission of students to unaided minority educational institutions, namely, schools and under-graduate colleges, cannot be regulated by the State or the University concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards. The learned Judges further held that the right to admit students, being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the University may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions was on a transparent basis and merit was adequately taken care of. The learned Judges went on to indicate that the right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it was more so in the matter of admissions to professional institutions.

156. In answering Question 5(a), as to whether the rights of minorities to establish and administer educational institutions of their choice would include the procedure and method of admission and selection of students, the learned Judges held that a minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent and the selection of students in professional and higher educational colleges should be on the basis of merit and even an unaided minority institution should not ignore the merit of the students for admission while exercising its right to admit students to professional institutions. On the question whether the rights of minority institutions regarding admission of students and to lay down the procedure and method of admission would be affected, in any way, by receipt of State aid, the learned Judges were of the view that while giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe conditions in that regard, without, however, affecting the right of such institutions to actually admit students in the different courses run by them.

157. What can ultimately be culled out from the various observations made in the decisions on this issue, commencing from the *Kerala Education Bill* case (supra) to recent times, is that admissions to educational institutions have been held to be part and parcel of the right of an educational institution to administer and the same cannot be regulated, except for the purpose of laying down standards for maintaining the excellence of education being provided in such institutions. In the case of aided institutions, it has been held that the State and other authorities may direct a certain percentage of students to be admitted other than by the method adopted by the institution. However, in cases of unaided institutions, the position is that except for laying down standards for maintaining the excellence of education, the right to admit students into the

different courses could not be interfered with. In the case of aided minority institutions, it has been held that the authority giving aid has the right to insist upon the admission of a certain percentage of students not belonging to the minority community, so as to maintain the balance of Article 19(2) and Article 30(1) of the Constitution. Even with regard to unaided minority institutions, the view is that while the majority of students to be admitted should be from the minority community concerned, a certain percentage of students from other communities should also be admitted to maintain the secular character of education in the country in what has been described as a "sprinkling effect".

158. Mr. Parasaran's submissions with regard to the concept of "Rag Bag" legislation would not apply to the facts of these cases since the amendments to the Regulations of 1997, 2000 and 2007 were effected under Entry 66, List I of the Seventh Schedule and no recourse was taken to Entry 25 of the Concurrent List by the MCI and DCI while amending the said Regulations.

159. This brings us to the last issue, which has been raised before us regarding the impact of the Presidential Orders made under Article 371D of the Constitution of India. As pointed out by Mr. L. Nageshwar Rao, learned Senior Advocate, special enactments have been made in the States of Andhra Pradesh and Tamil Nadu regarding admission of students in the different medical colleges and institutions being run in the said States. The said legislation being under Entry 25 of List III of the Seventh Schedule to the Constitution, the question which arises is whether the amended MCI Regulations would have primacy over the said State enactments. The question is answered by Article 371-D of the Constitution which empowers the President to make special provisions with respect to the State of Andhra Pradesh, including making orders with regard to admission in educational institutions. Clause 10 of Article 371-D provides as follows:

> "The provisions of this article and of any order made by the President thereunder shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force."

Accordingly, the enactments made in the States of Andhra Pradesh and Tamil Nadu will remain unaffected by the impugned Regulations. We have already held that the Regulations and the amendments thereto have been framed by the MCI and the DCI with the previous permission of the Central Government under Entry 66, List I, but that the Regulations cannot prevail over the constitutional guarantees under Articles 19(1)(g), 25, 26, 29(1) and 30 of the Constitution.

160. Apart from the legal aspects, which have been considered at length, the practical aspect of holding a single National Eligibility-cum-Entrance Test needs to be considered. Although, it has been submitted by the learned Additional Solicitor General that a single test would help poor students to avoid sitting for multiple tests, entailing payment of fees for each separate examination, it has to be considered as to who such poor students could be. There can be no controversy that the standard of education all over the country is not the same. Each State has its own system and pattern of education, including the medium of instruction. It cannot also be disputed that children in the metropolitan areas enjoy greater privileges than their counter-parts in most of the rural areas as far as education is concerned, and the decision of the Central Government to support a single entrance examination would perpetuate such divide in the name of giving credit to merit. In a single window competition, the disparity in educational standards in different parts of the country cannot ensure a level playing field. The practice of medicine entails something more than brilliance in academics, it requires a certain commitment to serve humanity. India has brilliant doctors of great merit, who are located mostly in urban areas and whose availability in a crisis is quite uncertain. What is required to provide health care to the general

masses and particularly those in the rural areas, are committed physicians who are on hand to respond to a crisis situation. Given the large number of people who live in the villages in difficult conditions, the country today has more need of such doctors who may not be specialists, but are available as general physicians to treat those in need of medical care and treatment in the far flung areas of the country, which is the essence of what was possibly envisaged by the framers of the Constitution in including Article 30 in Part III of the Constitution. The desire to give due recognition to merit is laudable, but the pragmatic realities on the ground relating to health care, especially in the rural and tribal areas where a large section of the Indian population resides, have also to be kept in mind when policy decisions are taken in matters such as this. While the country certainly needs brilliant doctors and surgeons and specialists and other connected with health care, who are equal to any in other parts of the world, considering ground realities, the country also has need for "barefoot doctors", who are committed and are available to provide medical services and health care facilities in different areas as part of their mission in becoming doctors.

161. In the light of our aforesaid discussions and the views expressed in the various decisions cited, we have no hesitation in holding that the "Regulations on Graduate Medical Education (Amendment) 2010 (Part II)" and the "Post Graduate Medical Education (Amendment) Regulation, 2010 (Part II)", whereby the Medical Council of India introduced the single National Eligibility-cum-Entrance Test and the corresponding amendments in the Dentists Act, 1948, are ultra vires the provisions of Articles 19(1)(g), 25, 26(a), 29(1) and 30(1) of the Constitution, since they have the effect of denuding the States, State-run Universities and all medical colleges and institutions, including those enjoying the protection of the above provisions, from admitting students to their M.B.B.S., B.D.S. and Post-graduate courses, according to their own procedures, beliefs and dispensations, which has been found by this Court in the

T.M.A. Pai Foundation case (supra), to be an integral facet of the right to administer. In our view, the role attributed to and the powers conferred on the MCI and the DCI under the provisions of the Indian Medical Council Act, 1956, and the Dentists Act, 1948, do not contemplate anything different and are restricted to laying down standards which are uniformly applicable to all medical colleges and institutions in India to ensure the excellence of medical education in India. The role assigned to the MCI under Sections 10A and 19A(1) of the 1956 Act vindicates such a conclusion.

162. As an off-shoot of the above, we also have no hesitation in holding that the Medical Council of India is not empowered under the 1956 Act to actually conduct the NEET.

163. The Transferred Cases and the Writ Petitions are, therefore, allowed and the impugned Notifications Nos. MCI-31(1)/2010-MED/49068, and MCI.18(1)/2010-MED/49070, both dated 21st December, 2010, published by the Medical Council of India along with Notification Nos. DE-22-2012 dated 31st May, 2012, published by the Dental Council of India and the amended Regulations sought to be implemented thereunder along with Notification Nos. DE-22-2012 dated 31st May, 2012, published by the Dental Council of India, are hereby quashed. This will not, however, invalidate actions so far taken under the amended Regulations, including the admissions already given on the basis of the NEET conducted by the Medical Council of India, the Dental Council of India and other private medical institutions, and the same shall be valid for all purposes.

164. Having regard to the nature of the cases decided by this judgment, the parties thereto will bear their own costs.

ANIL R. DAVE, J. 1. I have carefully gone through the elaborate judgment delivered by the learned Chief Justice. After going through the judgment, I could not persuade myself to share the same view.

2. As the learned Chief Justice is to retire within a few

days, I have to be quick and therefore, also short. Prior to preparation of our draft judgments we had no discussion on the subject due to paucity of time and therefore, I have to express my different views but fortunately the learned Chief Justice has discussed the facts, submissions of the concerned counsel and the legal position in such a detail that I need not discuss the same again so as to make the judgment lengthy by repeating the submissions and the legal provisions, especially when I am running against time.

3. Sum and substance of all these petitions is that the Medical Council of India (hereinafter referred to as 'the MCI') should not be entrusted with a right to conduct National Eligibility-cum- Entrance Test (hereinafter referred to as 'the NEET') and whether introduction of the NEET would violate fundamental rights of the petitioners guaranteed under the provisions of Articles 19(1)(g), 25, 26, 29(1) and 30 of the Constitution of India.

4. The submissions are to the effect that if the MCI or any other body conducts examination in the nature of the NEET, the petitioners, who are managing medical colleges, would not be in a position to exercise their discretion in relation to giving admission to the students in their colleges and therefore, their fundamental right guaranteed under Article 19(1)(g) and the rights of the minority institutions under Articles 29 and 30 would be violated. The submission is to the effect that the minority institutions should have full and unfettered right to select the students who are to be imparted education in their colleges. Any restriction or regulation of whatsoever type, would violate their fundamental rights. Thus, what is to be seen by this Court is whether the system sought to be introduced by the MCI under the provisions of the Indian Medical Council Act, 1956 (hereinafter referred to as 'the Act') is violative of any of the legal or constitutional provisions. In the process of deciding so, in my opinion, this Court also has to examine whether it would be in the interest of the society and the students aspiring to study medicine to have a common examination in the nature of the NEET.

5. Sections 19A and 20 of the Act, which have been reproduced in the judgment delivered by the learned Chief Justice, permit the MCI to prescribe the minimum standards of medical education. Section 33 of the Act also empowers the MCI to make regulations to carry out the purposes of the Act. Thus, the said provisions enable the MCI to regulate the system of medical education throughout the country.

6. Let me first of all consider the scope of the aforestated sections and the provisions of the Act in relation to the regulation of the standards of education to be imparted in medical colleges. It is a matter of sound common sense that to have doctors well versed in the subject of medicine and having proficiency in their field, we should have suitable and deserving students who should be imparted good medical education and there should be strict supervision over the education system so as to see that the students who are not up to the mark or are not having the highest standards of education are not declared successful at the examinations.

7. To achieve the aforestated ideal, the system should be such that it should have effective regulations at three different stages - The first stage is the admission of the students to medical colleges. The students who are admitted to the medical course should be suitable and should have the right aptitude so that they can be shaped well into the medical profession after being imparted proper education. The second stage is with regard to determination of syllabus and the manner of imparting education and for the said purpose, the regulating authorities should see that proper medical training is given to the students and for the said purpose sufficiently equipped hospitals should be there as teaching institutes. It should also be seen that sufficient number of patients are treated at the hospitals so that the students can get adequate practical training where the patients are being treated. Finally, the examinations, which the students have to pass to prove their worth as successful students should also be strictly regulated. If there is any lacuna or short-coming at any of the above three

stages, it would adversely affect the professional standards of the students passing out from the educational institutions as physicians, who are trusted by the citizens of India at critical moments, when someone's life is at stake. I need not state anything more with regard to the importance of the medical field or the physicians as it is a matter of common knowledge that to maintain good health and to cure the diseases and to avoid or reduce trauma of a patient, existence of a trained and well groomed doctor is a sine qua non. All these facts equally apply to dentists and therefore, I am not specially referring to them every time.

8. By virtue of introduction of the NEET to be conducted under the supervision of the MCI, standards of the students at the stage of their admission to the medical colleges, be it for admission to the M.B.B.S. course or the post graduation studies in medical faculties, would be regulated. Similarly, for imparting education to the students studying in the field of Dentistry, Dental Council of India (For short 'the DCI') has to regulate admissions so as to see that eligible and suitable students are admitted to the different courses in the field of dentistry.

9. There is no need to discuss the importance of quality of input, when something is to be produced, manufactured or developed. Even when one thinks of manufacturing an article, the manufacturer is conscious about the quality of the input and he would invariably select the best input i.e. such raw material so as to make his final product excellent. Principle is not different in the field of education. If an educational institution wants an excellent output in the nature of a well trained, well educated, well groomed professional, the institution must see that suitable and deserving students having an aptitude for becoming good doctors are admitted to the medical college. If among all good students, there are students who are not up to the mark, who are lagging behind in their studies, who are weak in studies, it would not be possible to educate or groom such students effectively and efficiently. A weak student may

lag behind due to his lower level of grasping or education or training. In the circumstances, it becomes the duty of the regulating authority to see that quality of the students at the stage of admission is thoroughly examined and only deserving and suitable students are given admission to the medical colleges so as to make them suitable members of a noble profession upon completion of their studies. So as to see that only deserving and suitable students are admitted to the medical colleges, the MCI has introduced the NEET. By virtue of introduction of the NEET, the students aspiring to become physicians or pursue further medical studies will have to pass the NEET. The NEET would be a nationwide common examination to be held at different places in the country so that all students aspiring to have medical education, can appear in the examination and ultimately, on the basis of the result of the examination, suitability and eligibility of the students for admission to the medical profession can be determined. This system is a part of regulation whereby entry to the field of medical education is regulated in such a way that only eligible and suitable students are given admission to medical colleges.

10. If the NEET is conducted under the supervision of the apex professional body, it would inspire confidence in the system and in that event, the selection of the students for admission to the medical profession would be on merit based selection. No extraneous consideration would come into play in the process of selection. The process of selection would not be influenced by irrelevant factors like caste and creed, community, race, lineage, gender, social or economic standing, place of residence - whether rural or urban, influence of wealth or power; and admission would be given only to the students who really deserve to be well qualified physicians or dentists. Thus, there would not be any discrimination or influence in the process of selection. I may add here that though the students can be selected only on the basis of their merit, it would be open to the States to follow their reservation policy and it would also be open to the institutions based on religious or linguistic minority to select students of their choice, provided the students

so selected have secured minimum marks prescribed at the NEET. From and among those students, who have secured prescribed qualifying marks, the concerned institutions, who want to give priority to the students belonging to a particular class or caste or creed or religion or region, etc. would be in a position to give preference to such students in the matter of their admission to the concerned medical college. Thus, the purpose with which the Articles 25, 26, 29, and 30 are incorporated in our Constitution would be fully respected and implemented.

11. Furthermore, centralization of the selection process under holding the NEET would help the students to appear at the examination from any corner of our nation. The result of the examination would be published at the same time on one particular day and with the same standard. There would not be any problem with regard to equalizing marks and merits of different students passing different examinations from different regions or states or universities or colleges. The process of selection would be equal, fair, just and transparent. All the students would be in a position to compete from a common platform and the test will have credibility in the eyes of the students and the society. There are number of professional institutions which are having only one professional examination and there are some institutions which also have one common entrance test which would decide competence and capability of a student for being admitted to the professional course and the system which is followed by them for years is quite satisfactory and successful. The students would be benefited because they will not have to appear at different places on different days at different examinations for the same purpose. In my opinion, the aforestated factors, in practical life, would surely help the students, the profession and the institutions which are not money minded and are sincere in their object of imparting medical education to the aspiring students. The cost of appearing at the NEET would be much less as the aspiring students will not have to purchase several expensive admission forms and will not have to travel to different places.

12. An apprehension has been voiced by the counsel for the petitioners that the minority institutions or the educational institutions belonging to special classes would be adversely affected because of the introduction of the NEET. In fact, the said apprehension is not well founded. The policy with regard to the reservation can be very well implemented if the NEET is introduced because the NEET would determine standard or eligibility of a student who is to be imparted education in the field of medicine. The institution imparting medical education will have to see that the student to be admitted is having minimum standard of suitability and the institution will be at a liberty to select a student of its choice if it wants to promote a particular class of persons. By admitting suitable and deserving students having an aptitude for becoming doctors, the religious institutions would be in a position to have better doctors for fulfilling their objective.

13. Moreover, the policy with regard to reservation for certain classes, followed by the States would also not be adversely affected. From the deserving eligible students, who have procured qualifying marks at the NEET and who belong to the reserved classes would be given preference so as to fulfill the policy with regard to reservation. Thus, the students belonging to the reserved classes would also not suffer on account of holding the NEET.

14. In the circumstances, it cannot be said that introduction of the NEET would adversely affect the policy with regard to the reservation or the policy of the States pertaining to upliftment of downtrodden persons belonging to certain classes.

15. The MCI has power to regulate medical education and similarly the DCI has also the power to regulate the education in the field of Dentistry. Meaning of the word 'to regulate' would also include controlling entry of undeserving or weak students into the profession, who cannot be groomed in normal circumstances as good physicians or doctors or dentists. The term 'regulate' would normally mean to control something by means of rules or by exercise of control over a system. It is an

admitted fact that one of the functions of these apex bodies of the professionals is to regulate the system of education. In my opinion, we cannot put any fetter on the system introduced by these bodies, whereby they try to control entry of weak or undeserving or less competent students to the institutes where medical education is imparted. Thus, in my opinion, the MCI and the DCI are competent to exercise their right to regulate the education system under the provisions of the Act and under the provisions of the Dentists Act, 1948, which permit them to determine the standard of students who are to be admitted to these professional courses.

16. Hence, I am of the view that the MCI and the DCI are entitled to regulate the admission procedure by virtue of the provisions of their respective Acts, which enable them to regulate and supervise the overall professional standards.

17. I have now to see whether the legal provisions which permit the aforestated apex bodies to conduct the NEET, so as to regulate admission of the students to medical institutes, are in accordance with legal and Constitutional provisions. The aforestated question has been rightly answered by this court in the case of *Dr. Preeti Srivastava and Another vs. State of M.P. and Others* (1999) 7 SCC 120 to the effect that norms of admission will have a direct impact on the standards of education. This court has observed that the standards of education in any institution or college would depend upon several factors and the caliber of the students to be admitted to the institutions would also be one of the relevant factors. Moreover, in view of entry 25 of List III of the Seventh Schedule to the Constitution, Union as well as the States have power to legislate on the subject of medical education, subject to the provisions of entry 66 of List I of the Seventh Schedule, which deals with determination of standards in institutions for higher education. In the circumstances, a State has the right to control education, including medical education, so long as the field is unoccupied by any Union legislation. By virtue of entry 66 in List I to the Seventh Schedule, the Union can make laws with

respect to determination of standards in institutions for higher education. Similarly, subject to enactments, laws made with respect to the determination of standards in institutions for higher education under power given to the Union in entry 66 of List I of the Seventh Schedule, the State can also make laws relating to education, including technical education and medical education. In view of the above position clarified in the case of *Dr. Preeti Srivastava* (supra), the NEET can be conducted under the supervision of the MCI as per the regulations framed under the Act. As stated hereinabove, Section 33 of the Act enables the MCI to make regulations to carry out the purposes of the Act and therefore, conducting the NEET is perfectly legal.

18. In para 36 of the judgment delivered in the case of *Dr. Preeti Srivastava* (supra), this Court has held that for the purpose of maintaining standards of education, it is very much necessary to see that the students to be admitted to the higher educational institutions are having high caliber and therefore, in the process of regulating educational standards in the fields of medicine and dentistry also the above principle should be followed and the apex professional bodies should be permitted to conduct examinations in the nature of the NEET. Regulations made under the Act and the Dentists Act, 1948 must be treated as part of the Act and therefore, conducting the NEET cannot be said to be illegal. Submissions were made by the learned counsel for the petitioners that as copies of the draft Regulations, as required under Section 19A of the Act, were not forwarded to the State Governments, the said Regulations cannot be acted upon. The said submission is of no importance for the reason that I am in agreement with the submission of the learned counsel appearing for the MCI that the said provision is not mandatory and therefore, non-supply of the draft regulations would not adversely affect the validity of the Regulations and the NEET. It also appears from the language used in Section 19A of the Act that the said provision with regard to furnishing copies of the draft regulations to all the State Governments is not mandatory and any defect in the said

procedure would not vitiate validity of the Regulations or action taken in pursuance of the Regulations.

19. Similar question with regard to having a common test had arisen for admitting students aspiring to become veterinary surgeons. The question was whether it was open to the apex body of the said profession to conduct a common entrance test. Ultimately, the issue had been resolved by this court in the matter of *Veterinary Council of India vs. Indian Council of Agricultural Research,* (2000) 1 SCC 750. This court, after considering several issues similar to those which have been raised in these petitions, held that it was open to the concerned regulatory Council to conduct a common entrance test.

20. So far as the rights guaranteed under Article 19(1)(g) of the Constitution with regard to practising any profession or carrying on any occupation, a trade or business, are concerned, it is needless to say that the aforestated rights are not unfettered. Article 19(6) of the Constitution permits the State to enact any law imposing reasonable restrictions on the rights conferred by Article 19(1)(g) in relation to the professional or technical qualifications necessary for practising any profession. Enactments of the Act and the Dentists Act, 1948, including Regulations made thereunder, which regulate the professional studies cannot be said to be violative of the Constitutional rights guaranteed to the petitioners under Article 19(1)(g) of the Constitution. The framers of the Constitution were conscious of the fact that anybody cannot be given a right to practise any profession without having regard to his capacity, capability or competence. To be permitted to practise a particular profession, especially when the profession is such which would require highly skilled person to perform the professional duties, the State can definitely regulate the profession. Even if we assume that all the petitioner institutions are in business of imparting education, they cannot also have unfettered right of admitting undeserving students so as to make substandard physicians and dentists. One may argue here that ultimately, after passing the final examination, all students who had joined

the studies would be at par and therefore, even if a very weak or substandard student is given admission, after passing the final examination, which is supervised by one of the apex bodies referred to hereinabove, he would be at par with other students who were eligible and suitable at the time when they were given admission. In practical life, we do find a difference between a professional who has passed his professional examination at the first or second trial and the one who has passed examination after several trials. Be that as it may, it is for the apex body of the professionals to decide as to what type of students should undergo the professional training. The function with regard to regulating educational activity would be within the domain of the professional bodies and their decision must be respected so as to see that the society gets well groomed bright physicians and dentists. Thus, in my opinion, the introduction of the NEET would not violate the right guaranteed to the petitioners under the provisions of Article 19(1)(g) of the Constitution of India.

21. So far as the rights guaranteed to the petitioners under the provisions of Articles 25, 26, 29 and 30 are concerned, in my opinion, none of the rights guaranteed under the aforestated Articles would be violated by permitting the NEET. It is always open to the petitioners to select a student subject to his being qualified by passing the examination conducted by the highest professional body. This is to assure that the students who are to undergo the professional training are suitable for the same. Regulations relating to admission of the students i.e. admitting eligible, deserving and bright students would ultimately bring reputation to the educational institutes. I fail to understand as to why the petitioners are keen to admit undeserving or ineligible students when eligible and suitable students are available. I am sure that even a scrupulous religious person or an educational institution would not like to have physicians or dentists passing through its institution to be substandard so as to bring down reputation of the profession or the college in which such a substandard professional was educated.

Minorities - be it religious or linguistic, can impart training to a student who is found worthy to be given education in the field of medicine or dentistry by the professional apex body. In my opinion, the Regulations and the NEET would not curtail or adversely affect any of the rights of such minorities as apprehended by the petitioners. On the contrary, standard quality of input would reasonably assure them of sterling quality of the final output of the physicians or dentists, who pass out through their educational institutions.

22. An apprehension was voiced by some of the counsel appearing for the petitioners that autonomy of the petitioner institutions would be lost if the NEET is permitted. I fail to understand as to how autonomy of the said institutions would be adversely affected because of the NEET. The Government authorities or the professional bodies named hereinabove would not be creating any hindrance in the administrative affairs of the institutions. Implementation of the NEET would only give better students to such institutions and from and among such highly qualified and suitable students, the minority institutions will have a right to select the students of their choice. At this stage, the institutions would be in a position to use their discretion in the matter of selection of students. It would be open to them to give weightage to the religion, caste, etc of the student. The institutions would get rid of the work of conducting their separate examinations and that would be a great relief to them. Except some institutions having some oblique motive behind selecting students who could not prove their mettle at the common examination, all educational institutes should feel happy to get a suitable and eligible lot of students, without making any effort for selecting them.

23. For the reasons recorded hereinabove, in my opinion, it cannot be said that introduction of the NEET would either violate any of the fundamental or legal rights of the petitioners or even adversely affect the medical profession. In my opinion, introduction of the NEET would ensure more transparency and less hardship to the students eager to join the medical

profession. Let us see the consequence, if the apex bodies of medical profession are not permitted to conduct the NEET. A student, who is good at studies and is keen to join the medical profession, will have to visit several different States to appear at different examinations held by different medical colleges or institutes so as to ensure that he gets admission somewhere. If he appears only in one examination conducted by a particular University in a particular State and if he fails there, he would not stand a chance to get medical education at any other place. The NEET will facilitate all students desirous of joining the medical profession because the students will have to appear only at one examination and on the basis of the result of the NEET, if he is found suitable, he would be in a position to get admission somewhere in the country and he can have the medical education if he is inclined to go to a different place. Incidentally, I may state here that learned senior counsel Mr. Gupta had informed the Court that some medical colleges, who are more in a profiteering business rather than in the noble work of imparting medical education, take huge amount by way of donation or capitation fees and give admission to undeserving or weak students under one pretext or the other. He had also given an instance to support the serious allegation made by him on the subject. If only one examination in the country is conducted and admissions are given on the basis of the result of the said examination, in my opinion, unscrupulous and money minded businessmen operating in the field of education would be constrained to stop their corrupt practices and it would help a lot, not only to the deserving students but also to the nation in bringing down the level of corruption.

24. For the aforestated reasons, I am of the view that the petitioners are not entitled to any of the reliefs prayed for in the petitions. The impugned notifications are not only legal in the eyes of law but are also a boon to the students aspiring to join medical profession. All the petitions are, therefore, dismissed with no order as to costs.

R.P. Transferred Cases & Writ Petitions allowed.

AKKODE JUMAYATH PALLI PARIPALANA COMMITTEE

v.

P.V. IBRAHIM HAJI AND OTHERS

(Civil Appeal Nos. 6124-6125 of 2013)

JULY 23, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Wakf Act:

Wakf Tribunal - Jurisdiction of - Suit for perpetual injunction restraining the defendants/respondents from interfering in administration, management and peaceful possession and enjoyment of Mosque - Held: Dispute is with regard to management and peaceful enjoyment of Mosque and madrassa and assets which relate to Wakf -- Nature of relief shows that Wakf Tribunal has got jurisdiction to decide the disputes - There is no error in the Wakf Tribunal entertaining the suit -- High Court committed an error in holding otherwise -- Order passed by High Court is set aside and the matter remitted to it to consider the revision on merits - Suit.

Ramesh Gobindram (Dead) Through Lrs. v. Sugra Humayun Mirza Wakf **2010 (10) SCR 945 = 2010 (8) SCC 726;** *Board of Wakf, West Bengal and Another v. Anis Fatma Begum and Another* **2010 (13) SCR 1063 = 2010 (14) SCC 588 - referred to.**

Case Law Reference:

2010 (10) SCR 945	**referred to**	**para 6**
2010 (13) SCR 1063	**referred to**	**para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6124-6125 of 2013.

From the Judgment and Order dted 10.11.2010 of the

High Court of Kerala at Ernakulam in CRP No. 1362 of 2004 and 04.02.2011 in RP No. 87 of 2011.

K. Rajeev for the Appellant.

P.V. Dinesh, Bineesh K., Sunil K. Tripathi, Shantanu for the Respondents.

The order of the Court was delivered by

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

2. The question that arises for consideration in this appeal is whether the Wakf Tribunal has got jurisdiction to entertain a suit for injunction restraining the defendants from interfering with the administration, management and peaceful enjoyment of the Mosque and madrassa run by it and all the assets attached to the Mosque.

3. Appellant, a society registered under the Societies Registration Act stated to be formed for the management and administration of wakf property including a Mosque situated therein, filed a suit for an injunction before the Court of Munsiff, Manjeri, which was transferred to the Court of Wakf Tribunal, Kozhikode and numbered as O.S. No.53 of 2003. The suit was contested by the respondents on merits and ultimately it was decreed by the Wakf Tribunal on 28.09.2004 and the plaintiff was given a decree for a perpetual injunction restraining the defendants/respondents and their men from interfering in any manner in the administration, management and peaceful and possession and enjoyment of the Mosque, namely, Akkode Juyamath Palli, the madrassa run by it and all the assets attached to the Mosque.

4. The respondents herein filed Civil Revision Petition as CRP No.1362 of 2004 under Section 83(9) of the Wakf Act before the Kerala High Court. The High Court vide its judgment dated 10.11.2010 set aside the judgment and decree passed by the Wakf Tribunal holding that a suit for injunction is not maintainable before a Wakf Tribunal placing reliance on the Judgment of this Court in *Ramesh Gobindram (Dead) Through*

Lrs. v. Sugra Humayun Mirza Wakf 2010 (8) SCC 726. The Court also granted permission to the appellant to take back the plaint for presenting before the appropriate court. Later the appellant preferred a Review Petition which was also dismissed by the High court on 04.02.2011. The legality of the orders is under challenge in this appeal.

5. We are of the view that the High Court has committed an error in holding that the reliefs sought for by the appellants in the suit could not be claimed before the Wakf Tribunal in view of the Judgment of this Court in *Ramesh Gobindram (Dead) Through Lrs.* (supra). In *Ramesh Gobindram (Dead) Through Lrs.* (supra) the question that arose for consideration before this Court was whether the Wakf Tribunal constituted under Section 83 of the Wakf Act was competent to entertain and adjudicate upon disputes regarding eviction of the appellants who were occupying different items of which were admittedly wakf properties. The Wakf Tribunal answered the question of jurisdiction in affirmative and decreed the suit which was affirmed by the High Court. This Court, after examining the various provisions of the Wakf Act and Section 9 of the Code of Civil Procedure in paras 34 and 35 of the Judgment held as follows:

> "34. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a civil court. If it is not, the jurisdiction of the civil court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the civil court would stand excluded.
>
> 35. In the cases at hand, the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the civil court and not before the Tribunal."

6. This Court allowed the appeals and the orders passed by the Wakf Tribunal were set aside and the suit filed by the respondents for eviction of the appellants before the Tribunal was held not maintainable. The ratio laid down in the above-mentioned Judgment later came up for consideration before this Court in *Board of Wakf, West Bengal and Another v. Anis Fatma Begum and Another* 2010 (14) SCC 588 and the Judgment in *Ramesh Gobindram (Dead) Through Lrs.* (supra) was held distinguishable. That was a case where the dispute related to the Wakf Estate which was created by registered deed of Wakf dated 22.09.1936. The question raised was with regard to the demarcation of the Wakf property, which this Court held is a matter which fell under the purview of the Wakf Act. The judgment of the Calcutta High Court which held otherwise was set aside and this Court held that the Wakf Tribunal has jurisdiction to decide those disputes.

7. We are of the view that the dispute that arises for consideration in this case is with regard to the management and peaceful enjoyment of the Mosque and madrassa and the assets which relate to Wakf. Nature of the relief clearly shows that the Wakf Tribunal has got jurisdiction to decide those disputes. We, therefore, find no error in the Wakf Tribunal entertaining O.S. No.53 of 2003 filed by the appellant and the High Court has committed an error in holding otherwise. Consequently the impugned order passed by the High Court is set aside and the matter is remitted to the High Court to consider the revision on merits. The appeals are disposed of as above, with no order as to costs.

R.P. Appeals disposed of.

DIGAMBER & ORS.
v.
STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 5346 of 2013)

AUGUST 1, 2013

[G.S. SINGHVI AND V. GOPALA GOWDA, JJ.]

Land Acquisition Act, 1894:

ss. 4, 6 and 23 - Acquisition of agricultural land for industrial development - Compensation - Comparative sale transactions - Criteria for determination of market value of acquired land - Explained - Held: That the acquisition of the land is for commercial purpose should be the relevant criteria for determining the market value by both the Land Acquisition Officer and reference court - Reference court, while enhancing the compensation, was right in placing reliance upon the sale instances even in relation to small plots of land and holding that there is a trend of escalation of the price of land situated in the proximity of the acquired land -- The said finding of fact has been erroneously set aside by High Court -- The reference court by placing reliance upon the documentary and oral evidence on record, and by re-determining the market value, has awarded just and reasonable compensation - Judgment of High Court set aside and award passed by reference court restored.

Notification u/s 4 of the Land Acquisition Act, 1894 for acquisition of agricultural land belonging to the appellants, for the purpose of industrial development was published on 7.9.1991 and final notification was published on 12.7.1992. The Land Acquisition Officer awarded the compensation at the rate of Rs.50,000/- per hectare, but the reference court placing reliance on comparable sale transactions of the dates prior and

subsequent to the issuance of notification u/s 4, enhanced the compensation to Rs.5/- per sq. foot. However, the High Court set aside the judgment of the reference court and restored the award passed by the Land Acquisition Officer.

Allowing the appeal, the Court

HELD: 1.1 In the instant case, the acquisition of land was for non residential purpose as it was required to establish industries through industrial entrepreneurs by forming industrial estate and carving out industrial plots by the Maharashtra Industrial Development Corporation, which was purely a commercial purpose. This important aspect of the matter was required to be kept in mind by the Special Land Acquisition Officer at the time of determining the market value of the acquired land in exercise of his statutory power u/s 11 of the L.A. Act. That the acquisition of the land is for commercial purpose should be the relevant criteria for determining the market value by both the Land Acquisition Officer and the reference court. [para 9 and 23] [1045-C-E; 1054-G]

1.2 Further, the legal principles laid down in the case of Atma Singh, indicate the criteria to be followed for determination of the market value of a property keeping in view its existing condition with all its existing advantages and its potential possibility when let out in its most advantageous manner. The existing amenities like water, electricity, possibility of their further extension, town is developing or has prospect of development in future, are very much abundantly available in respect of the acquired land as the said land is within the proximity of New Venkateshnagar Layout, wherein residential sites are formed, and there is a school and college near the Highway. [para 23] [1055-C-G]

Atma Singh Vs. State of Haryana **2007 (12) SCR 1120 = 2008 (2) SCC 568 - relied on.**

1.3 The reference court was right in placing reliance upon the sale instances even in relation to small plots of land. Some sale deeds are of prior to acquisition notification and some are subsequent to it. Though it is shown from the records that the acquired land on the date of notification was an agricultural land, it has got non agricultural potentiality as the said land was proposed by the District Collector for acquisition after satisfying himself that it was suitable for the purpose of industrial development. The reference court has held that there is a trend of escalation of the price of land situated in the proximity of the acquired land. The said finding of fact has been erroneously set aside by the High Court. [para 10, 14 and 23] [1048-F-G; 1054-G-H; 1055-A-B; 1056-C]

Sabhia Mohammed Yusuf Abdul Hamid Mulla Vs.Special Land Acquisition Officer **(2012) 7 SCC 595;** *Viluben Jhalejar Contractor vs. State of Gujarat* **2005 (3) SCR 542 = 2005 (4) SCC 789 - relied on.**

Nama Padu Huddar Vs. State of Maharashtra **1994 BCJ 316,** *Shashikant Krishanji v. Land Acquisition Officer* **1993 BCJ 27,** *Land Acquisition Officer Vs. L. Kamalamma* **1998 (1) SCR 1153 = 1998 (2) SCC 385,** *Faridabad Gas Power Project, NTPC Ltd.,etc Vs. Om Prakash & Ors., etc.* **(2009) 4 SCC 719;** *Vyricherla Narayana Gajapatiraju Vs. Revenue Divisional Officer* **AIR 1939 PC 98 - referred to.**

1.4 The award of compensation by the Special Land Acquisition Officer at Rs. 50,000/- per hectare of the acquired land does not reflect the correct market value as the same was unrealistic and contrary to legal evidence on record and the law laid down by this Court. The reference court has held that the claimants are entitled for enhanced compensation at the rate of Rs.5/-

per sq. ft. as per calculations made in its judgment. The findings of fact and reasons recorded by the reference court in determining the market value of the acquired land are well founded and the same are based on facts, cogent and legal evidence adduced on record by the appellants. The reference court referring to the notes of inspection of the site made by the Assistant Collector and Land Acquisition Officer on 21.11.1990, and placing reliance upon the documentary and oral evidence on record, and by re-determining the market value, has passed judgment and awarded just and reasonable compensation. The findings of fact recorded by the reference court have been erroneously set aside by the High Court without assigning valid reasons. Therefore, it would be just and proper for this Court to restore the judgment and award passed by the reference court. Ordered accordingly. [para 9, 11, 12, 13 and 24-25] [1045-E; 1046-G-H; 1047-B; 1048-B-D; 1055-H; 1056-A, B-C, E-F]

The special Land Acquisition Officer, BTDA, Bagalkot Vs. Mohd. Hanif Sahbi Bawa Sahib **2002 (2) SCR 550 = JT 2002 (3) SC 176;** *Saraswati Devi and others Vs. U.P. Government & Anr.* **AIR 1992 SC 1620;** *Union of India Vs. Zila Singh and Ors.* **(2003) 10 SCC 166 - cited.**

Case Law Reference:

2002 (2) SCR 550	**cited**	**para 4**
AIR 1992 SC 1620	**cited**	**para 7**
(2003) 10 SCC 166	**cited**	**para 7**
2005 (3) SCR 542	**relied on**	**para 17**
(2012) 7 SCC 595	**relied on**	**para 23**
1994 BCJ 316	**referred to**	**para 15**
1993 BCJ 27	**referred to**	**para 16**
2007 (12) SCR 1120	**relied on**	**para 18**

1998 (1) SCR 1153	**referred to**	**para 19**
(2009) 4 SCC 719	**referred to**	**para 20**
AIR 1939 PC 98	**referred to**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5346 of 2013.

From the Judgment and Order dated 05.10.2005 of the High Court of Judicature of Bombay Bench at Aurangabad in F.A. No. 646 of 1998.

Bina Madhavan, Praseena E. Joseph, Shivendra Singh, for the Appellants.

Shyam Divan, Ramni Taneja, Guruprasad Pal, Umang Jain, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave has been granted by this Court vide order dated 8.7.2013.

2. This appeal is directed against the judgment and order dated 05.10.2005 passed by the High Court of Judicature of Bombay, Bench at Aurangabad passed in First Appeal No. 646 of 1998 whereby the High Court set aside the judgment and award dated 02.05.1998 of the learned Civil Judge, Senior Division, Nanded passed in land acquisition reference case and restored the compensation awarded at the rate of Rs.50,000/- per hectare by the Special Land Acquisition Officer, Nanded by allowing the appeal filed by the respondents.

3. It is contended by Ms. Bina Madhavan, the learned counsel for the appellants that the impugned judgment is contrary to the legal evidence on record particularly Exhs. 20-21 which are the sale deeds of the plots covered in the same area that were prior to the notification that is before 14.06.1990 which sale instances were very well considered by the reference

court for comparison and the finding of fact was recorded that the said instances are comparable to the acquired land to that of the plots covered in the sale deeds. Therefore, it is contended that the acquired land has the similar non agricultural potentiality and the State Government had acquired the said land in favour of the Maharashtra Industrial Development Corporation (in short 'the Corporation') for the purpose of formation of industrial estate and sale of the plots for commercial purposes. It is urged by the learned counsel that the judgment and award passed by the reference court is erroneously set aside by the High Court as it has found fault with it in placing reliance upon the sale instances and has wrongly re-determined the market value of the land which findings recorded by the High Court in its judgment are not only erroneous in law but also suffers from error in fact and therefore, the same is liable to be set aside.

4. The further legal contention urged by the learned counsel for the appellants is that learned reference Judge has rightly awarded the compensation of the acquired land after re-determining its market value based on legal evidence on record at the rate of Rs.5/- per sq. feet. The documentary evidence produced by the appellants are sale deeds marked as Exhs. 22 and 23 pertaining to years 1991 and 1993 respectively and Exhs. 24 and 25 pertaining to the year 1994, ie. post acquisition notification period. That the plots covered in the said sale instances are non agricultural plots of Venkateshnagar Layout which are comparable to the acquired land is the finding of fact recorded by the learned Judge of the reference court on proper appreciation of legal evidence on record. The same is supported by the decision of this Court in the case of *The special Land Acquisition Officer, BTDA, Bagalkot Vs. Mohd. Hanif Sahbi Bawa Sahib*[1], wherein this Court in the aforesaid case has held that the reference court can take into consideration the plots which are covered in the sale instances which were small bits of land, if the acquired land is comparable

1. JT 2002 (3) SC 176.

to the land covered in sale deeds and that placing reliance on such sale instances by the reference court for re-determination of the market value of the acquired land is permissible in law. It is further urged by the learned counsel that this vital aspect of the matter has been overlooked by the learned Judge of the High Court while passing the impugned judgment and award by setting aside the judgment and award of the reference court and restored the compensation awarded by the Land Acquisition Officer which is vitiated both on facts and on law. Therefore, the same is liable to be set aside and the judgment of the reference court must be restored.

5. Further, it is contended by her that the learned Judge of the High Court has erred in affirming the compensation awarded by the Special Land Acquisition Officer at Rs. 50,000/- per hectare of the acquired land ignoring its potentiality as it is acquired for the purpose of formation of industrial estate with a view to carve out the plots and allot the same in favour of allottees/private industrial entrepreneurs at commercial rates for construction of the commercial and industrial buildings upon such allotted plots.

6. It is further contended that the impugned judgment and award of the High Court is otherwise contrary to the principles of law laid down by this Court in a catena of cases, and, therefore requested this Court to award just and reasonable compensation as awarded by the reference court.

7. Mrs. Asha Gopalan Nair, the learned counsel for respondent Nos. 1 and 2 and Mr.Shyam Divan, learned Senior Counsel for respondent No.3 have sought to justify the impugned judgment of the High Court, inter alia, contending that the learned single Judge of the High Court has rightly set aside the impugned judgment in the First Appeal after recording valid and cogent reasons for rejecting the finding recorded by the reference court on contentious issues by placing reliance upon the pre and post sale instances in relation to the non residential plots which are not comparable to the acquired land. Therefore,

it is submitted that the High Court has rightly came to the conclusion on proper re-appraisal of evidence and held that the finding of fact recorded by the reference court in placing reliance upon the sale instances is in relation to small plots, whereas the land acquired is a bigger area. Therefore, the plots covered under sale instances are not comparable to the acquired land in order to arrive at a conclusion and record finding that the acquired land is comparable to the plots referred to supra. Further, the land of the owners has not acquired non agricultural potentiality and re-determination of the market value by the learned reference Judge on the basis of sale instances is erroneous and contrary to the judgments of this Court. The High Court, in support of its findings and conclusions has placed reliance upon the judgment of this Court reported in *Saraswati Devi and Others Vs. U.P. Government & Anr*[2]*.* and Another judgment in *Union of India Vs. Zila Singh and Ors.*[3] wherein this court after interpretation of Section 23 of Land Acquisition Act, 1894 (in short 'the L.A. Act), has held that the sale price in respect of a small piece of land (one bigha in that case) cannot be the basis for determination of market value of a vast stretch of land (5484 bighas in that case). Therefore, the impugned judgment of the High Court in setting aside the judgment of the reference court must be accepted by this Court and does not call for interference by this Court. Hence, they have prayed for dismissal of this appeal.

8. With reference to the above rival legal contentions, the following points would arise for consideration of this Court:

I. Whether the impugned judgment passed by the High Court by reversing the judgment and award of the reference court is vitiated on the ground of erroneous finding and also error in law?

2. AIR 1992 SC 1620.

3. (2003) 10 SCC 166.

II. For what award the appellants are entitled to in this appeal?

9. The first point is required to be answered in the affirmative in favour of the appellants for the following reasons:-

The State of Maharashtra in exercise of its statutory power acquired the lands in favour of the Corporation by publishing the notification in the government gazette on 7.09.1991, and final notification published in the government gazette on 12.07.1992, for the purpose of industrial development by the Corporation in the State of Maharashtra. Undisputedly the acquisition of land is for non residential purpose as it was required to establish industries through industrial entrepreneurs in the acquired land by forming industrial estate and carving out the industrial plots by the Corporation, which is purely a commercial purpose. This important aspect of the matter was required to be kept in mind by the Special Land Acquisition Officer at the time of determining the market value of the acquired land in exercise of his statutory power under Section 11 of the L.A. Act and the Special Land Acquisition Officer has awarded compensation at Rs. 50,000/- per hectare of the acquired land which does not reflect the correct market value.

10. Feeling aggrieved by the said award the appellants herein sought for reference to the reference court by filing claim petition under Section 34 of the Maharashtra Industrial Development Act, 1961 for enhancement of compensation by re-determining the market value. The Collector made reference to the reference court by acceding to the request of the land owners for re-determination of the market value of the acquired land. The appellants produced documentary evidence of sale instances of the plots which are situated in the near proximity of the acquired land and the reference court has examined their claim for enhancement of compensation and rightly re-determined the market value of their land by placing reliance upon the sale instances. The said claim was opposed by the respondents by filing their written statement, inter alia,

contending that compensation awarded by the land acquisition officer is as per the sale consideration of the land covered in the sale instances which are situated nearby the acquired land. The claimants have rightly placed strong reliance upon the sale instances of small plots which are formed in the New Venkateshnagar layout. The sale deed Exh. 21 dated 17.3.1989 shows that the 120 sq. feet was sold for Rs. 3500/- and Exhs. 20 and 22 dated 03.11.1989 which plots measuring 1200 sq. feet sold for Rs.9000/- i.e. Rs. 7.50/- per sq. feet. The aforesaid sale deeds are no doubt prior to the issuance of preliminary notification under Section 4 of the L.A. Act. The other sale instance produced by the claimants, Exh. 23 from GRC 136 shows that plot No.22 about 1500 sq. feet has been sold for 18,000/- at the rate of Rs. 12 per sq. feet. The sale deed is dated 31.05.1993 i.e. three years later from the date of issuance of preliminary notification under Section 4 of the L.A. Act. Another sale deed Exh. 14 is in respect of G.No.605 wherein plot No. 8 measuring 45 x 14 sq. feet was sold for Rs. 35,000/- on 21.12.1994. The appellants also produced the sale deed dated 16.02.1990 at Exh. 33 showing that plot No. 34 and 35 admeasuring 60 x 30 feet situated at Venkateshnagar Layout was sold for Rs. 11,000/-. Another sale deed Exh. 34 shows that one plot No. 13 measuring 40 x 30 feet was sold for Rs. 9,000/- on 02.11.1991 which are all after the preliminary notification under Section 4 of the L.A. Act. The learned reference Judge has rightly placed reliance upon the said sale instances for comparison and held that the acquired land is comparable to the plots covered in the sale deeds referred to supra, as it has acquired non-agricultural potentiality and the acquired land is situated in the near proximity to the plots covered in the sale deeds.

11. The learned Judge of the reference court has referred to the notes of inspection of the site made by the Assistant Collector and Land Acquisition Officer on 21.11.1990, wherein they have stated that the acquired land is situated adjacent to Bhokar and on the eastern side of Bhokar Umri Road i.e.

towards southern side of Bhokar - Bhainsa Road, and population of Bhokar is about 12000. It is further stated that there are various facilities in the said area like school and college. Bhokar is connected by Railway and State Road Transport. The learned reference Judge after referring to the factual contention urged on behalf of the Land Acquisition Officer and the claim of the appellants and placing reliance upon the documentary and oral evidence on record, passed judgment by awarding just and reasonable compensation by re-determining the market value. The land G.No.133 is acquired for the purpose of Mini MIDC i.e. for non agricultural purpose and further with reference to Map. 4, the acquired land is on Nanded Bhokar - Bhainsa Highway. Further, on the basis of receipts produced at Exhs. 17 and 18, the claimant No. 2 Ashok Narayan Kondalwar has converted his share of land from G.No. 123 into non-agricultural purpose. To substantiate this fact the claimants produced the certificate issued by the Talathi, which is marked as Exh. 19. The learned reference Judge has also taken note of the fact that there is no evidence to prove that the acquired land was converted for non agricultural purpose prior to 14.06.1990. From Exhs. 40 and 41, it is clear that the possession of this land was taken on 19.6.1995 and prior to that date claimant No. 2 Ashok Narayan Kondalwar had converted his share of land into non agricultural purpose. The learned Judge did not consider the said documentary evidence and erroneously held that they are not helpful to the appellants. However, he has rightly placed reliance upon the sale instances on record and come to the correct conclusion and held that there is tendency for price of the land to increase in the locality and found fault with the Land Acquisition Officer in not determining the market value of the acquired land at the rate of Rs. 5/- per sq. feet after deducting 40% area of the acquired land which is used for the purpose of development. Therefore, the appellants are entitled for compensation as awarded by the learned Judge of the reference court.

12. The learned reference Judge has recorded a finding

of fact stating that the acquired land is having non agricultural potentiality as it has been acquired for MIDC for the purpose of industrial development and further, it is an admitted fact that no crops were raised by the appellants upon the land. The claim of the appellants was partly allowed by the reference Judge holding that they are entitled for enhanced compensation at the rate of Rs. 5/- per sq. feet as per the calculations made in the judgment of the reference court.

13. Accordingly, the reference Judge has rightly re-determined the market value of the acquired land and awarded all statutory benefits like 30% solatium and interest and additional compound interest from August, 1993 to 6th March, 1995. Statutory interest under Section 38 of the L.A. Act was given, on enhanced compensation from 19.06.1995 to 18.06.1996 and thereafter @ 15% from 19.06.1996 till the date of realization of the amount by the appellants.

14. We have carefully examined the factual and legal contentions urged on behalf of the parties and also the findings recorded by the learned reference Judge in the judgment impugned in the First Appeal filed by the respondents before the High Court. The reference court has rightly placed reliance upon the sale instances for comparison with that of the acquired land after satisfying the fact that it has also acquired non-agricultural potentiality. The subsequent sale deeds in relation to the residential plots of New Venkateshnagar Layout, which were sold after the preliminary notification was issued in relation to the acquired land, the learned reference Judge has noticed the same and held that there is a trend of escalation of the price of land situated in the proximity of the acquired land. The said finding of fact is erroneously set aside by the High Court, holding that the learned reference Judge has erroneously applied the sale instances of the small residential plots of New Venkateshnagar Layout to the land acquired by the State government in favour of the M.I.D.C. The Land Acquisition Officer while determining the market value has considered the

acquired land as agricultural land and awarded inadequate compensation in favour of the appellants.

15. We have carefully examined the factual and legal contentions urged on behalf of the respondents keeping in view the decision of this Court in the case of *Sabhia Mohammed Yusuf Abdul Hamid Mulla Vs. Special Land Acquisition Officer*[4], wherein this Court after interpreting Section 23 of the L.A. Act, 1894, referred to the various legal principles laid down by the Bombay High Court and this Court regarding the relevant criteria to be followed by the Land Acquisition Collector and Courts for determination of the market value of the land acquired for public purpose. At paragraph 5 of the above referred judgment, there is a reference to the Bombay High Court's judgment rendered in the case of *Nama Padu Huddar Vs. State of Maharashtra*[5], the relevant extracted portion is reproduced below:

> "Judicial note can be taken of the fact that the industrial growth in and around Bombay has started with rapid stride from the year 1965 onwards. In fact, the growth is by leaps and bounds in the magnitude of industries as well as number of industries and virtually all the industries of the country are represented on the industrial estates scattered on this highway. It is also an admitted position that on this highway on all sides the facility of electric supply is available as also of abundant water supply. In the area in question it is also an admitted position that all the lands have suitable access roads to Zila Parishad and State Highway including lands which are the farthest from the highway."

16. Further, in para 7 of *Sabhia Mohammed Yusuf Abdul Hamid Mulla's* judgment, reference is made to the judgments in *Shashikant Krishanji v. Land Acquisition Officer*[6] and *Nama Padu Huddar v. State of Maharashtra* (supra), relevant portion of which is extracted below:-

> "The land involved in the reference in hand and the land involved in *State of Maharashtra v. Ramchandra Damodar Koli*[7] are virtually identical situated in the same area bearing similar topographical and physical characteristics covered by the same Notification dated 3-2-1970, when the nearby land of the land under reference fetched market value @ Rs 25 per square metre. On the date of notification, certainly the land under reference will fetch the same market value."

17. Also paras 16 and 17 from *Sabhia Mohammed Yusuf Abdul Hamid Mulla* (supra) are quoted hereunder:

> "16. We have considered the respective arguments and carefully perused the record. It is settled law that while fixing the market value of the acquired land, the Land Acquisition Collector is required to keep in mind the following factors:
>
> (i) Existing geographical situation of the land.
>
> (ii) Existing use of the land.
>
> (iii) Already available advantages, like proximity to National or State Highway or road and/or developed area.
>
> (iv) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

17. In *Viluben Jhalejar Contractor v. State of Gujarat*[8] this Court laid down the following principles for determination of market value of the acquired land: (SCC pp. 796-97)

4. (2012) 7 SCC 595.
5. 1994 BCJ 316.
6. 1993 BCJ 27.
7. (1997) 2 Mah. LR 325.
8. (2005) 4 SCC 789.

"17. Section 23 of the Act specifies the matters required to be considered in determining the compensation; the principal among which is the determination of the market value of the land on the date of the publication of the notification under sub-section (1) of Section 4.

18. One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

19. Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered."

18. Further, it would be worthwhile to refer to the portion which is extracted from *Atma Singh Vs. State of Haryana*[9] which para is referred to at para 18 in *Sabhia Mohammed Yusuf Abdul Hamid Mulla's* case (supra) which reads thus:

"5. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one

9. (2008) 2 SCC 568.

of fact depending upon its condition, situation, uses to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether nearabout town is developing or has prospect of development have to be taken into consideration."

19. In para 22 of *Sabhia Mohammed Yusuf Abdul Hamid Mulla's* case (supra), the judgment of this Court in *Land Acquisition Officer Vs. L. Kamalamma*[10] is referred to and the relevant portion of which is extracted hereunder:

"7. ... When a land is acquired which has the potentiality of being developed into an urban land, merely because some portion of it abuts the main road, higher rate of compensation should be paid while in respect of the lands on the interior side it should be at lower rate may not stand to reason because when sites are formed those abutting the main road may have its advantages as well as disadvantages. Many a discerning customer may prefer to stay in the interior and far away from the main road and may be willing to pay a reasonably higher price for that site. One cannot rely on the mere possibility so as to indulge in a meticulous exercise of classification of the land as was done by the Land Acquisition Officer when the entire land was acquired in one block and therefore classification of the same into different categories does not stand to reason."

20. Para 18 of this Court's judgment in the case of *Faridabad Gas Power Project, NTPC Ltd.,etc Vs. Om Prakash & Ors., etc*[11], is extracted thus:

"18. On the facts and circumstances of the matters before us and difference in quality and potentiality of the lands

10. (1998) 2 SCC 385.

11. (2009) 4 SCC 719.

acquired, we are of the view that market value of the acquired lands for NTPC when compared to the lands acquired for Sector-II Faridabad, should be reduced by at least one-fifth (20%)."

21. It would be worthwhile to refer to the judgment of Privy Council decided on 23.02.1939 in the decision reported in *Vyricherla Narayana Gajapatiraju Vs. Revenue Divisional Officer*[12] wherein at para 24 it reads as under:

"24. It was then claimed on the appellant's behalf that the spring could but for its acquisition, have been used by him as a source of water supply either to the Harbour Authority or to the oil companies and others residing or carrying on business in the harbour area; and the appellant claimed to be compensated upon this footing. After a lengthy hearing before him in the course of which many questions of law and fact not now in issue were discussed, the learned Judge made his award. He found as a fact, and the fact cannot be disputed, that the water of the spring was on 13th February, 1928 capable of being used as a source of water supply to persons outside the plaintiff's land. He also found that the only possible buyers of the water at that date were the Harbour authority itself and the oil companies and labour camps that might be established as a result of the development of the Harbour and stated that this fact would be taken into consideration in fixing the amount of compensation. **But after considering the authorities on the subject, he came to the conclusion as a matter of law that the value to a vendor of a potentiality of his land can be assessed even though there are no other possible purchasers beyond the acquiring authority. Other principles of law stated by him for his guidance in making his award were that it was the contingent possibility of the user that had to be taken as the basis of valuation**

12. AIR 1939 PC 98.

and not the realized possibility and that the use to which the acquiring authority had actually put the property could be taken as a strong piece of evidence to show that the property acquired could be put to such use by the owner at the date of acquisition."

(Emphasis supplied)

22. The judgment of Bombay High Court extracted in *Sabhia Mohammed Yusuf Abdul Hamid Mulla's* case (supra), and the principles laid down by this Court would clearly go to show that the relevant consideration for determination of market value of the acquired land is virtually identical. The nearby land of the land under reference fetched market value of Rs.25/- per sq. metre. In the judgment referred to supra it is held that judicial notice can be taken of the fact that the industrial growth in and around Bombay has started with rapid strides from the year 1965 onwards. In fact, the growth is by leaps and bounds in magnitude as well as number of industries and virtually all the industries of the country are represented on the industrial estates scattered on this highway.

23. The sale instances in relation to the small residential plots covered in the sale deeds Exhs. 20-21 are situated in the same area, which sales were prior to the issuance of the preliminary notification i.e. before 14.06.1990 and it has similar topographical and physical characteristics and the fact is that the land of the appellants is acquired for the purpose of industrial development, which has got the potentiality for development of the land as industrial estate and to carve out industrial plots in it. That the acquisition of the land is for commercial purpose should be the relevant criteria for determining the market value by both the Land Acquisition Officer and reference Court placing reliance upon the sale instances even in relation to small plots of land, though it is shown from the records that the acquired land on the date of notification is an agricultural land. But the acquired land has got

non agricultural potentiality as the said land was proposed by the District Collector after identifying the land for acquisition and stated that it is suitable for the purpose of industrial development. Therefore, the principles laid down at para 16 of Sabhia Mohammed Yusuf Abdul Hamid Mulla's case and the principles laid down in Viluben Jhalejar Contractor's case referred to supra laid down the criteria for determination of the market value of the acquired land. Also, in *Atma Singh's* case (supra) it was stated that the criteria for the determination of the market value the potentiality of the acquired land should also be taken into consideration which has been explained stating that potentiality means capacity or possibility for changing or developing into a state of actuality. Further, the legal principles laid down in the case of *Atma Singh* (supra) at para 5 which portion is extracted above, gives us the criteria to be followed for determination of the market value of a property keeping in view its existing condition with all its existing advantages and its potential possibility when let out in its most advantageous manner. The various criteria laid down in the above referred case namely, the existing amenities like water, electricity, possibility of their further extension, whether near about the acquired land, town is developing or has prospect of development in future, have to be taken into consideration by both the Land Acquisition Collector and the courts for determination of the market value. The aforesaid advantages are very much abundantly available in respect of the acquired land as the said land is within the proximity of New Venkateshnagar Layout, wherein residential sites are formed, and it is on record and there is a school and college near the Highway. Therefore, the principles laid down in the aforesaid case are aptly applicable to the fact situation of the case in hand. Hence, we have to apply the aforesaid principles laid down in the cases of *Atma Singh & Sabhia Mohammed Yusuf Abdul Hamid Mulla* (supra) to the case on hand.

24. In view of the foregoing reasons, we are of the view that the findings of fact and reasons recorded by the learned

Judge of the reference court in determining the market value of the acquired land are well founded and the same are based on facts, cogent and legal evidence adduced on record by the appellants. The same has been rightly accepted by the learned reference Judge after having noticed that the Land Acquisition Officer in a casual manner rejected the claim of the appellants and determined the meager sum of Rs. 50,000/- per hectare as the market value of the land which is unrealistic and contrary to the legal evidence on record and the law laid down by this Court in the cases referred to supra. The findings of fact recorded by the reference Judge on the relevant issue has been erroneously set aside by the High Court without assigning valid reasons. The findings and reasons recorded by the High Court in its judgment are contrary to the facts and legal evidence and various legal principles laid down by this court in the cases referred to supra. Therefore, we have to record our finding that reversing the judgment and award of the reference court is not only erroneous on facts but is also erroneous in law. Accordingly, we answer the first point in favour of the appellants.

25. Since, we have answered the first point in favour of the appellants, the second point is also answered in favour of the appellants and it would be just and proper for this Court to restore the judgment and award passed by the reference court. Since we have affirmed the award of the reference court, having regard to the undisputed fact that this acquisition is of more than 23 years, it would be just and proper for this Court to direct the respondent No.3 - M.I.D.C. to issue the Demand Draft in favour of the landowners/appellants or their legal representatives or deposit the same in their bank accounts within six weeks from the date of receipt of a copy of this judgment and submit the compliance report before the reference court.

26. The appeal is allowed accordingly. There shall be no order as to cost.

R.P. Appeal allowed.

SHRIDHAR NAMDEO LAWAND
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1124 of 2013)

AUGUST 5, 2013

[P. SATHASIVAM, CJI, AND RANJANA PRAKASH DESAI AND RANJAN GOGOI, JJ.]

Appeal:

Criminal appeal - Decided by High Court in absence of counsel for accused - Held: Court should not decide criminal case in the absence of counsel for the accused - Accused should not suffer for the fault of his counsel and court must appoint another counsel as an amicus curiae to defend the accused - It is the duty of appellate court to look into the evidence adduced in the case so as to arrive at the conclusion whether prosecution case can be said to have been proved beyond reasonable doubt - Credibility of a witness has to be adjudged by appellate court in drawing inference from proved and admitted facts - In the case on hand, the said recourse has not been followed by High Court - Impugned order is set aside and matter remitted to High Court for disposal afresh - - Appellant is in custody for nearly two months as against the sentence of two years - Therefore, he is ordered to be released on bail till the disposal of appeal pending before High Court - Bail.

Bani Singh & Ors. vs. State of U.P. **1996 (3) Suppl. SCR 247 = (1996) 4 SCC 720 (Larger Bench);** *Harjinder Singh vs. State of Punjab* **2010 (10) SCR 326 = (2010) 13 SCC 533;** *Iqbal Abdul Samiya Malek vs. State of Gujarat,* **(2012) 11 SCC 312;** *K.S. Panduranga vs. State of Karnataka,* **(2013) 3 SCC 721 - referred to.**

Case Law Reference:

1996 (3) Suppl. SCR 247	**referred to**	**para 8**
2010 (10) SCR 326	**referred to**	**para 8**
(2012) 11 SCC 312	**referred to**	**para 8**
2013 (3) SCC 721	**referred to**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1124 of 2013.

From the Judgment and Order dated 29.11.2012 of the High Court of Judicature at Bombay in Criminal Appeal No. 220 of 1997.

Rakesh Kumar, Naveer Gaur, Debnandan R., for the Appellant.

Chinmoy Khaladkar, Sanjay Kharde, Asha Gopalan Nair for the Respondent.

The following order of the Court was delivered

O R D E R

1. Heard learned counsel for the parties.

2. Leave granted.

3. Against the conviction and sentence under Section 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, the appellant has approached the High Court by way of Criminal Appeal No. 220 of 1997.

4. Learned counsel appearing for the appellant has pointed out the following two infirmities in the impugned order.

(i) The appellant was not heard and the appeal was disposed of only on the basis of the statement made by the Counsel-State.

(ii) The High Court has not gone into all the details and has not appreciated the evidence placed by both sides.

5. In the light of the said contention, we have carefully perused the impugned order. Even at the first sight, we noticed none appeared for the appellant-accused before the High Court. This is evident from para 2 of the impugned order. Though, the High Court has mentioned certain factual details, the fact remains that it has not analyzed the evidence led by the prosecution and defence pleaded by the appellant-accused.

6.It is settled law that court should not decide criminal case in the absence of the counsel for the accused as an accused in a criminal case should not suffer for the fault of his counsel and the court should, in such a situation must appoint another counsel as an amicus curiae to defend the accused.

7. It is also equally settled that it is the duty of the appellate court to look into the evidence adduced in the case to arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon then whether prosecution can be said to have been proved beyond reasonable doubt on the said evidence. To put it clear, the credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. In the case on hand, the said recourse has not been followed by the High Court.

8. All the above principles have been reiterated in:

i) *Bani Singh & Ors. vs. State of U.P.,* (1996) 4 SCC 720 (Larger Bench)

ii) *Harjinder Singh vs. State of Punjab,* (2010) 13 SCC 533

iii) *Iqbal Abdul Samiya Malek vs. State of Gujarat,* (2012) 11 SCC 312

iv) *K.S. Panduranga vs. State of Karnataka,* (2013) 3 SCC 721

9. Accordingly, we set aside the impugned order and remit the matter to High Court for fresh disposal. We request the High Court to restore Criminal Appeal No. 220 of 1997 on its file and dispose of the same on merits, after affording opportunity to all the parties concerned.

10. It is brought to our notice that the appellant is in custody for nearly two months as against the sentence of two years. Taking note of the said aspect, we are inclined to consider the claim of the appellant for bail. Therefore, the appellant is ordered to be released on bail to the satisfaction of the Special Judge for Greater Bombay in Session Case No. 57 of 1990 arising out of FIR bearing CR No. 14/1989 PS, Anti Corruption Bureau, Greater Bombay till the disposal of the appeal pending before the High Court.

11. The Special Judge is free to impose appropriate condition(s) as he deems fit.

12. The appeal is disposed of accordingly.

R.P. Appeal disposed of.

ABU SALEM ABDUL QAYYUM ANSARI
v.
CENTRAL BUREAU OF INVESTIGATION & ANR.
(Criminal Appeal Nos. 415-416 of 2012)

AUGUST 5, 2013.

[P. SATHASIVAM, CJI AND J. CHELAMESWAR, J.]

EXTRADITION ACT, 1962:

ss.3(1) and 21 - Extradition - Accused in 1993 Bombay Blast case, extradited to India from Portugal (Extradition order dated 28.3.2003) on the assurance that he would not be awarded capital sentence and imprisonment for more than 25 years - Additional charges framed - Difference of opinion between courts in India and courts in Portugal as regards trial of accused for additional charges - CBI seeking to modify judgment in Abu Salem and praying for withdrawal of additional charges - Held: Taking note of the fact that the offences for which the appellant was extradited to India are grave enough to even award him the maximum punishment and, therefore, no prejudice would be caused if the application for modification is allowed - Accordingly, prayer of CBI allowed and additional charges permitted to be withdrawn -- However, the analysis and reasoning rendered in the judgment of Abu Salem with regard to the interpretation of the Principle of Speciality stands good as the law declared by the Court under Art. 141 of the Constitution of India and shall be binding on all courts within the territory of India - Constitution of India, 1950 - Art. 141.

ss. 3(1) and 21 - Ministerial order of Government of Portugal permitting extradition of accused in 1993 Bombay blast case - Additional charges framed by Special Court - Lisbon Court of Appeals holding the additional charges in violation of extradition order and authorization granted ought

to be terminated - Held: Constitutional Court of Portugal holding that Portuguese law does not provide for any specific consequence for violation of the Principle of Speciality and the findings may not be construed as a direction to Union of India to return the appellant to Portugal but shall only serve as a legal basis for Government of Portugal, should it choose to seek the return of appellant to Portugal through political, or diplomatic channels, which has not been done till date -- In this view of the matter, order of Extradition dated 28.03.2003 stands valid and effective in the eyes of law.

CONSTITUTION OF INDIA, 1950:

Art.136 - Supreme Court of India - Power to modify its decisions - Held: Constitution of India bestows upon Supreme Court the inherent power to modify its earlier decision if it finds that the error pointed out in the modification petition was under mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice - Interlocutory applications.

INTERNATIONAL LAW:

Extradition - Explained.

The appellant was one of the 189 persons accused in TADA Special Case No. 1-B of 1993 and Special Case No. 1 of 2006 before the Designated Court under TADA for causing serial bomb blasts in Mumbai on 12.3.1993. The Designated Court framed a common charge of criminal conspiracy punishable u/s 3(3) of TADA. Various other charges under the Penal Code, 1860, the Arms Act, 1959, the Explosives Act, 1884, the Explosive Substances Act, 1908 and the Prevention of Damage to Public Property Act, 1984 were also framed. Since the appellant had absconded, a Red Corner Notice was issued through Interpol, which led to his detention by the Portuguese

Police at Lisbon. The Government of India submitted a request for extradition of the appellant in 9 criminal cases with an assurance to the Government of Portugal that the appellant, if extradited for trial in India, would neither be awarded death penalty nor be subjected to imprisonment for a term beyond 25 years. Accordingly, in view of the Ministerial order dated 28.3.2003 admitting extradition, the Supreme Court of Justice, Portugal, on 27.1.2005 granted extradition of the appellant in respect of various offences like criminal conspiracy, murder etc. punishable u/ss 302, 307, 435, 436 IPC, ss 3(2) and 3(3) of TADA, s.3 of the Explosive Substances Act, 1908 and ss. 4 of the Prevention of Damage to Public Property Act, 1984. On 11.11.2005, the appellant was brought to India and was produced before the Designated Court, Mumbai in RC-1(S/93)/CBI/STF, i.e., BBC No. 1 of 1993.

On 01.03.2006, a supplementary charge sheet u/s 173(8) of the Code of Criminal Procedure, 1973 was filed in respect of the appellant before the Designated Court in BBC No. 1 of 1993.By order dated 18.03.2006, the substantive charges, in addition to the charge of conspiracy, were framed against the appellant. By order dated 13.06.2006, the Designated Court allowed the application for separation of trial and held that the trial would continue as BBC-1-B of 1993 in continuity with the earlier joint case being BBC No. 1 of 1993. It was also held that the assurances were given with respect to sentence which could be imposed and not with respect to the offences with which he could be tried. The said order was challenged before the Supreme Court of India in Criminal Appeal No. 990 of 2006 and Writ Petition No. 171 of 2006, as being in violation of the extradition decree.

The appellant also moved an application before the Lisbon Court of Appeals stating that he was being tried in India in violation of Principle of Speciality as contained

in Article 16 of Law 144 of 99. The Court of Appeals, by order dated 13.10.2008, adjourned the matter till the Supreme Court of India passed the final order in the Criminal Appeal No. 990 of 2006 as well as in Writ Petition No. 171 of 2006. The Supreme Court of India, by judgment dated 10.09.2010 in *Abu Salem*[1] dismissed the appeal as well as the petition filed by the appellant. The Lisbon Court of Appeals, by judgment dated 14.09.2011, held that the authorization granted for the extradition of the appellant ought to be terminated. The Supreme Court of Justice, Portugal dismissed the appeal of Union of India as not maintainable. However, the Constitutional Court of Portugal, on 05.07.2012, decided the appeal preferred by the Union of India holding that in spite of having considered the trial for new crimes illegal and of having decided to terminate the authorization granted for the extradition of the appellant, "the decision of the Lisbon Court of Appeals only concludes for the violation of the Principle of Speciality. It does not by itself bind the requesting State to the practice of a certain act and namely to return the extradited person and thus it is not a decision rendered against the Union of India, a decision that directly and effectively prejudices it".

The appellant then filed applications before the Special Court, which dismissed the same. The appellant filed the appeals. Pending disposal of the appeals, the respondent- CBI filed Crl. Misc. Petitions Nos. 3301-3302 of 2013 praying for clarification/modification of the judgment dated 10.09.2010 in Abu Salem, as also for permission to withdraw charges (iii) to (viii) leveled against the appellant by order dated 18.3.2006, and for vacation of the stay order dated 17.02.2012.

The questions for consideration before the Court were: (i) whether Court could modify the judgment rendered in Abu Salem under the grounds raised by the

respondent; and (ii) whether the order of Extradition dated 28.03.2003 stood annulled/cancelled as alleged by the appellant.

Disposing of the appeals and the Crl. Misc. Petitions, the Court

HELD: 1.1 The Constitution of India bestows upon the Supreme Court the inherent power to reconsider, modify and revise its earlier decisions for the reason that law has to bend before justice. Certainly, nothing would preclude this Court from rectifying the error if it finds that the error pointed out in the modification petition was under mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice. [para 11] [1081-D-E]

1.2 In the given case, the only ground on which the respondent/CBI seeks modification is to harmonize the situation created by the divergent views expressed by the Indian Courts and the Courts in Portugal with regard to violation of the Principle of Speciality, and accordingly seeks permission to withdraw the additional charges framed against the appellant. [para 12] [1081-F; 1082-B-C]

1.3 Extradition is a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused, criminal or a fugitive offender. This delivery of individuals to a requesting sovereign is usually based on treaties or bilateral agreements but sometimes it also occurs by reciprocity and comity as a matter of courtesy and goodwill between sovereigns, as in the instant case. Therefore, 'world public order' is the recurring theme based on which the extradition is practiced by the States. [para 13] [1082-C-E]

1.4 Taking note of the fact that the offences for which the appellant was extradited to India are grave enough to even award the appellant with maximum punishment and, therefore, no prejudice would be caused if the application for modification is allowed, this Court is of the considered view that allowing the modification petition under the existing peculiar circumstance will not be detrimental to any of the parties. However, it is pertinent to clarify that by allowing the modification petition filed by the respondent, it cannot be construed that this Court is reviewing the judgment in the light of the verdict of the Constitutional Court of Portugal. Both India and Portugal are two sovereign States with efficient and independent judicial system. As a consequence, in unequivocal terms, the verdict by the Constitutional Court of Portugal is not binding on this Court but only has persuasive value. [para 14] [1082-F-H; 1083-A]

1.5 Consequently, though this Court has rendered a decision in favour of the CBI, in the interest of comity of Courts and on the statement made by the Attorney General that the matter is being pursued through diplomatic channels, while allowing the modification petition, the respondent-CBI is permitted to withdraw the charges (iii) to (viii) in the additional charge-sheet. The Attorney General also assured this Court that they are in the process of withdrawing other charges too pending in various States against the appellant which are claimed to be in violation of the Extradition order. [para 15] [1083-B-D]

1.6 Nevertheless, it is clarified that the modification petition is allowed only to the extent of withdrawal of the additional charges framed against the appellant. However, the analysis and reasoning rendered in the judgment with regard to the interpretation of the Principle of Speciality still stands good as the law declared by this Court under

Art. 141 of the Constitution of India and shall be binding on all courts within the territory of India. [para 16] [1083-D-E]

2.1 As regards the status of the order of Extradition dated 28.03.2003, the Constitutional Court of Portugal has categorically held that Portuguese law does not provide for any specific consequence for violation of the Principle of Speciality and their findings may not be construed as a direction to the Union of India to return the appellant to Portugal but shall only serve as a legal basis for the Government of Portugal, should it choose to seek the return of the appellant to Portugal through political, or diplomatic channels, which has not been done till date. In this view of the matter, the order of Extradition dated 28.03.2003 stands valid and effective in the eyes of law. [para 17] [1083-F, G-H; 1084-A-B]

2.2 In the result, the respondent-CBI is permitted to withdraw charge Nos. (iii) to (viii) of the additional charges. Consequently, the stay order dated 17.02.2012 is vacated and the trial is allowed to continue. [para 18] [1084-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 415-416 of 2012.

From the Judgment and Order dated 08.11.2011 of the Designated Judge (designated Court of TADA) for Greater Bombay at Mumbai in Exhibit No. 208 in TADA Special Case No. 1-B of 1993 and Exhibit No. 491 in TADA Special Case No. 1 of 2006.

G.E. Vahanvati, AG, Sidharth Luthra, ASG, Sudeep Pasbola, Shobha Kurshi, Sushil Karanjkar, K.N. Rai, Mohd, Nizam Pasha, Supriya Juneja, Balram Das, Arjun Divan, Arvind Kumar Sharma, Asha G. Nair, Sanjay Kharde for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. These appeals, at the instance of the appellant - Abu Salem Abdul Qayyum Ansari, have been filed under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short 'the TADA') challenging the final judgment and order dated 08.11.2011 passed by the Designated Court under TADA for the Bombay Bomb Blast Case, Greater Bombay in TADA Special Case No. 1-B of 1993 and Special Case No. 1 of 2006 whereby the Designated Judge dismissed both the applications filed by the appellant in view of the order dated 14.09.2011 passed by the Court of Appeals of Lisbon, Portugal terminating the extradition order dated 28.03.2003 for stay of all further proceedings.

2. Pending disposal of the above appeals, the respondent- CBI filed Criminal Misc. Petitions being Nos. 3301-3302 of 2013 praying for clarification/modification of the judgment and order dated 10.09.2010 in *Abu Salem Abdul Qayoom Ansari vs. State of Maharashtra and Another* (2011) 11 SCC 214. In the same applications, the CBI has also prayed for permission to withdraw certain charges leveled against the appellant-Abu Salem. They also prayed for vacation of the stay order dated 17.02.2012 and to allow the trial to continue.

3. In view of the applications filed by the CBI for clarification/modification of the earlier order dated 10.09.2010, it is useful to highlight the factual aspects of the case to decide the present applications.

4. Brief facts

(i) On 12.03.1993, a series of 12 bomb blasts took place one after the other in the city of Bombay which resulted in the death of 257 persons, injuries to 713 others and properties worth about Rs.27 crore were destroyed. Thereafter, 27 criminal cases were registered in relation to the said incident at various police stations in Bombay City, District Thane and District Raigarh. Upon completion of the investigation, a single

chargesheet was filed against 189 accused persons including 44 absconding accused (AA) persons on 04.11.1993.

(ii) During the course of investigation, large number of arms, ammunitions and explosives were recovered from the possession of accused persons. Since the appellant was an absconder, he was shown as an absconding accused (A-139) in the charge sheet and a proclamation was issued against the appellant on 15.09.1993. A Red Corner Notice bearing No. A-103/3-1995 was also issued through Interpol for the arrest of the appellant herein.

(iii) The Designated Court framed a common charge of criminal conspiracy punishable under Section 3(3) of TADA as well as various charges under the Indian Penal Code, 1860 (in short 'the IPC'), the Arms Act, 1959, the Explosives Act, 1884, the Explosive Substances Act, 1908 and the Prevention of Damage to Public Property Act, 1984 were also framed.

(iv) The specific role attributed to Abu Salem in the said chargesheet was that he was entrusted with the task of transporting illegally smuggled arms and ammunitions, their storage and distribution to other conspirators. Some of the arms and explosives which were smuggled into India on 09.02.1993 were transported to Village Sansrod, District Bharuch. In the second week of January, 1993, Abu Salem brought AK-56 rifles, ammunitions and hand grenades from village Sansrod to Bombay and distributed them among various co-accused.

(v) At the time of trial, the Designated Court directed that evidence to be adduced against the absconding accused persons for the purpose of Section 299 of the Code of Criminal Procedure, 1973.

(vi) The appellant herein entered the territorial jurisdiction of Portugal in assumed name of Arsalan Mohsin Ali on a Pakistani Passport. On 18.09.2002, Abu Salem was detained

by the Portuguese Police at Lisbon on the strength of the said Red Corner Notice.

(vii) In December 2002, Government of India submitted a request for the extradition of Abu Salem in 9 criminal cases (3 cases of CBI, 2 cases of Mumbai Police and 4 cases of Delhi Police). The request was made relying upon the International Convention for the Suppression of Terrorist Bombings of which India and Portugal are signatories. The requisition was signed by the then Minister of State for External Affairs and was supported on facts with a detailed affidavit sworn by Mr. Om Prakash Chhatwal, the then Sr. Superintendent of Police, CBI/ STF.

(viii) On 13.12.2002, the Government of India issued a Notification under Section 3(1) of the Extradition Act, 1962 to the effect that the provisions of the Extradition Act (other than Chapter III) will apply to the Portuguese Republic with effect from 13.12.2002.

(ix) On 17.12.2002, the Government of India extended an assurance to the Government of Portugal through the then Deputy Prime Minister that the appellant, if extradited for trial in India, would neither be conferred with death penalty nor be subjected to imprisonment for a term beyond 25 years.

(x) On 28.03.2003, the Ministerial order came to be passed admitting extradition, amongst others, under Section 120-B read with Section 302 IPC and Section 3(2) of TADA. However, the Ministerial order declined extradition of the appellant under Section 25(1-A) and (1-B) of the Arms Act, 1959 Sections 4 & 5 of the Explosive Substances Act,1908, Sections 5 & 6 of TADA and Section 9-B of the Explosives Act,1884.

(xi) The Ambassador of India in Lisbon gave a further assurance on 25.05.2003 that -

(i) Abu Salem will not be prosecuted for offences other than those for which his extradition has been sought; and

(ii) Abu Salem would not be re-extradited to any third country.

(xii) On 27.01.2005, the Supreme Court of Justice, in view of the guarantee given by the Indian Government, granted extradition of the appellant in respect of various offences like criminal conspiracy, murder punishable under Section 302 IPC, attempt to murder under Section 307 IPC, offence punishable under Section 435 IPC, mischief by fire or explosive punishable under Section 436 IPC, offence punishable under Sections 3(2) and 3(3) of TADA, offence punishable under Section 3 of the Explosive Substances Act, 1908 and offence punishable under Section 4 of the Prevention of Damage to Public Property Act, 1984.

(xiii) On 10.11.2005, the custody of the appellant was handed over to the Indian Authorities and on 11.11.2005, the appellant was brought to India and was produced before the Designated Court, Mumbai in RC-1(S/93)/CBI/STF, i.e., BBC No. 1 of 1993.

(xiv) On 01.03.2006, a supplementary charge sheet under Section 173(8) of the Code of Criminal Procedure, 1973 was filed in respect of the appellant before the Designated Court in BBC No. 1 of 1993.

(xv) By order dated 18.03.2006, the substantive charges, in addition to the charge of conspiracy, were framed against the appellant and his plea of not guilty and claim of trial was recorded. The charges which have been framed by the Designated Court are:

(i) Criminal Conspiracy punishable under Section 3(3) of TADA and Section 120B IPC read with Section

3(2)(i), (ii), 3(3), 3(4), 5 and 6 of TADA read with Sections 302, 307, 326, 324, 427, 435, 436, 201, 212 IPC read with Sections 3 and 7 read with Section25(1A), (1B)(a) of Arms Act, 1959, Section 9-B (1)(a), (b), (c) of Explosives Act, 1884, Sections 3, 4(a), (b), 5 & 6 of Explosive Substances Act, 1908 and Section 4 of Prevention of Damage of Public Property Act, 1984.

(ii) Section 3(3) of TADA;

(iii) Section 5 of TADA;

(iv) Section 6 of TADA;

(v) Section 4(b) of the Explosive Substances Act, 1908;

(vi) Section 5 of the Explosive Substances Act, 1908;

(vii) Section 25(1-A) (1-B) (a) read with Section 387 of the Arms Act, 1959 and

(viii) Section 9-B of the Explosives Act, 1884

(xvi) The additional charges which were framed by the Court (which Abu Salem contends are in violation of the Extradition Order) pertain to offences under Section 5 of TADA, Section 4(b) and Section 5 of the Explosive Substances Act, 1908 and Section 9-B of the Explosive Substances Act, 1884.

(xvii) On 31.03.2006, the prosecution filed an application being M.A. No. 144 of 2006 seeking separation of the trial of the appellant in the same manner as was done by the Designated Court in respect of Mustafa Ahmad Dossa (AA).

(xviii) On 12.04.2006, the appellant also filed an application being M.A. No. 161 of 2006 seeking production of relevant record of extradition and sought joint trial along with other 123 accused whose trial was nearing completion.

(xix) By way of order dated 13.06.2006, the Designated Court allowed the application for separation of trial and held that the trial would continue as BBC-1-B of 1993 in continuity with the earlier joint case being BBC No. 1 of 1993. It was also held that the assurances were given with respect to sentence which could be imposed and not with respect to the offences with which he could be tried.

(xx) In September, 2006, Criminal Appeal No. 990 of 2006 came to be filed before this Court. A writ petition was also filed invoking Article 32 of the Constitution challenging the said orders. It was his grievance that time and again the authorities abused the process of criminal law by failing to file the orders passed by Portugal courts and by wilfully and deliberately violating the solemn sovereign assurance. It was his categorical claim that the respondents are lowering the esteem of the nation by their deceitful behaviour in the field of international law, breaching the principle of speciality established under the rule of international law and recognised by Section 21 of the Extradition Act after securing the extradition and gaining control of the appellant. The construction made by the Designated Court is not acceptable and the appellant is being wrongly tried by the Designated Court in violation of the extradition decree and prayed for quashing of the entire proceedings. It was contended by the appellant that he has been charged with the offences other than that for which he was extradited and to that extent the order framing charges is bad. The appellant further contended that the order of separation of trial is prejudiced inasmuch as the confessions and evidence recorded in the trial of BBC No.1 of 1993 will not be available to him. He also contended that the separation is against the spirit of the extradition decree which confines the trial of the appellant to the Bombay Bomb Blast case.

(xxi) In view of the above, the appellant moved an application before the Court of Appeals of Lisbon stating that he is being tried in India in violation of Principle of Speciality as contained in Article 16 of Law 144 of 99.

(xxii) By order dated 18.05.2007, the Court of Appeal expressed its inability to enquire into the question of surrender by the Indian State on the ground that the Indian State has violated certain conditions on which extradition was granted and when the said order was carried in appeal, the Supreme Court of Justice, by order dated 13.12.2007, remitted the matter to the Court of Appeal to enquire whether there has been violation of any condition as alleged by the appellant.

(xxiii) The Court of Appeal, by order dated 13.10.2008, adjourned the matter till this Court passed the final order in the abovesaid proceedings, namely, Criminal Appeal No. 990 of 2006 as well as in Writ Petition No. 171 of 2006.

(xxiv) This Court, by judgment and order dated 10.09.2010 in *Abu Salem* (supra) dismissed the appeal as well as the petition filed by the appellant holding that:-

> "72. We have already highlighted how the Government of India and the Government of Portugal entered into an agreement at the higher level mentioning the relevant offences and the appellant was extradited to India to face the trial. We have also noted the notification of the Government of India about the applicability of the Extradition Act, 1962. In the light of the said notification, the additional charges that have been framed fit well within the proviso to Section 21(b) of the Extradition Act. The offences with which the appellant has been additionally charged are lesser than the offences for which the appellant has been extradited. To put it clear, the offences with which the appellant is charged are punishable with lesser punishment than the offence for which he has been extradited. The extradition granted in the present case had due regard to the facts placed which would cover the offences with which the appellant has been charged. As rightly pointed out by the learned Solicitor General, the offences are disclosed by the same set of facts placed before the Government of Portugal. We agree with the

submission of the learned Solicitor General and the ultimate decision of the Designated Court".

(xxv) Subsequent to the judgment dated 10.09.2010, the Court of Appeals of Lisbon, by judgment dated 14.09.2011, took a contrary view and held that the authorization granted for the extradition of Abu Salem ought to be terminated. It was held that Article 16 of the Portuguese Law No. 144/99 clearly provides that a person cannot be tried for an offence other than the one that gives rise to request for cooperation by way of extradition. It was further held that Article 16(2) provides that a person cannot be tried for offences other than those determined in the request for cooperation. However, the said two sub-articles need to be read with sub-Article (5) which provides that an extradition can be sought in respect of facts other than those that laid the foundation for the request. The Court of Appeals of Lisbon has concluded that

"…..In the light of the Portugese legal system, the Indian Union were not considering the limits imposed by the Portuguese Republic to the extradition of Abu Salem of which it was perfectly aware…..violated the principle of Speciality."

(xxvi) Being aggrieved of the above order, Union of India preferred an appeal before the Supreme Court of Justice, Portugal but the same was dismissed as not maintainable. The Constitutional Court of Portugal has, however, on 05.07.2012, decided the appeal preferred by the Union of India. For the sake of brevity and convenience, certain portions are relevant which are as under:

"8. Independent of the manner how the question of violation of the principle of speciality is framed, whether or not it is seen as an incident of the delivery of the extradited person that still falls within the judicial phase of the extradition procedure, the considerations just made apply to the judicial procedure that gave rise to the present appeal. In

spite of the judgment whose possibility of appeal is under consideration being in the sense of the violation of such principle by the Union of India, terminating the authorization granted by the extradition of the appellant, the judicial decision does not impose by itself the devolution of the extradited person. The Principle of Speciality according to which the extradited person cannot be prosecuted held tried or subjected to any other restriction of his freedom for a fact or a condemnation previous to his leaving the Portuguese territory other than those determined in the request for extradition (Article 16, No.1 of Law No. 144/99) is an internationally recognized principle by means of which the sovereignty of the requested State is protected and the protection of the extradited person is assured (about this, Gregory B. Richardson, "The Principle of Speciality in extradition" ; and Dominique Poncet/Paul GullyHart, "Le Pricnipe de la specialite en matiere d'extradition.", Revue Internationale de Droit Penal, 1991, respectively, page 86, and pages 201 and following). The question of violation of the principle presupposes, therefore, two distinct plans: that of the relations between the requesting State and the requested State, with an eminently political basis; and that of the relations between the requesting State and the extradited person in relation to which the form how the latter makes the assurance that the Principle of Speciality represents for the extradited person avail against the former is analysed (cf. point 2. of the Legal Basis, above and such authors, pages 86 and following and pages 217 and following respectively). When what is under consideration is the plan in which the relations between the requesting State and the extradited person are established, even if the violation of the Principle of Speciality is determined in the internal legal order of the requested State within the scope of a judicial procedure brought by the extradited person which occurred in the present records, without the admissibility of this via being peacefully understood (cf.point2. of the Legal Basis, above)

the State requesting the extradition request is not in this procedure in a position of procedural confrontation in relation to such State. It is not vested with any role as procedural participant (party) in relation to which it can be concluded that a decision against it or in its favour was rendered which directly and effectively prejudices it because the legal nature of the extradition would always prevent that, a form of international judicial cooperation between sovereign States in criminal matters. An understanding that is also sustained by Article 7 No.1 of the CRP, when in respect of matters of international relations it sets out that Portugal is governed among other international law principles by the principles of equality between States and of non-interference in the internal matters of other States. The legal decision that terminates the authorization extradition, namely for violation of the Principle of Speciality, must be considered only as one element among others that the requested State takes into consideration when it politically ponders on the attitude to take in the plan of its relations with the requesting State. Therefore, it cannot have the reach of a decision that just by itself sets off the consequence of violation of the Principle of Speciality, applying as a decision against the requesting State, as a decision that directly and effectively prejudices it. All the more so that unlike what occurs in the judicial phase of the extradition procedure which is necessarily preceded by an administrative decision in the sense of granting the extradition request, there has not yet been any decision made with an eminently political basis, and it is certain that the violation of the Principle of Speciality has direct repercussions on the plan of the relations between the States involved since such principle also protects in an autonomous manner the sovereignty of the requested State."

What has just been said is in consonance with the judgment of the Supreme Court of Justice of 13.12.2007,

which although deciding in the sense of the internal legal order having to take a position on the alleged violation of the principle of speciality, concludes that the declaration of termination of the authorization granted should "subsequently be referred to the political power instances through the central authority, in order for the Portuguese State to take the attitude it deems to be the most convenient, through diplomatic channels" (cf. point 2 of the Report above). As well as with the judgment of the Lisbon Court of Appeals of 14.09.2011 the judicial decision whose non-possibility of appeal arises out of the rule under appraisal that fulfilled it. In reply to the two questions that it undertook to appraise and decide upon the said judgment of the Lisbon Court of Appeals concludes that in the light of the Portuguese Legal system, the Union of India violated the Principle of Speciality laid down in Article 16 of Law No. 144/99 (sheet 587); and that, although such law does not set out in general terms any specific consequence for the violation of the Principle of Speciality by the State requesting the extradition, that does not impair that in case of violation the Portuguese State can react through political diplomatic channels, and for such purpose the judgment formulated by Portuguese judicial instances will be relevant. Further to the possibility of the Portuguese State requesting the intervention of international jurisdiction instances and extracting due political consequences from the case. That is: in spite of having considered the trial for new crimes illegal and of having decided to terminate the authorization granted for the extradition of Abu Salem Abdul Qayoom Ansari, the decision of the Lisbon Court of appeals only concludes for the violation of the Principle of Speciality. It does not by itself bind the requesting State to the practice of a certain act and namely to return the extradited person and thus it is not a decision rendered against the Union of India, a decision that directly and effectively prejudices it. As a result of the reply to the question of knowing which is the

consequence of the violation of the Principle of Speciality in the light of Portuguese Law, it will be incumbent on the Portuguese State rather than on Portuguese judicial instances to decide what such consequence will be, which will have to do with the political diplomatic plan of the relations between the two sovereign States."

5. Heard Mr. Sudeep Pasbola, learned counsel for the appellant and Mr. G.E. Vahanvati, learned Attorney General for the respondent-CBI.

Discussion:

6. This Court, in *Abu Salem* (supra) (2011) 11 SCC 214 has held that in view of the Indian Laws, there has been no violation of the Principle of Speciality on the part of the Union of India whereas the Courts in Portugal have decided otherwise. The reason given by this Court while arriving at such conclusion is that the appellant could have been tried for offences which are lesser in nature than the offences for which the extradition has been granted. In view of the above, it is clear that there exist differences of opinion in the ratio of judgments of this Court and the Courts in Portugal.

7. Learned Attorney General appearing for the respondent submitted that though the Constitutional Court of Portugal may not have entertained the appeal of Union of India on a constitutional issue, still the Court has observed that the issue of whether the person extradited has to be returned to the requested State or not, is something which may be decided by both the countries diplomatically. It is also pointed out that the Union of India, through diplomatic routes, is in touch with the Government of Portugal on the present issue. According to learned Attorney General, the Constitutional Court of Portugal has simply dismissed the appeal of the Union of India on the ground that they had no locus standi to appeal since it is not an order against them. It is also brought to our notice that pursuant to the decision of the Constitutional Court of Portugal,

the appellant-Abu Salem had made a representation dated 14.09.2012 to the Ministry of Home Affairs and the Ministry of External Affairs trying to make out a case of annulment of Extradition Order due to its alleged violation by the prosecution. Further, the appellant has filed a petition to the Court of Appeals of Lisbon on 19.09.2012 praying that directions may be given to the Government of Portugal for taking steps for his devolution to Portugal in view of the orders passed by the Portugese Courts.

8. It is relevant to mention that out of the eight charges mentioned in the supplementary chargesheet filed against the appellant supra, the charges mentioned at S. Nos. (iii) to (viii) hereinabove have been termed as "Additional Charges" by the Portuguese Court because of which it has come to the conclusion that there has been a violation of the Principle of Speciality. More so, the technicality on which the appellant has raised various objections/litigations/representations in India as well as in Portugal has been with respect to the charges at S.Nos. (iii) to (viii) hereinabove. In view of the earlier commitment given to the Government of Portugal and also in view of the comity of Courts as well as in the interest of justice, the respondent-CBI seeks to withdraw the abovementioned charges, i.e., charges at S.Nos. (iii) to (viii). It is stated by learned Attorney General that no prejudice would be caused to the appellant if the present applications are allowed by this Court and the stay on the trial of the appellant is vacated in view of the above.

9. On the other hand, learned counsel for the appellant-Abu Salem submitted that the present application of the respondent praying for clarification/modification of the judgment and order dated 10.09.2010 rendered in Criminal Appeal No. 990 of 2006 and Writ Petition (Crl.) No. 171 of 2006 is vexatious and serves no purpose and the same should be dismissed. It is submitted by the appellant that since the order of Extradition itself has been set aside and is no longer valid and subsisting,

the withdrawal of additional charges will have no effect and the appellant cannot be tried in India.

10. In view of the above, the following points arose for consideration:-

- "Firstly, whether this Court can modify the judgment rendered in *Abu Salem* (supra) dated 10.09.2010 reported in (2011) 11 SCC 214 under the grounds raised by the respondent.

- "Secondly, whether the order of Extradition dated 28.03.2003 stands annulled/cancelled as alleged by the appellant.

11. As regards the first question, no doubt, the Constitution of India bestows upon the Supreme Court the inherent power to reconsider, modify and revise its earlier decisions for the reason that law has to bend before justice. Certainly, nothing would preclude this Court from rectifying the error if it finds that the error pointed out in the modification petition was under mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice.

12. In the given case, the only ground on which the respondent/CBI seeks modification is to harmonize the situation created by the divergent views with regard to the violation of the Principle of Speciality. It is further submitted that in the interest of comity of Courts, united fight at international level against the global terrorism, the Government of India is taking further efforts through diplomatic channels. As a result, the respondent is of the view that the additional charges framed against the appellant, which were held valid by this Court in the order dated 10.09.2010, may come as impediment for furthering the diplomatic talks. As on date, there exist two divergent views with regard to the violation of the Principle of Speciality rendered by the Supreme Court of India and the

Constitutional Court of Portugal. The available options for the Union of India are either to approach an international forum to settle the divergent view or in alternate reconcile via diplomatic channels. Considering the two decades delay in the prosecution of the accused/appellant, the respondent is of the view that withdrawal of additional charges framed against the appellant will cut short the process. Therefore, the respondent seeks permission to withdraw the additional charges levied against the appellant via this modification petition. While it is made clear that this petition is moved before this Court only to avoid endless deferral of the trial of the appellant.

13. It is vital to comprehend the cause behind the concept of extradition before we decide the issue at hand. Extradition, throughout the history of the practice, has remained a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused criminal or a fugitive offender. This delivery of individuals to a requesting sovereign is usually based on treaties or bilateral agreements but sometimes it also occur by reciprocity and comity as a matter of courtesy and goodwill between sovereigns as in this case. Therefore, 'world public order' is the recurring theme based on which the extradition is practiced by the States.

14. Taking note of the submission of the respondent that the offences for which the appellant was extradited to India are grave enough to even award the appellant with maximum punishment and therefore no prejudice would be caused if the present application for modification is allowed, we are of the considered view that allowing the present modification petition under the existing peculiar circumstance will not be detrimental to any of the parties. However, it is pertinent to clarify that by allowing the modification petition filed by the respondent, it cannot be construed that this Court is reviewing the judgment in the light of the verdict of the Constitutional Court of Portugal. Both India and Portugal are two sovereign States with efficient

and independent judicial system. As a consequence, in unequivocal terms, the verdict by the Constitutional Court of Portugal is not binding on this Court but only has persuasive value.

15. Consequently, though this Court has rendered a decision in favour of the CBI in the interest of comity of Courts and on the statement made by learned Attorney General that the matter is being pursued through diplomatic channels, while allowing the modification petition, we permit the respondent-CBI to withdraw the charges (iii) to (viii) as mentioned in paragraph supra. Learned Attorney General also assured this Court that they are in the process of withdrawing other charges too pending in various States against the appellant which are claimed to be in violation of the Extradition order and the same is hereby recorded.

16. Nevertheless, it is clarified that the modification petition is allowed only to the extent of withdrawal of the additional charges framed against the appellant. However, the analysis and reasoning rendered in the impugned judgment with regard to the interpretation of the Principle of Speciality still stands good as the law declared by this Court under Article 141 of the Constitution of India shall be binding on all courts within the territory of India.

17. As regards the second question, whether the order of Extradition dated 28.03.2003 stands annulled/cancelled as alleged by the appellants, it is submitted by the respondent that the decision of the Courts of Portugal themselves does not contain any direction to the Union of India to return the appellant to Portugal as is being agitated by the appellant. The Constitutional Court of Portugal has categorically held that Portuguese law does not provide for any specific consequence for violation of the Principle of Speciality and their findings may not be construed as a direction to the Union of India to return the appellant to Portugal but shall only serve as a legal basis

for the Government of Portugal, should it choose to seek the return of the appellant to Portugal through political, or diplomatic channels, which has not been done till date according to the statement made by learned Attorney General. In view of the above discussion, it is vividly clear that the order of Extradition dated 28.03.2003 still stands valid and effective in the eyes of law. Accordingly, the second question stands responded.

18. In the light of the above discussion, we allow Criminal Misc. Petition Nos. 3301-3302 of 2013 for modification of our order dated 10.09.2010 rendered in Criminal Appeal No. 990 of 2006 and Writ Petition (Crl.) No. 171 of 2006 and permitting the respondent-CBI to withdraw the charges viz., charge Nos. (iii) to (viii) as mentioned in paragraph supra. Consequently, we vacate the stay order dated 17.02.2012 and allow the trial to continue. It is made clear that we have not expressed any opinion in respect of other charges and both the parties are free to put forth their respective stand.

19. In view of the order passed in Criminal Misc. Petition Nos. 3301-3302 of 2013, no further adjudication is required in the above appeals, i.e., Criminal Appeal Nos. 415-416 of 2012 filed by the appellant-Abu Salem. These appeals are accordingly disposed of in terms of the order passed in Criminal Misc. Petition Nos. 3301-3302 of 2013. In view of the above, no order is required in the application for impleadment.

R.P. Appeals & Crl. Misc. Petitions disposed of.

NASIRUDDIN

v.

STATE (NCT) DELHI AND ORS.

(Criminal Appeal No. 1128 of 2013)

AUGUST 07, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.438 - Anticipatory bail - Cancellation of - Investigation against appellants for causing gun-shot injuries to complainant, pending - Addl. Sessions Judge granting anticipatory bail - Held: This is not a fit case for granting anticipatory bail, especially when the investigation is not over and the weapon used in the offence is yet to be traced - None of the accused persons had disclosed the source from which the weapon and bullets were procured - Additional Sessions Judge, while granting anticipatory bail, opined that after having considered the medical report, the ingredients of s. 326 IPC have not been satisfied - It was too early for the Additional Sessions Judge to express any opinion merely looking at the medical report, which, however, positively indicates of gunshot injury, may be simple, and it is due to that reason that the police has added the offences u/s. 307 IPC as well as s. 25 of the Arms Act - Additional Sessions Judge has committed an error in granting anticipatory bail to respondents - Order passed by Additional Sessions Judge and the affirmation order passed by High Court, are set aside.

During the pendency of investigation in a case of gun-shot injuries stated to have been caused to the complainant, the Additional Sessions Judge granted anticipatory bail to respondent nos. 2-4 observing that having considered the medical report, ingredients of

s.326 IPC were not satisfied. The High Court affirmed the order.

Allowing the appeal filed by the complainant, the Court

HELD: This is not a fit case for granting anticipatory bail, especially when the investigation is not over and the weapon used in the offence is yet to be traced. None of the accused persons had disclosed the source from which the weapon and bullets were procured and the Investigating Officer has pointed out that the offence u/s. 201 would be charged if the weapon is not traced/ recovered. The medical report refers to the gunshot injury caused to the appellant. The FIR was also found promptly registered. The question as to whether the case will fall u/s. 326 IPC could be determined only after the investigation is completed. It was too early for the Additional Sessions Judge to express any opinion merely looking at the medical report, which positively indicates of gunshot injury, may be simple, and it is due to that reason that the police has added the offences u/s. 307 IPC as well as s. 25 of the Arms Act. The Additional Sessions Judge has committed an error in granting anticipatory bail to respondents 2-4. Consequently, the order passed by the Additional Sessions Judge and the affirmation order passed by the High Court, are set aside. [Para 12-13] [1091-D-F, G-H; 1092-A-B]

State Rep. by the CBI v. Anil Sharma **1997 (3) Suppl. SCR 737 = (1997) 7 SCC 187,** *State of A.P. v. Bimal Krishna Kundu and Another* **1997 (4) Suppl. SCR 412 = (1997) 8 SCC 104,** *Jai Prakash Singh v. State of Bihar and Another* **2012 (5) SCR 1 = (2012) 4 SCC 379 and** *Rashmi Rekha Thatoi v. State of Orissa and Others* **2012 (5) SCR 674 = (2012) 5 SCC 690;** *Savitri Agarwal and Others v. State of Maharashtra and Another* **2009 (10) SCR 978 = (2009) 8 SCC 325 - cited.**

Case Law Reference:

1997 (3) Suppl. SCR 737	**cited**	**para 7**
1997 (4) Suppl. SCR 412	**cited**	**para 7**
2012 (5) SCR 1	**cited**	**para 7**
2012 (5) SCR 674	**cited**	**para 7**
2009 (10) SCR 978	**cited**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1128 of 2013.

From the judgment and Order dated 03.09.2012 of the High Court of Delhi at New Delhi in Crl. M.C. No. 3021 of 2012.

N.S. Dalal, D.P. Singh, M. Rein, R.C. Kaushik for the Appellant.

Sidharth Luthra, ASG, Mukul Gupta, Shiv Mangal Sharma, Anjali Chauhan, Jaisleen Kaur, D.S. Mahra, Yunus Malik, Shashank Singh, Prashant Chaudhary for the Respondents.

The Judgment of the Court was delivered by

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

2. Can the Additional Sessions Judge while dealing with an application for anticipatory bail filed under Section 438 of the Code of Criminal Procedure, 1973 (for short "CrPC"), express his opinion on merits that no case is made out under Section 326 IPC, even when the investigation is not yet over?

3. Appellant herein was the complainant from whom the statement under Section 161 CrPC was recorded on 28.5.2012. Statement records that, at about 11.00PM on 25.5.2012, the appellant went to sleep at the roof top of his house and his wife Shamina and his cousin sister Chandani were sleeping in the room. At about 2.30AM on 26.5.2012, they

made hue and cry and shouted for help. On hearing this, the complainant came down and saw that the In-laws of Chandani, namely, Hazi Saleem (father-in-law), Azad (devar), Taslim (uncle-in-law) and Noushad (brother-in-law) were dragging Chandani, which was objected by the complainant. Noushad and Azad then caught hold of him and Taslim fired at him with the gun injuring his both legs from back side and they ran away from the spot.

4. FIR was also lodged by the Sub-Inspector Lalaram on 26.5.2012 at 4.55AM on the date of occurrence itself, wherein it was recorded that the complainant, immediately after the incident, was taken to G.T.B. Hospital from where MLC No. B-2309/12 was obtained on which the opinion given by the doctor was recorded. The injury, though simple, it was recorded, was due to the result of gunshot. On the basis of the same, a case under Section 326 IPC was registered.

5. Respondents 2-4 approached the Court of the Additional Sessions Judge, NCT of Delhi for seeking anticipatory bail. The application was opposed by the appellant/complainant as well as the State. Learned Additional Sessions Judge, however, passed the following order:

> "Perusal of the record reveals that as per the opinion of the expert, the nature of the injury sustained by the injured is simple and as such the ingredients of the offence U/s 326 IPC are not satisfied in the present set of circumstances. Further keeping in view that the applicants are having permanent base in Delhi and they have root in the society and they are also ready to join the investigation as and when required by the IO, I hereby allow the application with the direction to the accused persons to join the investigation as and when required by the IO and in case IO still feels the necessity of the arrest of the accused persons then he will enlarge them on furnishing of personal bond in the sum of Rs.25,000/- with one local surety of the like amount to the satisfaction of IO/SHO."

6. Appellant/Complainant, aggrieved by the same, approached the High Court by filing Crl. M.C. No. 3021/2012 for cancellation of the bail, which was rejected by the Court holding that the cancellation of bail could take place only for rare and compelling reasons and that the case in question did not fall within the aforesaid pigeonhole. Aggrieved by the same, appellant has come up with this appeal.

7. Shri N. S. Dalal, learned counsel appearing for the appellant, submitted that the Courts below are not justified in granting anticipatory bail to respondents 2-4, especially when the investigation is not over. Learned counsel also submitted that the FIR clearly indicates the use of firearm, by which the complainant received gunshot injury, which attracts offence under Section 307 IPC. Learned counsel also submitted that the learned Additional Sessions Judge is not justified in expressing the opinion that since the injury is simple, no offence under Section 326 IPC has been made out, especially when the investigation is yet to be completed. Learned counsel also pointed out that the custodial interrogation is absolutely necessary for proper investigation and since respondents 2-4 are on anticipatory bail, investigation has been not proceeded in the right direction and that they are not cooperating with the investigation and the recovery of gun could not be effected so far. Learned counsel submitted that, in any view, this is not a case where anticipatory bail could be granted. In support of his contention, reference was made to the judgments of this Court *State Rep. by the CBI v. Anil Sharma* (1997) 7 SCC 187, *State of A.P. v. Bimal Krishna Kundu and Another* (1997) 8 SCC 104, *Jai Prakash Singh v. State of Bihar and Another* (2012) 4 SCC 379 and *Rashmi Rekha Thatoi v. State of Orissa and Others* (2012) 5 SCC 690.

8. Learned counsel appearing for respondents 2-4 referred to some matrimonial disputes between Saleem (2nd respondent) and cousin sister of the appellant and also to the civil disputes pending between the parties. Further, it was also

pointed out that the story put up by the complainant is incorrect and that the respondents have roots in the society and they are always willing to cooperate with the investigation. Further, it was also pointed out that the medical reports would show that the alleged injuries are of simple nature and no offence under Section 326 IPC has been made out. In support of his contention, reference was made to the judgment of this Court in *Savitri AGarwal and Others v. State of Maharashtra and Another* (2009) 8 SCC 325 and submitted that the learned Sessions Judge has rightly granted anticipatory bail, also affirmed by the High Court, warranting no interference by this Court.

9. Shri Sidharth Luthra, learned Additional Solicitor General appearing for the State, submitted that, despite the order dated 16.7.2013 of this Court, all the four accused persons have failed to disclose the source of pistol which was used in the offence and are not co-operating in the investigation. He also pointed out that, on going through the records and evidence collected during the course of investigation, the police has added Section 307 IPC and Section 25 of the Arms Act. The State has, thus, supported the plea of the appellant for cancellation of the anticipatory bail.

10. We have heard the counsel on either side at length and also perused the FIR as well as MLC No. B-2309/12 of G.T.B. Hospital, wherein the injuries sustained have been recorded as follows:

> "(1) Multiple Small pellets wounds (+) over back of both lower limbs extending from back to mid thighs to back of legs each measuring about 2mm in diameter.
>
> (2) No external injury marks over back.
>
> (3) A pellet wound (+) over ® middle finger.
>
> (4) No external neurovascular deficit."

11. On 26.5.2012, the Complainant Nasirruddin, after having discharged from the hospital, went to the Police Station and made his statement under Section 161 CrPC. On the same day, the Investigating Officer also recorded the statement of Shamina, wife of the complainant as well as the statement of Chandani, wife of Shehzaad. The statement of Chandani was got recorded under Section 164 CrPC on 29.5.12 in which she narrated the role of all the accused, i.e. respondents 2-4. Above mentioned statements would indicate that the accused Tasleem told Azar and Noushad to apprehend appellant and Tasleem fired at the appellant with a "country made pistol", which was brought by Tasleem at the spot of the incident. On hearing the cries and also the gunshot, the neighbours of the appellant gathered near the spot and on seeing them, respondents 2-4 ran away from the spot.

12. We are informed that none of the accused persons had disclosed the source from which the weapon and bullets were procured and that the Investigating Officer has pointed out that the offence under Section 201 would be charged if the weapon is not traced/recovered. Above facts would clearly indicate that this is not a fit case for granting anticipatory bail, especially when the investigation is not over and the weapon used in the offence is yet to be traced. The medical report refers to the gunshot injury on the body of the appellant. FIR was also found promptly registered. The question as to whether the case will fall under Section 326 IPC could be determined only after the investigation is completed. Learned Additional Sessions Judge, while granting anticipatory bail, opined that after having considered the medical report, the ingredients of Section under Section 326 IPC have not been satisfied. We are of the view that it was too early for the learned Additional Sessions Judge to express any opinion merely looking at the medical report. Medical report positively indicates of gunshot injury, may be simple, and it is due to that reason that the police has added the offences under Section 307 IPC as well as Section 25 of the Arms Act.

13. Above being the factual situation, in our view, learned Additional Sessions Judge has committed an error in granting anticipatory bail to respondents 2-4, which was affirmed by the High Court. Consequently, the appeal is allowed and the order passed by the Additional Sessions Judge and the affirmation order passed by the High Court, are set aside. However, respondents 2-4, if so advised, may apply for regular bail before the trial court and the trial court may consider the same in accordance with law..

R.P. Appeal allowed.

JITENDRA KUMAR KHAN AND OTHERS
v.
THE PEERLESS GENERAL FINANCE AND INVESTMENT COMPANY LIMITED AND OTHERS
(Civil Appeal No. 6784 of 2013)

AUGUST 7, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Code of Civil Procedure, 1908:

O. 6, r. 17 - Written statement - Amendment - Equitable set-off - Suit for declaration as regards plaintiffs' entitlement to certain amounts - Defendants seeking amendment of written statement after more than 3 years of its filing and seeking to grant of a decree for a certain amount - Held: Division Bench of High Court has rightly allowed the amendment on the basis that the claim put forth could be treated as a plea in the nature of equitable set-off, for it has treated the stand taken in the amendment petition to be a demand so connected in the nature and circumstances that they can be looked upon as a part of one transaction. The view expressed by the Division Bench has to be treated as a prima facie expression of opinion. Whether the claim would be allowable or not will depend upon the evidence adduced before the court so as to sustain a claim of equitable set-off.

O. 8, rr. 6 and 6-A - Set off and counter claim - Legal set off and equitable set-off - Explained.

A suit was filed before the High Court for declaration that the plaintiffs were entitled to a decree of certain amount against defendant-respondent no. 1 company. The defendants filed their written statement on 12.8.1994. Thereafter, on 7.4.1998, they filed an application for amendment of the written statement seeking to grant of

a decree for a sum of Rs.4,19,509.43 in favour of defendant No. 1 and a decree for further interest, which was resisted by the plaintiffs as impermissible since it amounted to introducing a counter claim or set-off. The single Judge of the High Court rejected the application. However, the Division Bench of the High Court allowed the amendments holding that if the defendants' set-off were found to be barred by limitation at trial, they would not be entitled to a decree on their own but only to a wiping off pro-tanto of the plaintiffs' claim.

In the instant appeal filed by the plaintiffs, the question for consideration before the Court was: whether the claim of equitable set-off, as put forth, was tenable or not.

Disposing of the appeal, the Court

HELD: 1.1 For application of r. 6 of O. 8 of the Code of Civil Procedure, 1908, two primary conditions are that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum. Besides, there are other parameters to sustain a plea of set-off under r.6. [para 12] [1101-D]

Jai Jai Ram Monohar Lal v. National Building Material Supply, Gurgaon **1970 (1) SCR 22 = AIR 1969 SC 1267;** *Suraj Prakash Bhasin v. Smt. Raj Rani Bhasin and Others* **AIR 1981 SC 485;** *Nichhalbhai Vallabhai v. Jaswantlal Zinabhai* **AIR 1966 SC 997;** *Abdul Rahim Naskar v. Abdul Jabbar Naskar and Ors.* **AIR 1950 Cal 379;** *Baijnath Bhalotia v. State Bank of India and Others* **AIR 1967 Pat 386;** *I.T.C. Limited v. M.M.P. Lines Pvt. Ltd. and Others* **AIR 1978 Cal 298;** *Mackinnon Mackenzie and Company Pvt. Ltd. v. Anil Kumar Sen and Anr.* **AIR 1975 Cal 150 - referred to.**

1.2 As far as equitable set-off is concerned, the right of set-off exists not only in cases of mutual debits and

credits, but also where cross-demands arise out of the same transaction. From the enunciation of law, it emerges that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due. [para 12 and 16] [1101-E; 1103-E-G]

Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh and Others, **AIR 1952 SC 782;** *M/s. Lakshmichand and Balchand v. State of Andhra Pradesh,* **1987 (1) SCR 108 = (1987) 1 SCC 19;** *Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others,* **2004 (2) SCR 997 = (2004) 3 SCC 504;** *Dobson & Barlow v. Bengal Spinning & Weaving Co. (***1897) 21 Bom 126;** *Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal* **AIR 1940 Nag 177; and** *Chishlom v. Gopal Chander,* **ILR 16 Cal 711 (1889) - referred to.**

Clark v. Ratnavaloo Chett, M.H.C.R. **296 (1865) - referred to.**

1.3 The Division Bench of the High Court has rightly allowed the amendment on the base that the claim put forth could be treated as a plea in the nature of equitable set-off, for it has treated the stand taken in the amendment petition to be a demand so connected, in the nature and circumstances, that they can be looked upon

as a part of one transaction. The view expressed by the Division Bench has to be treated as a prima facie expression of opinion. Whether the claim would be allowable or not will depend upon the evidence adduced before the court so as to sustain a claim of equitable set-off. These aspects are to be gone into while disposing of the suit. [para 17] [1104-A-C]

Case Law Reference:

1970 (1) SCR 22	**referred to**	**para 5**
AIR 1981 SC 485	**referred to**	**para 5**
AIR 1966 SC 997	**referred to**	**para 5**
AIR 1950 Cal 379	**referred to**	**para 5**
AIR 1967 Pat 386	**referred to**	**para 5**
AIR 1978 Cal 298	**referred to**	**para 5**
AIR 1975 Cal 150	**referred to**	**para 6**
M.H.C.R. 296 (1865)	**referred to**	**para 12**
ILR 16 Cal 711 (1889)	**referred to**	**para 12**
AIR 1952 SC 782	**referred to**	**para 13**
1987 (1) SCR 108	**referred to**	**para 14**
2004 (2) SCR 997	**referred to**	**para 15**
(1897) 21 Bom 126	**referred to**	**para 16**
AIR 1940 Nag 177	**referred to**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6784 of 2013.

From the Judgment and Order dated 17.06.2004 of the High Court of Calcutta in G.A. No. 1372 of 1998.

Ranjan Mukherjee for the Appellants.

Bhaskar P. Gupta, Abhijit Chatterjee, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak, K. Rajeev for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Delay in filing the application for substitution is condoned and prayer for substitution of appellant No. 2 is allowed.

2. Leave granted.

3. The appellant Nos. 1 and 3 along with the predecessor-in-interest of appellant No. 2 instituted suit No. 301 of 1993 in the High Court of Calcutta principally for a declaration that they are entitled to be paid all the commissions and other incentives payable to the agents/field officers by the defendants in respect of the transactions and/or business which was done through the customers/certificate holders in accordance with the circulars/ terms and conditions of appointment of all agents/field officers of the defendant company and for a decree of Rs.25 lacs against the defendant No. 1 company jointly and severally or in the alternative to cause an enquiry pertaining to the damages suffered by the plaintiffs and pass a decree for such a sum.

4. After issuance of notice of the plaint which was presented on 11.8.1993, the defendants entered appearance and filed their written statement on 12.8.1994. Thereafter, on 7.4.1998, the defendants filed an application for amendment of the written statement. The amendment that was sought for by the defendants was to the effect of grant of a decree for a sum of Rs.4,19,509.43 in favour of the defendant No. 1 and a decree for further interest and, if necessary, to enquire into the sum which is payable by the plaintiff No. 1 to the defendant company. The said application was seriously opposed by the plaintiffs on the ground that such an amendment was totally

impermissible and by seeking incorporation of such a plea by way of amendment the defendants were actually taking recourse to an adroit method of introducing a counter claim or set-off.

5. The learned single Judge scanned the anatomy of the language employed in Order VI Rule 17, Order VIII Rule 6 and Rule 6-A of the Code of Civil Procedure and after referring to decisions in *Jai Jai Ram Monohar Lal v. National Building Material Supply, Gurgaon*[1], *Suraj Prakash Bhasin v. Smt. Raj Rani Bhasin and Others*[2], *Nichhalbhai Vallabhai v. Jaswantlal Zinabhai*[3], *Abdul Rahim Naskar v. Abdul Jabbar Naskar and Ors.*[4], *Baijnath Bhalotia v. State Bank of India and Others*[5] and *I.T.C. Limited v. M.M.P. Lines Pvt. Ltd. and Others*[6] and analyzing the principles stated therein, came to hold that there is no scope for entertaining a counter claim when the time had expired long back and there was no justification to accede to the claim at the desire of the party. Be it noted, the learned Judge came to hold that the claims were not identical in nature and, hence, the defendants could not have asked for adjustment of any claim on the basis of a cause of action inasmuch as the nature of cause of action, as pleaded by the defendants in their amendment application, is different from the cause of action set forth by the plaintiffs in the suit. It was further opined that conceptually they did not meet the same character and the spacious plea that the amendment should be treated as equitable set-off was not acceptable. Emphasis was laid on the relief sought in the plaint which pertained to declaration and the entitlement of the plaintiffs to the commission and incentives payable by the defendants to the plaintiffs. Being of this view,

1. AIR 1969 SC 1267.
2. AIR 1981 SC 485.
3. AIR 1966 SC 997.
4. AIR 1950 Cal 379.
5. AIR 1967 Pat 386.
6. AIR 1978 Cal 298.

the learned single Judge rejected the application for amendment.

6. Dissatisfied with the order of rejection an appeal was preferred and the Division Bench vide order dated 17.6.2004 came to hold that the claim put forth by the defendants by way of written statement could no longer be legally recoverable at that distance of time; and that the claim could not be treated as a counter claim and set-off as envisaged under the Civil Procedure Code. The Division Bench, after referring to *Mackinnon Mackenzie and Company Pvt. Ltd. v. Anil Kumar Sen and Anr.*[7], came to hold that the provisions of the Limitation Act do not necessarily bar an equitable set-off and the provisions of Order VIII Rule 6 do not do away with the principles of equitable set-off. Eventually, the Division Bench clarified by stating as follows: -

> "It is clarified that though the amendments are allowed, if the appellant's set-off are found to be barred by limitation at trial, then and in that event, they would never be entitled to a decree on their own but only to a wiping off pro-tanto of the plaintiff's claim. The amendment by way of paragraph 20G of the written statement is particularly to be read in this light at trial."

7. The aforesaid order is the subject-matter of assail in the present appeal by special leave.

8. We have heard Mr. Ranjan Mukherjee, learned counsel for the appellants, and Mr. Bhaskar P. Gupta, learned senior counsel for the respondents.

9. Mr. Mukherjee, learned counsel for the appellants, has strenuously urged that in the garb of equitable set-off an endeavour has been made to introduce a claim which is really in the nature of set-off as incorporated under Order VIII Rule 6 of the Code and, therefore, the learned single Judge was

7. AIR 1975 Cal 150.

absolutely justified in not allowing the same. He has seriously criticized the opinion expressed by the Division Bench on the ground that in the case at hand the equitable set-off, as argued, encroaches into the compartment of legal set off. It is urged by him that the High Court has committed grave illegality in allowing the amendment as a result of which the defendants have been able to procrastinate the proceeding.

10. Mr. Gupta, learned senior counsel appearing for the defendants, the respondents herein, conceded that the claim put forth in the written statement cannot be regarded as a counter claim or a legal set-off as both are really not permissible at the stage when the application to amend the written statement was filed. The learned senior counsel would submit that the claim put forth in the amended written statement has to be restricted to equitable set-off which is beyond the scope of legal set-off. It is urged by him that equitable set-off is not governed by the Code and, in fact, there is an immense distinction between the equitable set-off and legal set-off.

11. In view of the aforesaid submissions we are required to restrict our deliberations to the controversy whether the claim of equitable set-off, as put forth, is tenable or not. To appreciate the said issue it is relevant to understand what is the requirement of set-off in the Code. Order VIII Rule 6 deals with set-off. It reads as follows:-

> **"6. Particulars of set-off to be given in written statement. -** (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to

be set-off.

(2) Effect of set-off. - The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

12. On a reading of the aforesaid Rule it is noticeable that certain conditions precedent are to be satisfied for application of the said Rule. Two primary conditions are that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum. Apart from the aforesaid parameters there are other parameters to sustain a plea of set-off under this Rule. As far as equitable set-off is concerned, it has been enunciated in the case of *Clark v. Ratnavaloo Chetti*[8] that the right of set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction. The said principle has been reiterated by the Calcutta High Court in *Chishlom v. Gopal Chander*[9].

13. In *Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh and Others*[10] it has been opined that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction and not connected in its nature and circumstances. It has been further stated therein that a wrongdoer who has wrongfully withheld moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom

8. 2 M.H.C.R. 296 (1865).

9. ILR 16 Cal 711 (1889).

`0. AIR 1952 SC 782.

the amounts that have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it.

14. In *M/s. Lakshmichand and Balchand v. State of Andhra Pradesh*[11], this Court has ruled that when a claim is founded on the doctrine of equitable set-off all cross-demands are to arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction.

15. In *Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others*[12], while referring to concept of set-off, this Court has stated thus: -

"15. "Set-off" is defined in Black's Law Dictionary (7th Edn., 1999) inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from A Treatise on the *Law of Set-Off, Recoupment, and Counter Claim* as stating:

"Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deducted from the cross-demand"."

Thereafter, the learned Judges referred to Sub-rule (1) of Rule 6 of Order VIII and proceeded to opine thus: -

"What the rule deals with is legal set-off. The claim sought

11. (1987) 1 SCC 19.

12. (2004) 3 SCC 504.

to be set off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so."

16. From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in *Dobson & Barlow v. Bengal Spinning & Weaving Co.*[13] and *Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal*[14].

13. (1897) 21 Bom 126.

14. AIR 1940 Nag 177.

17. Tested on the aforesaid principles we are disposed to think that the Division Bench has rightly allowed the amendment on the base that the claim put forth could be treated as a plea in the nature of equitable set-off, for it has treated the stand taken in the amendment petition to be a demand so connected in the nature and circumstances that they can be looked upon as a part of one transaction. The view expressed by the Division Bench has to be treated as a prima facie expression of opinion. Needless to emphasise, whether the claim would be allowable or not will depend upon the evidence adduced before the Court so as to sustain a claim of equitable set-off. These aspects are to be gone into by the learned single Judge while disposing of the suit. As the suit is pending since 1993, the High Court is requested to dispose of the same as expeditiously as possible preferably within one year from today.

18. Ex-consequenti, with the aforesaid observations, the appeal stands disposed of with no order as to costs.

R.P. Appeal disposed of.

MRITUNJOY BISWAS

v.

PRANAB @ KUTI BISWAS AND ANOTHER

(Criminal Appeal No. 378 of 2007)

AUGUST 08, 2013

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

Penal Code, 1860:

s.302 – Murder caused by gun-shot – Conviction by trial court – Acquittal by High Court – Held: Husband of deceased has clearly deposed to have seen the accused firing at his wife -- Nephew of deceased (informant) has stood by his earlier version -- They are the most natural witnesses and there is no reason that they would falsely implicate the accused – Besides, in the instant case, abscondence of the accused gains significance -- Non-examination of the treating doctor at Primary Health Centre does not affect the prosecution case -- When there is ample unimpeachable ocular evidence and the same has been corroborated by medical evidence, non-recovery of the weapon does not affect prosecution case – Judgment of acquittal passed by High Court being wholly unsustainable, is set aside and conviction recorded by trial court, restored – Investigation – Evidence.

APPEAL:

Criminal appeal – Power of appellate court – Held: Appellate court has full power to review at large all the evidence and to reach the conclusion that upon the said evidence, the order of acquittal should be reversed.

EVIDENCE:

Appreciation of evidence – Minor contradictions and inconsistencies – High Court setting aside the conviction and acquitting the accused by referring to some discrepancies –

Held: Every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments not affecting the core of the case, should not be taken to be a ground to reject the prosecution evidence – While appreciating the evidence of a witness, the approach must be as to whether the evidence of the witness read as a whole appears to have a ring of truth – High Court in its appreciation of evidence has laid undue emphasis on some contradictions which do not affect the prosecution case – It has read the evidence not as a whole but in utter fragmentation and appreciated the same in total out of context – Testimonies of prosecution witnesses are credible and there is no reason to treat their testimony as untrustworthy – Penal Code, 1860 – s.302.

FIR:

Non-mentioning name of accused in FIR – Held: Evidence shows that accused was named at earliest opportunity – There is nothing on record to suggest that he was falsely implicated by way of an afterthought.

Respondent no. 1 was prosecuted on the allegation that on 20.4.2001, at about 8.25 p.m. he fired at the wife of PW-8, who succumbed to her injuries on the following day. The trial court convicted and sentenced him to life imprisonment u/s 302 IPC. However, on appeal, the High Court acquitted the accused giving him benefit of doubt. Aggrieved, the complainant filed the appeal.

Allowing the appeal, the Court

HELD: 1. The appellate court has full power to review at large all the evidence and to reach the conclusion that upon the said evidence, the order of acquittal should be reversed. [para 12] [1117-D-E]

Jadunath Singh v. State of U.P. **(1971) 3 SCC 577,** *Surajpal Singh v. State* **1952 SCR 193 =1952 AIR 52;** *Sanwat Singh v. State of Rajasthan* **1961 SCR 120 = 1961 AIR 715;**

Damodarprasad Chandrikaprasad v. State of Maharashtra **1972 (2) SCR 622 = 1972 (1) SCC 107,** *State of Bombay v. Rusi Mistry* **AIR 1960 SC 391;** *Shivaji Sahabrao Bobade v. State of Maharashtra* **1974 (1) SCR 489 = 1973 (2) SCC 793,** *Chandrappa v. State of Karnataka* **2007(2) SCR 630 = 2007 (4) SCC 415;** *S. Ganesan v. Rama Raghuraman* **2011 (1) SCR 27 = 2011 (2) SCC 83,** *Jugendra Singh v. State of Uttar Pradesh* **2012 (6) SCR 193 = 2012 (6) SCC 297; and** *State of Madhya Pradesh v. Dal Singh and Ors.* **2013 (7) SCALE 513 – referred to.**

Sheo Swarup v. King Emperor **AIR 1934 PC 227,** *Nur Mohammad v. Emperor* **AIR 1945 PC 151– referred to.**

2.1. The High Court has taken serious exception to the non-mentioning of the name of the accused in the FIR. PW-8, the husband of the deceased had screamed about the gun-shot and PW-1 (informant) had rushed to his house and thereafter immediately proceeded to get a vehicle to take the victim to a hospital. In such a situation, to expect that he should have heard PW-8 mentioning the name of the accused would be in the realm of hyper-technical approach. The evidence shows that the accused was named at the earliest opportunity. There is nothing brought on record to suggest that he was falsely implicated by way of an afterthought. The exception taken to the fact that though the deceased was aware of the name of the accused, yet she did not utter the name of the assailant and, therefore, the prosecution version does not inspire confidence, is inapposite. It is inappropriate to assume that she should have heard the name of the accused and to expect of her to mention the same to the others. The doubt expressed is not a reasonable one and such a degree of exactitude should not have been emphasised upon. The finding of the High Court on this score cannot be accepted. [para 24 and 27] [1122-D, F-H; 1123-A-B; 1125-B-C]

Pandurang and Others v. State of Hyderabad **1955 SCR 1083 =AIR 1955 SC 216;** *Rotash v. State of Rajasthan* **2006 (10) Suppl. SCR 264 = 2006 (12) SCC 64;** *Mulla and Another v. State of Uttar Pradesh* **2010 (2) SCR 633 = 2010 (3) SCC 508;** *Ranjit Singh and Others v. State of Madhya Pradesh* **2010 (14) SCR 133 = 2011 (4) SCC 336,** *Rattan Singh v. State of H.P.* **1996 (9) Suppl. SCR 938 = 1997 (4) SCC 161,** *Pedda Narayana v. State of A.P.* **1975 (0) Suppl. SCR 84 = 1975 (4) SCC 153,** *Sone Lal v. State of U.P.* **1978 (4) SCC 302,** *Gurnam Kaur v. Bakshish Singh* **1980 Suppl. SCC 567;** *Kirender Sarkar v. State of Assam* **2009 (6) SCR 1133 = 2009 (12) SCC 342;** *Jitender Kumar v. State of Haryana* **2012 (4) SCR 408 = 2012 (6) SCC 204;** *Gurbachan Singh v. Satpal Singh and Others* **1989 (1) Suppl. SCR 292 = AIR 1990 SC 209;** *State of U.P. v. Krishna Gopal and Another* **(1988) 4 SCC 302,** *Krishnan v. State* **2003 (1) Suppl. SCR 771 = 2003 (7) SCC 56,** *Valson and Another v. State of Kerala* **2008 (11) SCR 642 = 2008 (12) SCC 241 a;** *Bhaskar Ramappa Madar and Others v. State of Karnataka* **2009 (5) SCR 256 = 2009 (11) SCC 690 – relied on.**

2.2. The High Court has referred to the some discrepancies which are absolutely in the realm of minor discrepancies. Minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the evidence inspires confidence in the mind of the court. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. However, every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments not affecting the core of the case should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about creditworthiness of a witness. Further, while appreciating the evidence of a witness, the

approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. In the instant case, the High Court in its appreciation of evidence has given unnecessary and undue emphasis on certain contradictions which do not affect the prosecution case and has read the evidence not as a whole but in utter fragmentation and appreciated the same in total out of context. It has erroneously discarded the credible evidence by paving the path of totally hyper-technical approach. [para 28-29] [1125-D; 1126-B; 1127-A-B, E]

Leela Ram (dead) through Duli Chand v. State of Haryana and another **1999 (3) Suppl. SCR 435 = 1999 (9) SCC 525, and** *Rammi alias Rameshwar v. State of M.P.* **1999 (3) Suppl. SCR 1 = 1999 (8) SCC 649;** *Shyamal Ghosh v. State of West Bengal* **2012 (10) SCR 95 = 2012 (7) SCC 646;** *State of U.P. v. M.K. Anthony* **1985 (1) SCC 505 – relied on**

2.3. The testimonies of PWs-1, 2, 3, 7 and 8 are credible and there is no reason to treat their testimony as untrustworthy. PW-8, the husband of the deceased has clearly deposed to have seen the accused in the light of the lamp firing at the back of his wife; and PW-1, the nephew of the deceased, has stood by his earlier version. Nothing has been elicitated in the cross-examination to discard their testimony. They are the most natural witnesses and there is no reason that they would falsely implicate the accused leaving the real culprit solely because some quarrel had earlier taken place. The other two witnesses have deposed about the accused running away from the place of occurrence immediately. That apart, the accused had absconded from the village. Though abscondence cannot from the fulcrum of a guilty mind but it is a relevant piece of evidence to be considered along with other evidence and its value would always depend the circumstances of each case. In the instance case, if the evidence of the witnesses are

read in a cumulative manner, the abscondence of the accused gains significance. [para 29] [1126-B-G]

Matru Alias Girish Chandra v. State of Uttar Pradesh **1971 (3) SCR 914 = 1971 (2) SCC 75,** *State of M.P. Through C.B.I. and Others v. Paltan Mallah and Others* **2005 (1) SCR 710 = 2005 (3) SCC 169; and** *Bipin Kumar Mondal v. State of West Bengal* **2010 (8) SCR 1036 = 2010 (12) SCC 91 – relied on.**

2.4. As far as non-examination of the treating doctor at the Primary Health Centre is concerned, the same does not even remotely affect the case of the prosecution. The High Court has taken exception to his non-examination solely on the base that his evidence in the court would have reflected the exact health condition of the deceased. When the testimonies of other witnesses are accepted on their own creditworthiness, this aspect has to melt into insignificance. [para 30] [1127-F-G, H; 1128-A]

2.5. When there is ample unimpeachable ocular evidence and the same has been corroborated by the medical evidence, non-recovery of the weapon does not affect the prosecution case. [para 33] [1129-B]

Lakhan Sao v. State of Bihar and Another **(2000) 9 SCC 82;** *State of Rajasthan v. Arjun Singh and Others* **2011 (10) SCR 823 = 2011 (9) SCC 115 – relied on.**

Lakshmi and Others v. State of U.P. **2002 (1) Suppl. SCR 733 = 2002 (7) SCC 198 – referred to.**

2.6. The judgment of acquittal passed by the High Court being wholly unsustainable is set aside and the judgment of conviction by the trial Court is restored. [para 34] [1129-C]

Case Law Reference:

(1971) 3 SCC 577	**referred to para12**
AIR 1934 PC 227	**referred to para 12**

AIR 1945 PC 151	**referred to**	**para 12**
1952 SCR 193	**referred to**	**para 12**
1961 SCR 120	**referred to**	**para 12**
1972 (2) SCR 622	**referred to**	**para 13**
AIR 1960 SC 391	**referred to**	**para 13**
1974 (1) SCR 489	**referred to**	**para 14**
2007 (2) SCR 630	**referred to**	**para 15**
2011 (1) SCR 27	**referred to**	**para 16**
2012 (6) SCR 193	**referred to**	**para 16**
2013 (7) SCALE 513	**referred to**	**para 16**
1955 SCR 1083	**relied on**	**para 19**
2006 (10) Suppl. SCR 264	**relied on**	**para 20**
2010 (2) SCR 633	**relied on**	**para 21**
2010 (14) SCR 133	**relied on**	**para 22**
1996 (9) Suppl. SCR 938	**relied on**	**para 22**
1975 (0) Suppl. SCR 84	**relied on**	**para 22**
1978 (4) SCC 302	**relied on**	**para 22**
1980 Suppl. SCC 567	**relied on**	**para 22**
2009 (6) SCR 1133	**relied on**	**para 22**
2012 (4) SCR 408	**relied on**	**para 23**
1989 (1) Suppl. SCR 292	**relied on**	**para 24**
(1988) 4 SCC 302	**relied on**	**para 25**
2003 (1) Suppl. SCR 771	**relied on**	**para 26**

2008 (11) SCR 642	**relied on**	**para 26**
2009 (5) SCR 256	**relied on**	**para 26**
1999 (3) Suppl. SCR 435	**relied on**	**para 28**
1999 (3) Suppl. SCR 1	**relied on**	**para 28**
2012 (10) SCR 95	**relied on**	**para 28**
1971 (3) SCR 914	**relied on**	**para 28**
2005 (1) SCR 710	**relied on**	**para 29**
2010 (8) SCR 1036	**relied on**	**para 29**
1985 (1) SCC 505	**relied on**	**para 29**
2002 (1) Suppl. SCR 733	**referred to**	**para 31**
(2000) 9 SCC 82	**relied on**	**para 32**
2011 (10) SCR 823	**relied on**	**para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 378 of 2007.

From the Judgment and Order dated 25.09.2006 of the High Court at Calcutta in Criminal Appeal No. 558 of 2004.

Rauf Rahim, Yadunandan Bansal for the Appellant.

Rukhsana Choudhury, Chanchal Kumar Ganguli, Avijit Bhattaharjee, Soumi Kundu for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Assailing the judgment of acquittal dated 25.9.2006 passed by the High Court of Calcutta in Criminal Appeal No. 558 of 2004 whereby the judgment of conviction and order of sentence dated 12.8.2003 and 13.8.2003 respectively passed in Sessions Case No. 52 of 2001 by the learned Third Additional Sessions Judge, Nadia,

convicting the accused-respondent No. 1 under Section 302 of the Indian Penal Code (for short "IPC") and sentencing him to suffer imprisonment for life and to pay a fine of Rs.1,000/-, in default, to suffer further imprisonment for one year, has been reversed, the instant appeal has been preferred by special leave.

2. The factual score that needs to be exposited is that on 20.4.2001 about 8.25 p.m. Gnanendra Nath Biswas, PW-8, the husband of the deceased, was lying on a cot in the bedroom with his wife Ashalata Biswas who was reading a "Panchali" and he was listening to the radio. A lamp was burning near the cot as the house did not have any electric light. All on a sudden a miscreant fired at the deceased Ashalata Biswas through the eastern window of the room as a result of which she sustained severe injuries. Hearing the scream of the husband, their nephew, Mritunjoy Biswas, PW-1, along with others came inside and took Ashalata Biswas to the Krishnaganj Hospital. The doctors, after primary treatment, advised them to take her to Shaktinagar Hospital and, accordingly, PW-1 along with Sujit Kumar Biswas, PW-10 and one Lakshmi Biswas took her to Shaktinagar Hospital. Thereafter, PW-1 went to Krishnaganj Police Station and lodged a written complaint, Ext.-1, and returned home. On the basis of the complaint ASI Kohkan Chandra Roy, PW-11, registered P.S. case No. 32 of 2001 dated 20.4.2001 under Section 326 IPC and Sections 25/27 of the Arms Act, 1959 and, eventually, the case was endorsed to S.I. Anupam Chakraborty, PW-13, for investigation.

3. On 21.4.2001 when the victim succumbed to his injuries, the case was converted to one under Section 302 of I.P.C. Accused Pranab, who was absconding, was arrested on 24.4.2001. The Investigating Officer sent the dead body for post mortem, examined the witnesses and after collecting all the evidence submitted the chargesheet to the competent Court which in turn transmitted the case to the Court of Session for trial.

4. The plea of the accused was that he was innocent, and had been falsely implicated due to animosity.

5. The prosecution, in order to bring home the charge against the accused, examined 14 witnesses and brought number of documents on record. The main witnesses are Mritunjoy Biswas, PW-1, the nephew of the deceased, Subhash Biswas, PW-2, a witness to seizure, Kamal Krishna Biswas, PW-3, who had deposed that at the time of occurrence the accused was not in the house, Dr. Ajit Kumar Biswas, PW-5, who had conducted the post mortem, Shantiranjan Samadar, PW-6, and Bishnu Pada Kritania, PW-7, who had seen the accused running and on a query being made did not give any reply, Gnanendra Nath Biswas, PW-8, the husband of the deceased and Anupam Chakraborty, PW-13, the Investigating Officer. The defence chose not to adduce any evidence.

6. After conclusion of the trial, on appreciation of the evidence on record, the learned trial Judge came to hold that the accused was guilty of the offence punishable under Section 302 IPC and, accordingly, convicted him and imposed the sentence as has been stated hereinbefore.

7. On an appeal being preferred the High Court found certain flaws in the case of the prosecution and opined that the learned trial Judge had fallen into error in appreciation of evidence on record and, accordingly, came to hold that the accused was entitled to benefit of doubt. Being of this view it reversed the judgment of conviction and acquitted the accused.

8. Mr. Rauf Rahim, learned counsel appearing for the appellant, has submitted that the High Court has fallen into grave error by opining that the non-mentioning of the name of the accused in the FIR by the informant was fatal to the case of the prosecution which is against the settled principle of law. The conclusion on this score, as the learned counsel would contend, is based on conjecture that PW-1, who has stated to have arrived at the spot immediately, had the occasion to know the

name of the accused from PW-8 though the circumstances and the material brought on record project a different picture. It is further urged by him that the High Court has failed to appreciate the evidence in a reasonable manner by recording a finding that the deceased, while being carried in the van to the hospital, despite being conscious, did not mention that it was the accused who had fired a gunshot through the window. The non-examination of Lakshmi Biswas who had accompanied the deceased to the hospital, has been given undue emphasis by the High Court which has resulted in an erroneous perception both in fact and in law. It is canvassed by him that there was no reason on the part of the High Court not to accept the testimonies of PW-1, PW-2 and PW-8 who were the most natural witnesses and further the High Court has totally ignored the other obtaining circumstances which make the judgment of reversal totally unsustainable. Therefore, it is urged that the appeal deserves to be allowed and the judgment of acquittal being untenable requires to be lancinated.

9. Ms. Rukhsana Choudhury, learned counsel appearing for respondent No. 1, supporting the judgment of the High Court, has contended that the appreciation of the evidence by the learned trial Judge being absolutely unacceptable, the High Court has appropriately disturbed the findings and, hence, the judgment of acquittal does not warrant any interference by this Court. It is her further submission that the High Court has rightly reached the conclusion that on the basis of such sketchy evidence it was inapposite to convict the accused and has justifiably extended the benefit of doubt. The learned counsel would also lay emphasis on the fact there had been no recovery of gun from the accused and, therefore, the prosecution version does not inspire confidence and on that bedrock alone the verdict of the High Court deserves to be treated as impeccable. The learned counsel would further contend that when the material witnesses, namely, Lakshmi Biswas and the treating doctor at the primary hospital have not been examined, the High Court is correct in its approach to record an acquittal and the

view being not an implausible one should be allowed to stand. That apart, it is argued that the material omissions and discrepancies in the evidence of witnesses create an incurable dent in the case of the prosecution and the High Court has taken note of the same in a sound manner and, hence, the conclusion resulting in acquittal cannot be flawed.

10. Mr. Chanchal Kumar Ganguli, learned counsel appearing for the State, supporting the stand and stance put forth by the learned counsel for the appellant, submitted that while treating the testimonies of PWs-1, 2, 7 and 8 as incredible and unacceptable, the reasons given by the High Court are absolutely unreasonable and, therefore, the reversal of conviction is vulnerable; that the deceased, as she was conscious, could have divulged the name of the deceased shows total incorrect approach inasmuch as the deceased was in a painful condition and she has told, as deposed by PW-3, that she would not survive; that the non-mentioning of the name of the accused in the FIR cannot be treated as fatal to the case of the prosecution when the entire evidence brought on record prove the guilt of the accused; that non-examination of the two witnesses and non-recovery of the weapon used are absolutely immaterial, for the prosecution may choose not to examine a witness and, in any event, their non-examination and non-recovery of the weapon cannot belie the version of the prosecution; that PW-2, Subhas Biswas, who had identified the accused fleeing way from the house of the deceased in the focus of the torch has been commented upon on the ground that the torch was not seized by the police but the same may be a lacunae in the investigating agency and cannot be a ground to discard the unimpeachable evidence of PW-2; and that the approach of the High Court is manifestly erroneous inasmuch as it has considered certain circumstances and opined that they are weak pieces of circumstantial evidence with the aid of which the accused cannot be convicted though there is direct evidence of natural witnesses pertaining to the role played by the accused. The emphasis on the fact that

independent witnesses have not been examined is inconsequential as the witnesses examined are most natural witnesses and they have no reason to implicate the accused in the crime. The High Court, Mr. Ganguli would contend, has laid immense stress on some minor discrepancies which are not vital for which the view expressed cannot be regarded as irreproachable.

11. Before we scrutinize whether the High Court has appositely appreciated the evidence on record and whether the findings recorded on such appreciation by it are totally unreasonable or perverse leading to serious illegality, which would warrant interference by this Court, we would like to refer to certain authorities in the field that lay down the parameters for reversing a judgment of acquittal.

12. In *Jadunath Singh v. State of U.P.*[1], a three-Judge Bench opined that in an appeal against acquittal, the appellate Court has full power to review at large all the evidence and to reach the conclusion that upon that evidence, the order of acquittal should be reversed. The Bench referred to the principles laid down in *Sheo Swarup v. King Emperor*[2], *Nur Mohammad v. Emperor*[3], *Surajpal Singh v. State*[4] and *Sanwat Singh v. State of Rajasthan*[5].

13. In *Damodarprasad Chandrikaprasad v. State of Maharashtra*[6], it has been ruled that once the appellate Court comes to the conclusion that the view of the trial Court is unreasonable, that itself provides reason for interference. The learned Judges referred to the decision in *State of Bombay v.*

1. (1971) 3 SCC 577.
2. AIR 1934 PC 227.
3. AIR 1945 PC 151.
4. AIR 1952 SC 52.
5. AIR 1961 SC 715.
6. (1972) 1 SCC 107.

Rusi Mistry[7] to come to the conclusion that if the finding shocks the conscience of the Court or the norms of legal process have been disregarded or substantial and great injustice has been done, the same can be interfered with.

14. In *Shivaji Sahabrao Bobade v. State of Maharashtra*[8], a three-Judge Bench expressed the opinion that there are no fetters on the plenary power of the appellate court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinize the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal, the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the finding without very convincing reasons and comprehensive consideration.

15. In *Chandrappa v. State of Karnataka*[9], this Court has held that an appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded and the Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. It has been further laid down therein that various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

7. AIR 1960 SC 391.
8. (1973) 2 SCC 793.
9. (2007) 4 SCC 415.

16. These principles have been reiterated in *S. Ganesan v. Rama Raghuraman*[10], *Jugendra Singh v. State of Uttar Pradesh*[11] and *State of Madhya Pradesh v. Dal Singh and Ors.*[12].

17. Keeping in view the aforesaid principles, we are required to scrutinize the base on which the findings have been recorded by the learned trial Judge and the appreciation on which the High Court thought it appropriate to reverse the conviction. It is perceptible that the learned trial Judge, scanning the evidence on record, opined that PWs-1, 2, 7 and 8 were the most natural witnesses and their evidence deserved to be accepted; that PW-3 who had gone to the house of the accused at the time of occurrence but immediately thereafter he came inside and in a different tone enquired about disturbance caused outside which was significant in the context of the occurrence; that the testimony of PW-7 deserved credence and he had stated that the mother of the accused came to his house in search of the accused at 8.00 p.m. in the night of the incident and he also heard the sound of a gunshot after five minutes from the time of departure of the mother of the accused from his house; that it was quite natural that there would be some discrepancies in the evidence of the prosecution witnesses, for after passage of time a witness cannot recollect everything with precision; and that the post mortem report revealed that the deceased had suffered a gunshot injury; that the defective investigation would not affect the prosecution case and, accordingly, rested his conclusion on the said findings.

18. The flaws noticed by the High Court are that the informant had not mentioned the name of the accused in the FIR though he could have mentioned; that though the deceased who was conscious while being taken to the hospital in a van, yet she did not divulge the name of the person who had fired

10. (2011) 2 SCC 83.

11. (2012) 6 SCC 297.

12. 2013 (7) SCALE 513.

through the window; that Lakshmi Biswas, who had accompanied Mritunjoy Biswas, PW-1 and Sujit Biswas, PW-10, to the hospital was not examined; that the evidence of PW-2 and PW-7, who saw the accused running away from the place of occurrence, was very weak piece of evidence to connect the accused with the crime; that the testimony of PW-3 that he had not found the accused in his house soon before the incident was inconsequential; that details of treatment of the deceased in the Krishnaganj Hospital had not been brought on record by the prosecution from which the condition of the deceased could have been known; that the prosecution should have, in all fairness, examined the treating doctor at the Primary Health Centre; and that the evidence on record did not establish the guilt of the accused beyond reasonable doubt and, hence, he was entitled to benefit of doubt.

19. The first ground of attack is non-mentioning the name of the accused in the FIR. Pyramiding the said submission, the learned counsel for the appellant would submit that once the name of the accused is not mentioned in the FIR, the prosecution version in entirety is bound to collapse. In this context, we may fruitfully refer to a three-Judge Bench decision in *Pandurang and Others v. State of Hyderabad*[13] wherein it has been held that on the facts of the case that the first information report did not mention the name of any person as assailant though it was alleged that the names were known was of no consequence specially when their names were disclosed at the time of inquest and their absence did not make the prosecution version a concocted one and further it could not be said that it was a planned one to rope someone later on.

20. In *Rotash v. State of Rajasthan*[14] wherein the FIR did not contain the name of the appellant before this Court, a contention was advanced that the informant who was known to the accused and who could easily identify the assailant, yet he

13. AIR 1955 SC 216.

14. (2006) 12 SCC 64.

was not named in the FIR and, therefore, the prosecution case was not to be believed. The Court took note of the fact that the investigation had taken place in quite promptitude and the accused persons were arrested being named by the witnesses. After taking note of the fact situation the Court proceeded to observe as follows: -

> "The first information report, as is well known, is not an encyclopedia of the entire case. It need not contain all the details. We, however, although did not intend to ignore the importance of naming of an accused in the first information report, but herein we have seen that he had been named in the earliest possible opportunity. Even assuming that PW 1 did not name him in the first information report, we do not find any reason to disbelieve the statement of Mooli Devi, PW 6. The question is as to whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case."

21. In *Mulla and Another v. State of Uttar Pradesh*[15], the accused persons were not named in the FIR. Taking into consideration the material brought on record, the Court observed that though none was named in the FIR, yet subsequently the names of the appellants had come into light during investigation and, hence, non-mentioning the names of the accused persons would not be fatal to the prosecution case.

22. In *Ranjit Singh and Others v. State of Madhya Pradesh*[16], after referring to authorities *Rotash* (supra), *Rattan Singh v. State of H.P.*[17], *Pedda Narayana v. State of A.P.*[18], *Sone Lal v. State of U.P.*[19], *Gurnam Kaur v. Bakshish Singh*[20]

15. (2010) 3 SCC 508.
16. (2011) 4 SCC 336.
17. (1997) 4 SCC 161.
18. (1975) 4 SCC 153.
19. (1978) 4 SCC 302.
20. 1980 Supp SCC 567.

and *Kirender Sarkar v. State of Assam*[21], the Court opined that in case the informant fails to name a particular accused in the FIR, and the said accused is named at the earliest opportunity, when the statements of witnesses are recorded, it cannot tilt the balance in favour of the accused.

23. In *Jitender Kumar v. State of Haryana*[22], it has been stated that an accused who has not been named in the FIR, to whom a definite role has been attributed in the commission of the crime and when such role is established by cogent and reliable evidence and the prosecution has also been able to prove its case beyond reasonable doubt, such an accused may be punished in accordance with law, if found guilty.

24. In the case at hand, the High Court has taken serious exception to the non-mentioning of the name of the accused in the FIR on the ground that the informant had the occasion to know the name of the assailant from the husband of the deceased as he had told the name of the accused to his nephew who had lodged the FIR and further the deceased had not mentioned the name of the accused though she was conscious and was able to speak. On a studied scrutiny of the evidence on record we are disposed to think that the reasons ascribed by the High Court on this score are unacceptable, for they do not really stand to reason. The husband, PW-8, had screamed about the gun-shot and PW-1 had rushed to his house and thereafter immediately proceeded to get a vehicle to take the victim to a hospital. In such a situation, to expect that he should have heard PW-8 mentioning the name of the accused would be in the realm of hyper-technical approach. That apart, the evidence brought on record, as we find, the accused has been named at the earliest opportunity and there is nothing brought on record to suggest that he has been falsely implicated by way of an afterthought. Quite apart from the above, the exception taken to the fact that though the deceased

21. (2009) 12 SCC 342.
22. (2012) 6 SCC 204.

was aware of the name of the accused and she was in a position to talk and further was administered an injection for amelioration of pain, yet she did not utter the name of the assailant and, therefore, the prosecution version does not inspire confidence, is inapposite. This approach, as we understand, is based on the principle that it is obligatory on the part of the prosecution to prove the guilt of the accused beyond reasonable doubt however complex and the intriguing may be the facts and circumstances of the case. Needless to say, the aforesaid test is not an absolute guidance in all circumstances for the court, for the doubts that are raised in the mind of the court must be reasonable. In this context, we may profitably refer to what has been stated by Sabyasachi Mukharji, J. (as his Lordship then was) in *Gurbachan Singh v. Satpal Singh and Others*[23]: -

> "The standard adopted must be the standard adopted by a prudent man which, of course, may vary from case to case, circumstances to circumstances. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law.
>
> 5. The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated."

25. In *State of U.P. v. Krishna Gopal and Another*[24],

23. AIR 1990 SC 209.

24. (1988) 4 SCC 302

Venkatachaliah, J. (as his Lordship then was) has opined thus:-

> "Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.
>
> 26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

26. The aforesaid principle has been reiterated in *Krishnan v. State*[25], *Valson and Another v. State of Kerala*[26] and *Bhaskar Ramappa Madar and Others v. State of Karnataka*[27].

27. The bedrock of reasoning of the High Court is to be tested on the anvil of the aforesaid enunciation of law. On a

25. (2003) 7 SCC 56.

26. (2008) 12 SCC 241.

27. (2009) 11 SCC 690.

careful and anxious scrutiny of the evidence on record it is difficult to accept the doubt expressed by the High Court in this regard. It is to be borne in mind that the deceased was being carried to the hospital after being shot on her back and, at that juncture, she had spoken few words but it is inappropriate to assume that she should have heard the name of the accused and further it was expected of her to mention the same to the others. The doubt expressed, as we perceive, is not a reasonable one and such a degree of exactitude should not have been emphasised upon. Hence, we are unable to persuade ourselves to accept the finding of the High Court on this score.

28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is worthy to note that the High Court has referred to the some discrepancies which we find are absolutely in the realm of minor discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram (dead) through Duli Chand v. State of Haryana and Another*[28], *Rammi alias Rameshwar v. State of M.P.*[29] and *Shyamal Ghosh v. State of West Bengal*[30].

29. It is noticeable that the High Court in its appreciation of evidence has really given unnecessary and undue emphasis on certain contradictions which really do not affect the prosecution case. The testimony of PWs-1, 2, 3, 7 and 8 are credible and there is no reason to treat their testimony as untrustworthy. We have arrived at such a conclusion as we find that PW-8, the husband of the deceased has clearly deposed about seeing the accused in the light of the lamp to have fired at the back of his wife and PW-1, the nephew of the deceased, has stood by his earlier version. Nothing has been elicitated in the cross-examination to discard their testimony. On the contrary, they are the most natural witnesses and there is no earthly reason that they would falsely implicate the accused leaving the real culprit solely because some quarrel had earlier taken place. Be it noted, the other two witnesses have deposed about the accused running away from the place of occurrence immediately. That apart, the accused had absconded from the village. We are absolutely conscious that mere abscondence cannot from the fulcrum of a guilty mind but it is a relevant piece of evidence to be considered along with other evidence and its value would always depend the circumstances of each case as has been laid down in *Matru Alias Girish Chandra v. State of Uttar Pradesh*[31], *State of M.P. Through C.B.I. and Others v. Paltan Mallah and Others*[32] and *Bipin Kumar Mondal v. State of West Bengal*[33]. In the instance case, if the evidence of the witnesses are read in a cumulative manner, the abscondence of the accused gains significance. The High

28. (1999) 9 SCC 525.
29. (1999) 8 SCC 649.
30. (2012) 7 SCC 646.
31. (1971) 2 SCC 75.
32. (2005) 3 SCC 169.
33. (2010) 12 SCC 91.

Court, as we find, has read the evidence not as a whole but in utter fragmentation and appreciated the same in total out of context. It is to be kept in mind that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. (See *State of U.P. v. M.K. Anthony*[34]). Tested on the anvil of the aforesaid principle, we have no shadow of doubt that the High Court has erroneously discarded the credible evidence by paving the path of totally hyper-technical approach.

30. The next aspect which has been highlighted by the High Court pertains to non-examination of Lakshmi Biswas and the treating doctor at Krishnaganj Hospital. As far as non-examination of the treating doctor at the Krishnaganj Hospital is concerned, we are of the view that the same does not even remotely affect the case of the prosecution. The High Court has taken exception to his non-examination solely on the base that his evidence in the court would have reflected the exact health condition of the deceased. Emphasis has been laid on the same as the appellate court has felt that the same could have been a pointer to find out whether the deceased was in a conscious state and why she did not mention the name of the accused. In our considered opinion when the testimonies of

34. (1985) 1 SCC 505.

other witnesses are accepted on their own creditworthiness, this aspect has to melt into insignificance. As far as non-examination of Lakshmi Biswas is concerned, as per the prosecution version she had only accompanied the deceased. There is no denial of the fact that the deceased had not mentioned the name of the accused. In this backdrop, we really fail to appreciate how the non-examination of the said witness creates a concavity in the case of the prosecution and, accordingly, we are unable to concur with the reasoning of the High Court.

31. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference. In *Lakshmi and Others v. State of U.P.*[35], this Court has ruled that undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder.

32. In *Lakhan Sao v. State of Bihar and Another*[36], it has been opined that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.

33. In *State of Rajasthan v. Arjun Singh and Others*[37], this

35. (2002) 7 SCC 198.

36. (2000) 9 SCC 82.

37. (2011) 9 SCC 115.

Court has expressed that mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place. Thus, when there is ample unimpeachable ocular evidence and the same has been corroborated by the medical evidence, non-recovery of the weapon does not affect the prosecution case.

34. In view of the aforesaid analysis, the appeal is allowed, the judgment of acquittal passed by the High Court being wholly unsustainable is set aside and the judgment of conviction of the trial Court is restored. The respondent is directed to surrender to custody to serve out the sentence.

R.P. Appeal allowed.

STATE OF PUNJAB
v.
MADAN MOHAN LAL VERMA
(Criminal Appeal No. 2052 of 2010)

AUGUST 12, 2013

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

PREVENTION OF CORRUPTION ACT, 1988:

ss. 7 and 13(1)(d) read with s.13(2) - Conviction by trial court, set aside by High Court - Held: Demand of illegal gratification is sine qua non for constituting an offence under the Act - Mere recovery of tainted money is not sufficient to convict the accused, unless there is evidence to prove payment of bribe or that the money was taken voluntarily as a bribe - High Court accepted the defence version made u/s 313Cr.PC that possibility of Phenolphthalein powder appearing on the hands of-accused when he shook hands with the complainant, cannot be ruled out -Executive Magistrate, who had been associated with the trap party, deposed only about recovery and not about accepting the bribe money -- This statement alone made it evident that the prosecution has not disclosed the genesis of the case correctly - There is, therefore, no cogent reason to interfere with the conclusion reached by High Court - Appeal against acquittal.

s. 20 - Statutory presumption - Rebuttal of - Discussed.

EVIDENCE:

Evidence of complainant in a bribe case - Nature of - Discussed.

The respondent was alleged to have demanded illegal gratification from the complainant for not to reopen his income tax assessment. The complainant approached the DSP (Vigilance). A trap was laid. The complainant and

the shadow witness reached the house of the respondent with chemically treated currency notes. On receiving the signal, the raiding party, which included a DSP and an Executive Magistrate, recovered the chemically treated currency notes that were kept on a table covered in a newspaper. The chemical examination of the respondent's hands was positive. The trial court convicted the respondent of the charges and awarded him sentence of one year each under the two counts. However, the High Court set aside the conviction and sentence.

Dismissing the appeal, the Court

HELD: 1.1 Demand of illegal gratification is sine qua non for constituting an offence under the Prevention of Corruption Act, 1988. Mere recovery of tainted money is not sufficient to convict the accused, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. While invoking the provision of statutory presumption u/s 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness, concerned with the success of the trap, and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused. [para 7] [1136-D-E, G-H; 1137-A-B]

Ram Prakash Arora v. The State of Punjab **AIR 1973 SC 498;** *T. Subramanian v. The State of T.N.,* **2006 (1) SCR 180 = AIR 2006 SC 836;** *State of Kerala & Anr. v. C.P. Rao* **2011 (6) SCR 864 = (2011) 6 SCC 450; and** *Mukut Bihari & Anr. v. State of Rajasthan,* **(2012) 11 SCC 642 - referred to.**

1.2 So far as the recovery in the instant case is concerned, the High Court accepted the defence version made u/s 313 of Code of Criminal Procedure, 1973 and recorded the finding that the possibility of Phenolphthalein powder appearing on the hands of the respondent-accused when he shook hands with the complainant cannot be ruled out. [para 8-9] [1137-C, F]

1.4 The courts below have not taken note of the statement made by PW.2 who is an Executive Magistrate and had been associated with the trap party. He must be treated to be the most reliable and independent person. PW.2 is a witness only of recovery and not of accepting the bribe money. This statement alone made it evident that the prosecution has not disclosed the genesis of the case correctly. The subsequent cases against the accused for having disproportionate assets cannot be co-related with the incident of trap case. The incident in which the respondent had been arrested for taking illegal gratification has to be examined on its own merit. [para 10] [1138-B-D, F-G]

2.The appellate court, in exceptional circumstances and for compelling reasons, should not hesitate to reverse a judgment of acquittal. However, while doing so, the appellate court must bear in mind the presumption of innocence in favour of the accused, and also that an acquittal by the court below bolsters such presumption of innocence. In the facts and circumstances of the case, there is no cogent reason to interfere with the conclusion reached by the High Court. [para 6 and 11] [1135-H; 1136-A-C; 1138-G-H]

Abrar v. State of U.P., **2010 (13) SCR 1217 = AIR 2011 SC 354;** *Rukia Begum v. State of Karnataka,* **AIR 2011 SC 1585; and** *State of Madhya Pradesh v. Dal Singh & Ors.,* **AIR 2013 SC 2059 - relied on.**

Case Law Reference:

2010 (13) SCR 1217	**relied on**	**para 6**
AIR 2013 SC 2059	**relied on**	**para 6**
AIR 1973 SC 498	**referred to**	**Para 7**
2006 (1) SCR 180	**referred to**	**Para 7**
2011 (6) SCR 864	**referred to**	**Para 7**
(2012) 11 SCC 642	**referred to**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2052 of 2010.

From the Judgment and Order dated 03.03.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 414-SB of 1996.

Ashok Kumar Panda, Lingaraj Sarangi, Rajiv Nanda, Syed Tanweer Ahmad, B.V. Balram Das, Arvind Kumar Sharma for the Appellant.

Madan Mohan Lal Verma, Respondent-In-Person.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 3.3.2009 in Criminal Appeal No. 414-SB/1996 passed by the High Court of Punjab and Haryana at Chandigarh, setting aside the judgment and order of the Trial Court dated 28.5.1996 by which the respondent stood convicted under the provisions of Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'Act 1988') and had been awarded the sentence of one year on each count and a fine of Rs.2,500/- was imposed, in default of payment of fine, to further undergo RI for one month.

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

A. The complainant - Naresh Kumar Kapoor was contacted by the respondent - the Income Tax Inspector who threatened him with reopening the assessment order, particularly in respect of the house owned and possessed by his wife Smt. Neeru Kapoor bearing No. 456, Model Town,

Jalandhar and for purchasing the car which had not been disclosed by the complainant in his income tax return. The complainant and the respondent-accused had been in touch with each other and the respondent demanded a sum of Rs.25,000/- as illegal gratification for not reopening the said assessment.

B. On 1.6.1994, the complainant - Naresh Kumar Kapoor (PW.7) alongwith Raj Kumar Sharma (PW.3) went to the house of respondent-accused i.e. 638, Mota Singh Nagar, Jalandhar to negotiate for not reopening the assessment. The respondent-accused asked for a sum of Rs.25,000/- as illegal gratification and the complainant expressed his inability. On this, respondent agreed to accept a sum of Rs.10,000/- as part payment of the illegal gratification to be paid on the same day, and a further sum of Rs.15,000/- on the next day. The complainant made a false promise of paying a sum of Rs. 10,000/- on the same day i.e. 1.6.1994. The complainant approached Harish Kumar (PW.12), DSP (Vigilance), Jalandhar and they prepared to lay a trap.

C. The complainant arranged the money i.e. 20 notes in the denomination of Rs.500/- each. Phenolphthalein powder was applied on the notes and the same were given to the complainant. The number of those notes were noted separately on a piece of paper. The complainant and the shadow witness Raj Kumar Sharma (PW.3) washed their hands and approached the respondent-accused at his house. The complainant gave the money to the respondent-accused. He put it on the table and covered it with a newspaper. The shadow witness Raj Kumar (PW.3) gave the appointed signal to Harish Kumar Sharma (PW.12) DCP, Gurlebleen Singh (PW.2), the Executive Magistrate and other members of the raiding party and the money was recovered. Hands of the respondent-accused were washed in the sodium carbonate solution, which turned pink. In view thereof, the criminal prosecution started.

D. After investigation, a charge sheet was filed against the respondent-accused. The prosecution examined 12 witnesses in support of its case and the defence also examined 9

witnesses. On conclusion of the trial, the respondent was convicted and sentenced as referred to hereinabove.

E. Aggrieved, the respondent preferred the criminal appeal before the High Court which has been allowed vide impugned judgment and order dated 3.3.2009.

Hence, this appeal.

3. Shri Ashok Kumar Panda, learned senior counsel appearing for the appellant, has submitted that it was a fool-proof case. The Trial Court gave cogent reasons and there was no justification for the High Court to discard the case of the prosecution. All the witnesses including Gurlebleen Singh (PW.2), the Executive Magistrate, have fully supported the prosecution's case. The Trial Court found that there had been a demand of illegal gratification and the amount received by the respondent was duly recovered by the raiding party. Thus, all the ingredients to constitute the offences for which the respondent had been prosecuted had been fulfilled. Therefore, the appeal deserves to be allowed.

4. Per contra, respondent-in-person has submitted that the complainant himself was an industrialist who evaded tax. The complainant was also running an NGO and was the chairman of an Anti-Corruption Society. The other office bearers of the said society had also raised a large number of complaints against the son of the respondent-accused. The complainant had been threatening him and even attacked him and caused injuries on 14.10.1994 in respect of which there had been complaints against him. The respondent had also filed a large number of cases in criminal courts which were settled by the officers of the CBI out of the court and in view thereof the cases were withdrawn. The parameters of interference against the order of acquittal as laid down by this Court have to be applied. Therefore, the appeal is liable to be rejected.

5. We have considered the rival submissions made by learned counsel for the appellant as well as the respondent in-person.

6. It is a settled legal proposition that in exceptional

circumstances, the appellate court for compelling reasons should not hesitate to reverse a judgment of acquittal passed by the court below, if the findings so recorded by the court below are found to be perverse, i.e. if the conclusions arrived at by the court below are contrary to the evidence on record; or if the court's entire approach with respect to dealing with the evidence is found to be patently illegal, leading to the miscarriage of justice; or if its judgment is unreasonable and is based on an erroneous understanding of the law and of the facts of the case. While doing so, the appellate court must bear in mind the presumption of innocence in favour of the accused, and also that an acquittal by the court below bolsters such presumption of innocence. (Vide: *Abrar v. State of U.P.,* AIR 2011 SC 354; *Rukia Begum v. State of Karnataka,* AIR 2011 SC 1585; and *State of Madhya Pradesh v. Dal Singh & Ors.,* AIR 2013 SC 2059).

7. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts

must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person.

(Vide: *Ram Prakash Arora v. The State of Punjab* AIR 1973 SC 498; *T. Subramanian v. The State of T.N.,* AIR 2006 SC 836; *State of Kerala & Anr. v. C.P. Rao,* (2011) 6 SCC 450; and *Mukut Bihari & Anr. v. State of Rajasthan,* (2012) 11 SCC 642).

8. The case is required to be examined in the light of the aforesaid settled legal propositions. So far as the recovery is concerned, the respondent-accused took a plea that he only had the duty to serve the notice on the complainant with regard to the tax evasion done by him and was not the authority for making an assessment order. It was his official duty to serve upon the complainant a notice under Section 148 of the Income Tax Act, 1961. The complainant came to his house and asked the respondent-accused to give him a glass of water as he had to take the medicine. He went inside the kitchen and came back with a glass of water and thereafter shook hands with the complainant and that is why when the hands of the respondent were washed, they turned pink.

9. The High Court also accepted the defence version made under Section 313 of Code of Criminal Procedure, 1973 and recorded the findings that the possibility of Phenolphthalein powder appearing on the hands of the respondent-accused when he shook hands with the complainant cannot be ruled out. The High Court further took note of various subsequent developments that certain complaints were filed against him by the CBI having dis-proportionate assets. The complainant Naresh Kumar Kapoor was a man having a criminal background. He was involved in a murder case as well as in a case of sale of shares in bogus names. The High Court further observed that in case two views are possible, the view favouring the accused has to be given preference, thus gave the benefit

of doubt to the respondent accused and acquitted him.

10. Undoubtedly, the reasoning given by the High Court does not deserve to be accepted for the reason that even if the complainant had a criminal background, he can still be forced by the officer of the Income Tax Department to pay illegal gratification for not reopening the assessment of a particular year. The subsequent cases against the respondent-accused for having disproportionate assets cannot be co-related with the incident of trap case. The incident in which the respondent had been arrested for taking illegal gratification has to be examined on its own merit. The courts below have not taken note of the statement made by Gurlebleen Singh (PW.2) who is an Executive Magistrate and must be treated to be the most reliable and independent person and admittedly, he had been associated with the trap party.

The case of the complainant was that on 1.6.1994 he went to the house of the respondent-accused and after bargaining, agreed to pay a sum of Rs.10,000/- on the same day as part payment of the illegal gratification of Rs.25,000/-. He immediately went alongwith Raj Kumar Sharma (PW.3), the shadow witness to Harish Kumar (PW.12), DCP and the plan for trap was prepared and the trap was laid. Gurlebleen Singh (PW.2), the Executive Magistrate has categorically stated that he had been directed by the Deputy Commissioner in writing on 31.5.1994 to join the trap party on 1.6.1994. Therefore, it is evident that in case the complainant himself had gone to Harish Kumar (PW.12) for having a trap on 1.6.1994, the question of receiving a direction from the Deputy Commissioner on 31.5.1994 could not arise. Gurlebleen Singh (PW.2) is a witness only of recovery and not of accepting the bribe money. This statement alone made it evident that the prosecution has not disclosed the genesis of the case correctly.

11. In view of the above, we do not find any cogent reason to interfere with the conclusion reached by the High Court. The appeal is accordingly dismissed.

R.P. Appeal dismissed.