BAL GOPAL MAHESHWARI & ORS.
v.
SANJEEV KUMAR GUPTA
(Civil Appeal No. 7279 of 2013)

AUGUST 30, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

Code of Civil Procedure, 1908:

O.15, r.5 – Striking off the defence – Suit for eviction on ground for default in payment of rent – Tenant filing written statement belatedly – Application by land-lord for striking off the defence as defendant failed to deposit the rent even after receipt of notice – Allowed by trial court and revisional court – Order set aside by High Court in a petition under Art. 227 of Constitution – Held: Trial court fully applied its mind while exercising its discretionary power to strike off the defence — Revisional court noticed the grounds and, exercising its revisional jurisdiction, affirmed the order — Order passed by courts below were not perverse nor had they exceeded their jurisdiction – Therefore, it was not open to High Court to sit in appeal under Art. 227 of the Constitution to alter such findings of fact and to accept the written statement without any ground –Judgment of High Court is set aside – Constitution of India, 1950 – Art.227.

The appellant filed a suit for eviction of the respondent-tenant from the suit premises, viz. a shop, for default in payment of rent and for arrears thereof. The defendant belatedly filed the written statement and did not deposit the rent on the first date of hearing, The application filed by the plaintiff under O.15, r.5 CPC for striking off the defence was allowed. The revision of the tenant was dismissed. However, the High Court in the

petition filed by the tenant under Art. 227 of the Constitution of India, 1950, set aside the orders of both the courts below.

Allowing the appeal, the Court

HELD: 1.1. In the instant case, both the courts below noticed several defaults committed by the respondent in depositing the monthly rent. The trial court fully applied its mind while exercising its discretionary power to strike off the defence. The revisional court noticed the grounds and, exercising its revisional jurisdiction, affirmed the order passed by the trial court. The power to strike off the written statement vested under r.5 of O. 15, CPC was exercised by the lower courts after going through the facts of the case. [Paras 10 and 15] [288-E; 293-H; 294-A-B]

Smt. Satya Kumari Kamthan v. Noor Ahmed and Others **1992 (2)** *Allahabad Rent Cases* **82 (SC);** *Bimal Chand Jain v. Sri Gopal Agarwal* **1982 (1) SCR 124 = (1981) 3 SCC 486 – relied on**

Mangat Singh Trilochan Singh v. Satpal **2003 (4) Suppl. SCR 54 = (2003) 8 SCC 357 – referred to**

1.2. The High Court failed to give any ground while exercising its inherent power under Art. 227 of the Constitution of India, but merely observed that the Supreme Court has held that the Court has jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summons on payment of heavy cost. The defendant has neither cited any decision nor has he shown any ground for acceptance of written statement even after expiry of 90 days from the date of service of summons on payment of heavy cost. The order passed by the trial court by exercising its discretionary power and the order passed by the revisional court affirming the trial court order were

not perverse and both the courts below have not exceeded their jurisdiction. Therefore, it was not open to the High Court to sit in appeal under Art. 227 of the Constitution to alter such finding of facts and to accept the written statement without any ground. The judgment passed by the High Court is set aside. [Para 16-17] [294-C-G]

Case Law Reference:

1982 (1) SCR 124	**relied on**	**Para 12**
1992 (2) *Allahabad Rent* *Cases* 82 (SC)	**relied on**	**Para 13**
2003 (4) Suppl. SCR 54	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7279 of 2013.

From the Judgment and Order dated 17.09.2007 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 44387 of 2007.

Anis Ahmed Khan for the Appellants.

D.N. Goburdhan, Rakesh Mittal, Prabal Begche for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. This appeal is preferred by the appellants against the judgment and order dated 17th September, 2007 passed by the learned Single Judge, High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No. 44387 of 2007. By the impugned judgment, the High Court exercised its revisional jurisdiction under Article 227 of the Constitution of India and set aside the orders dated 31st May, 2007 and 9th January, 2006 passed by the District Judge, J.P. Nagar in S.C.C Revision No.1 of 2006 and Civil Judge, (S.D.), J.P. Nagar in Suit No.

17 of 1998 respectively. Thus, defence of the respondent which was struck off by the Courts below was restored by the High Court.

2. The appellants filed Suit No. 17 of 1998 on 21st September, 1998 before Civil Judge (S.D.) for eviction of the respondent-defendant-tenant from the suit premises, the shop located at Mohalla Raju Sarai Kanth Road, Amroha Distt., J.P. Nagar on the ground of arrears of rent and default.

3. Inspite of receipt of notice, the respondent did not choose to file written statement within the specified period. After long delay, the respondent filed his written objection on 3rd April, 1999 against which the appellant-plaintiffs filed an application for striking off the defence on the ground that the respondent failed to deposit the rent, the damages due and the cost of the suit inspite of order dated 16th December, 1998, the first date of hearing and also failed to deposit water tax and house tax and thereby not complied with the provisions under Order XV Rule 5 of the Code of Civil Procedure ('CPC' for short).

4. The learned Civil Judge (S.D), J.P. Nagar by order dated 9th January, 2006 allowed the application of the appellant-plaintiffs and struck off the defence of the respondent.

5. Against the said order, the respondent filed revision application in S.C.C R.No.1 of 2006 before the District Judge, J.P. Nagar in February, 2006. The District Judge, J.P. Nagar by impugned order dated 31st May, 2007 dismissed the same and affirmed order dated 9th January, 2006 passed by the Trial Court.

6. The respondent thereafter filed a petition under Article 227 of the Constitution of India before the High Court of Judicature at Allahabad registered as Civil Miscellaneous Writ Petition No. 44387 of 2007. The learned Single Judge passed the following order:

" Heard learned counsel for the parties.

This is tenant's writ petition directed against the order striking off his defence. The Trial Court/JSCC/Civil Judge (S.D.), J.P. Nagar passed the order striking off the defence on 9.1.2006 in SCC Suit No.17 of 1998. Against the said order, petitioner filed SCC Revision No.1 of 2006 before the District Judge, J.P. Nagar and the same was dismissed on 31.5.2007.

Defence has been struck off due to some irregularity in deposit of the monthly rent, under the provisions of Order 15 Rule 5 C.P.C. The provision of Order 8 Rule 1 C.P.C. is also mandatory in nature. However, the Supreme Court has held that still the Court has got jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summon on payment heavy cost. The same principle may apply to the cases under Order 15 Rule 5 C.P.C.

Accordingly, the writ petition is allowed, both the impugned orders dated 31.5.2007 and 9.1.2006 are set aside. The petitioner shall pay Rs.10,000/- as costs and the same shall be deposited by the petitioner before the Trial Court within 6 weeks from today. In case of default, this order shall stand automatically vacated.

It is further directed that the Civil Judge (S.D.), J.P.Nagar shall make all efforts to decide the aforesaid suit within six months."

7. Learned counsel for the appellants submitted that the High Court committed a mistake in exercising its jurisdiction under Article 227 to set aside concurrent findings of the two Courts below against the wilful, habitual, consistent, persistent, regular and stubborn defaulter-tenant. The High Court exceeded its jurisdiction going beyond the pleadings and facts

and erred by comparing Order XV Rule 5 CPC with Order VIII Rule 1 CPC and wrongly gave benefit to the respondent. It was further contended that the High Court completely ignored the well reasoned finding of the Courts below which struck off the written statement.

8. Per contra, according to counsel for the respondent, the lower courts wrongly interpreted Order XV Rule 5 CPC that it is mandatory in nature whereas the court has jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summon on payment of heavy cost as per decision of this Court. It was further contended that by the impugned judgment the said mistake committed by the lower courts was corrected by the learned Single Judge of the High Court.

9. We have heard the learned counsel for the parties and perused the record. Both the parties relied upon one or the other decision of this Court which will be referred at an appropriate stage.

10. In the present case, we find that both the courts below noticed several defaults committed by the respondent in depositing the monthly rent. The aforesaid fact was noticed by the District Judge, J.P. Nagar, as mentioned in paragraph 11 of the order dated 31st May, 2007 and the same is reproduced below:

***"11**. In the present case there are several defaults committed by the revisionist in depositing the monthly rent as under.*

The rent of April 1999 must be deposited upto 7th May 1999, it has been deposited by delay of 20 days on 27/05/1999. No representation in this behalf has been given by the tenant explaining the delay. Further the rent of June 1999 has not been deposited upto 7th of July 1999 nor the rent of month of July 99 was deposited upto

07/08/99, on the contrary rent of both the months i.e. June & July 99 has been deposited after a considerable delay on 23/08/99, although including the rent of August 99, as well, but no explanation/representation regarding the delay in deposit of the month of June and July 99 has been furnished. In the same way, the rent of the month of September, October-99 has been deposited after considerable delay on 08/12/1999 although the rent of November and December-99 has been included therein but no explanation of such delay in deposit of rent of September and October 99, has been furnished, similarly the rent of Jan, 2000 was deposited on 07/03/2000, and no explanation/representation was furnished explaining the delay in deposit, although the rent of February, March and April 2000 has been included therein similarly, the rent of May and June – 2000 has been deposited on 27/07/2000 including the rent of Month of July and August 2000 but no explanation/representation regarding the delay deposit of the month of May and June-2000 was given by the tenant. Further the rent of Sep.2000 was deposited on 06/11/2000 in which the rent of October, November and December-2000, was included. The delay deposit of rent of the month of September has not been explained. The rent of January,2001 was deposited after a considerable delay on 22/03/2001 in which the rent up to April 2001 has been deposited the rent of May, June, July, August, September, October and November 2001, total 7 months of rent was deposit on 5/12/2001 including the month of December 2001, there is no explanation/representation regarding this huge delay of deposit of the rent of month May, June, July, August, September and October, 2001. The rent of January and February was deposited on 11/03/2002 no representation/explanation of this delay, too has been given, the rent of September, October, November and December 2002 was deposited for the first time on 11/12/2005 by tender 122/C after moving the application for

striking off the defence. In this deposit as well there is no representation/explanation of this delay of more than two years. The rent of Jan 2003 was deposited on 18/02/03, rent of September, October, November and December 2003 and Jan 2004 was deposited on 04/03/2004 in this deposit as well no representation/explanation of any kind has been given by the tenant. The rent of May, June, July 2004 has been deposited on 25/08/2004 in this deposit as well no delay has been explained..... The tenant in this case only made representation that he had deposited the correct money rent but he did not file any application for extension of time. In the circumstances, therefore, the courts below were right in holding that there was a default in payment of the monthly rent and since there was also no application for extension of time under sub rule (2) of Rule 5 of Order XV C.P.C. the defence was liable to be struck off. The order of the High Court in the writ petition is therefore not sustainable."

11. Rule 5 of Order XV, Code of Civil Procedure, was enacted by the U.P. Civil Laws (Amendment) Act, 1972 and the said Rule reads as follows:

*"**5. Striking off defence for failure to deposit admitted rent.**—(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the*

provisions of sub-rule (2) strike off his defence.

*Explanation 1-3 * * * *

(2) Before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within ten days of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

12. In *Bimal Chand Jain v. Sri Gopal Agarwal* (1981) 3 SCC 486, this Court having noticed the aforesaid provision held as follows:

***"6.** It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub-*

rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vested power in the court to strike off the defence. It does not oblige it to do so in every case of default. To that extent, we are unable to agree with the view taken by the High Court in Puran Chand[1]*. We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV."*

13. The same very provision of Rule 5 of Order XV fell for consideration before this Court in *Smt. Satya Kumari Kamthan*

v. Noor Ahmed and others 1992 (2) Allahabad Rent Cases 82 (SC). That was the case when the plaintiff filed an application for striking off, the tenant filed a written statement objecting to the striking off on the ground that there was no default in payment of the monthly rent as provided under Rule 5(1) of Order XV. The Courts below did not accept the said contention and found as a fact that there was a default in payment of the admitted rent. The Courts below also noticed that though there was a default there was no "representation" by the tenant giving any excuse for not depositing the correct amount or praying for extension of time for deposit for valid reasons and that, therefore, the plaintiff of the said case was held to be entitled to get the defence struck off. This Court referring to the provisions of Rule 5 of Order XV and relying on decision of this Court in *Bimal Chand Jain* (supra) held that if the tenant has not made any representation under Rule 5 of Order XV and there is a default in payment of rent, it is open to the court to strike off the defence. The word "representation" may cover a "representation" in answer to an application for striking off or a "representation" praying for an extension of time for making the deposit on sufficient grounds.

14. In *Mangat Singh Trilochan Singh v. Satpal* (2003) 8 SCC 357 this Court noticed the discretionary power of the Trial Court in the matter of striking off defence under Order XV of Rule 5 as in the said case Trial Court refused to strike off the defence of the tenant on the ground that a substantial question of jurisdiction was involved. The Trial Court also came to the conclusion that as arrears of rent having been deposited in Bank there were no mala fide on the part of the tenant and that the arrears were thereafter deposited in court with an application or representation made in accordance with sub-rule (2) of Rule 5. This Court held that refusal to strike off defence and acceptance of deposit of arrears of rent was justified.

15. In the present case, the Trial Court fully applied its mind while exercising its discretionary power to strike off the defence.

The grounds were noticed, as mentioned at Paragraph 11 of the judgment passed by the District Judge and is quoted above. Learned District Judge exercising its revisional jurisdiction, affirmed the order passed by the Trial Court. The aforesaid judgment(s) cannot be said to be perverse nor can it be said that the courts below have exceeded or failed to exercise their jurisdiction. The power to strike off the written statement vested under Rule 5 of Order XV was exercised by the lower courts after going through the facts of the case.

16. Inspite of the aforesaid fact, we find that the High Court failed to give any ground while exercising its inherent power under Article 227 of the Constitution of India. Learned Single Judge by impugned judgment observed that the Supreme Court has held that the Court has jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summons on payment of heavy cost. Defendant has neither cited any decision nor shown any ground for acceptance of written statement even after expiry of 90 days from the date of service of summons on payment of heavy cost. The order passed by the Trial Court by exercising its discretionary power and the order passed by the Revisional Court affirming the Trial Court order were not perverse and both the courts below have not exceeded their jurisdiction. Hence, it was not open to the High Court to sit in appeal under Article 227 of the Constitution of India to alter such finding of facts and to accept the written statement without any ground.

17. For the reasons aforesaid, we have no option but to set aside the impugned judgment dated 17th September, 2007 passed by the learned Single Judge, High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No.44387 of 2007 and allow the appeal. The Trial Court is expected to decide the Suit No.17 of 1998 expeditiously as the matter is pending since long. No costs.

R.P. Appeal allowed.

SUNIL DAMODAR GAIKWAD
v.
STATE OF MAHARASHTRA
(Criminal Appeal Nos. 165-166 of 2011)

SEPTEMBER 10, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

PENAL CODE, 1860:

ss. 302 and 307 – Accused causing death of his wife and 2 sons and attempting to cause death of his daughter – Sentenced to death by counts below u/s. 302 and life imprisonment u/s. 307 – Held: Apart from drawing a 'balance sheet' of mitigating and aggravating factors, socio-economic compulsions such as poverty are also factors that are to be considered by courts while awarding a sentence -- In the instant case, it has come in evidence that accused suffered from economic and psychic compulsions – He had no prior criminal record -- He had, in fact, intended to wipe out the whole family including himself on account of abject poverty -- The possibility of reforming and rehabilitating him cannot be ruled out – He is not likely to be menace or threat or danger to society -- In the facts and circumstances, the case does not fall under the rarest of rare category so as to warrant a punishment of death -- The 'individually inconclusive and cumulatively marginal facts and circumstances' tend towards awarding lesser sentence of life imprisonment – Sentence u/s. 302 commuted to life imprisonment which would be till the end of his biological life – Sentence u/s 307 reduced to 7 years RI – In case the sentence of imprisonment for life is remitted or commuted to any specified period, the sentence of imprisonment u/s. 307 shall commence thereafter.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 354(3) – Awarding of death sentence in a case of murder – Special reasons to be recorded – Held: This shows the paradigm shift to life imprisonment as the rule and death, as the exception -- Before awarding a sentence of death, in view of s. 354(3), court has to first examine whether it is a case fit for awarding of life sentence and if not and only then, death sentence can be awarded – Code of Criminal Procedure, 1898 – s. 367(5).

Judicial comity – Held: Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity -- When there are binding decisions, judicial comity expects and requires the same to be followed.

The appellant was prosecuted for causing the death of his wife and two sons, and attempting to kill his daughter whom he had caused serious stab injuries. After the occurrence the appellant was stated to have gone to the police station and reported that one of his sons had been suffering from Asthama, which required constant medication; that his income was hardly sufficient to maintain his family because of which he was under stress and, therefore, he decided to finish the entire family including himself. In the process he killed his wife and two sons with a pair of scissors and inflicted stab injuries to her daughter (PW 1) and also pressed her mouth with pillow but she did not succumb to death; and leaving the child in that condition and bolting the door from outside he reached the police station. This was corroborated by PW 4 in her deposition. However, the appellant, in his statement u/s. 313 Cr.P.C., simply denied everything and did not lead any evidence. The trial court convicted the appellant u/ss 302 and 307 IPC and sentenced him to death under the first count and life imprisonment under the second one.

In the instant appeal, the sole issue for consideration was that of commutation of the death sentence.

Allowing the appeals in part, the Court

HELD: 1.1. Before awarding a sentence of death, in view of s. 354(3), Cr.PC, the court has to first examine whether it is a case fit for awarding of life sentence and if not and only then, the death sentence can be awarded. The rule is life imprisonment for murder, and death is the exception for which special reasons are to be stated. The death sentence has been relegated to the 'rarest of rare' cases after Constitution Bench decision in Bachan Singh. The most significant aspect of the decision in that case is the mandate laid down by the Constitution Bench that courts must not only look at the crime but also the offender and give due consideration to the circumstances of the offender at the time of commission of the crime. In Machhi Singh and Shankar Kisanrao Khade, emphasis was laid on drawing a 'balance sheet' of mitigating and aggravating factors. [Para 15, 16, 17 and 19] [307-F-H; 308-A-B; 309-G-H; 310-A; 311-G]

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

Machhi Singh and Others vs. State of Punjab **1983 (3) SCR 413 = (1983) 3 SCC 470;** *Shankar Kisanrao Khade vs. State of Maharashtra* **(2013) 5 SCC 546;** *Dalbir Singh vs. State of Punjab* **1979 (3) SCR 1059 = AIR 1979 SC 1384 – relied on.**

1.2. Socio-economic compulsions such as poverty are also factors that are to be considered by courts while awarding a sentence, and in appropriate cases, judicial commutation is permissible. [Para 21 and 24] [315-D; 316-H; 317-A]

Ediga Anamma vs. State of Andhra Pradesh **1974**

(3) SCR 329 = (1974) 4 SCC 443; *Sushil Kumar vs. State of Punjab* **(2009) 10 SCC 434 – relied on.**

1.3. When there are binding decisions, judicial comity expects and requires the same to be followed. Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity. No doubt, in case there are newer dimensions not in conflict with the ratio of larger bench decisions or where there is anything to be added to and explained, it is always permissible to introduce the same. Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in Bachan Singh and Machhi Singh. Thus, this Court is bound to analyze the facts in the light of the aggravating and mitigating factors indicated in the binding decisions which have influenced the commission of the crime, the criminal, and his circumstances, while considering the sentence. [Para 18] [311-C-F]

1.4. In the instant case, it has come in evidence that the appellant suffered from economic and psychic compulsions. The possibility of reforming and rehabilitating the accused cannot be ruled out. He had no prior criminal record. On the facts available to the Court, it can be safely said that the accused is not likely to be menace or threat or danger to society. There is nothing to show that he had any previous criminal background. He had in fact intended to wipe out the whole family including himself on account of abject poverty. This aspect of the matter has not been properly appreciated by both, the Court of Session and the High Court. [Para 25] [317-G-H; 318-A-C]

1.5. In the facts of the case and the circumstances of the appellant at the time of commission of the offence, it is clear that the case does not fall under the rarest of

rare category of cases so as to warrant a punishment of death. The 'individually inconclusive and cumulatively marginal facts and circumstances' tend towards awarding lesser sentence of life imprisonment. Therefore, while upholding the conviction of the appellant u/s. 302 and s. 307 of IPC, the sentence is modified as follows:

(a) For offence punishable u/s. 302 of IPC, the appellant is sentenced to life imprisonment.

(b) For offence punishable u/s. 307 of IPC, the appellant is sentenced to imprisonment for a period of seven years.

Imprisonment for life of a convict is till the end of his biological life as held by the Constitution Bench in Gopal Vinayak Godse. However, it is made clear that in case the sentence of imprisonment for life is remitted or commuted to any specified period (in any case, not less than fourteen years in view of s. 433A, Cr.P.C.), the sentence of imprisonment u/s. 307 shall commence thereafter. [Para 26-28] [318-G-H; 319-A-E]

Gopal Vinayak Godse vs. The State of Maharashtra and Others **1961 SCR 440 = AIR 1961 SC 600 – relied on.**

Case Law Reference:

1974 (3) SCR 329	**relied on**	**para 4**
1979 (3) SCR 1059	**relied on**	**para 16**
1983 (3) SCR 413	**relied on**	**para 17**
(2013) 5 SCC 546	**relied on**	**para 19**
(2009) 10 SCC 434	**relied on**	**para 24**
1961 SCR 440	**relied on**	**para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 165-166 of 2011.

From the Judgment & Order dated 23.09.2010 of the High Court of Judicature at Bombay in Confirmation Case No. 2 of 2009 with Criminal Appeal No. 280 of 2009.

Ramesh Chandra Mishra, Dr. Meera Agarwal for the Appellant.

Sushil Karanjkar, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

KURIAN, J.1. Death and if not life, death or life, life and if not death, is the swinging progression of the criminal jurisprudence in India as far as capital punishment is concerned. The Code of Criminal Procedure, 1898, under Section 367(5) reads:

"If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."

(Emphasis supplied)

This provision making death the rule was omitted by Act 26 of 1955.

2. There have been extensive discussions and studies on abolition of capital punishment during the first decade of our Constitution and the Parliament itself, at one stage had desired to have the views of the Law Commission of India and, accordingly, the Commission submitted a detailed report, Report No. 35 on 19.12.1967. A reference to the introduction to the 35th Report of the Law Commission will be relevant for our discussion. To quote:

"A resolution was moved in the Lok Sabha on 21st April, 1962, for the abolition of Capital Punishment. In the course of the debate on the resolution, suggestions were made

that a commission or committee should be appointed to go into the question. However, ultimately, a copy of the discussion that had taken place in the House was forwarded to the Law Commission that was, at that time, seized of the question of examining the Code of Criminal Procedure and the Indian Penal Code.

The Law Commission considered it desirable to take up the subject separately from the revision of the general criminal law of the country. This was so, because of the importance of the subject, the voluminous nature of materials that were to be considered, and the large number of questions of detail that were to be examined. The matter had been repeatedly debated in Parliament in some form or other, and the Commission, therefore, thought its consideration to be somewhat urgent. In other countries also, the subject had been evidently treated as one for separate and full-fledged study."

3. It appears that Parliament finally decided to retain capital punishment in the Indian Penal Code. However, when the new Code of Criminal Procedure was enacted in the year 1973 (hereinafter referred to as 'the Cr.PC'), a paradigm shift was introduced, making it mandatory for Courts to state special reasons for awarding death sentence, under Section 354(3), which reads as follows:

"When the conviction is for an offence punishable with death, or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

(Emphasis supplied)

4. In the words of Krishna Iyer J. in *Ediga Anamma vs. State of Andhra Pradesh*[1]:

1. (1974) 4 SCC 443.

"20. The unmistakable shift in legislative emphasis is that life imprisonment for murder is the rule and capital sentence the exception to be resorted to for reasons to be stated. …

21. It is obvious that the disturbed conscience of the State on the vexed question of legal threat to life by way of death sentence has sought to express itself legislatively, the stream of tendency being towards cautious, partial abolition and a retreat from total retention."

(Emphasis supplied)

5. It is interesting to note that the requirement for reasons to be stated for awarding any sentence for a term of years found legislative expression in the Cr.PC for the first time in 1973. In the case of death sentence, there must be special reasons. That shows the paradigm shift to life imprisonment as the rule and death, as the exception.

6. The above preliminary discussion on death sentence has special significance as far as facts of the present case are concerned. The appellant before us faced trial under Section 302 read with Section 307 of IPC. The Sessions Court convicted him under both Sections. Under Section 302, he was sentenced to death and under Section 307, to life imprisonment. On reference, the High Court confirmed the death sentence. The appeal filed by the appellant before the High Court was dismissed confirming the conviction and sentence under Section 307. Thus aggrieved, the present appeals.

7. In view of the overwhelming evidence, though the learned counsel appearing for the appellant was mainly canvassing for commuting the death sentence, in order to satisfy our conscience, we may refer to the facts, evidence and the contentions briefly, on merits as well.

8. The appellant was married to a woman named Sangita. They had three children, one daughter and two sons. They were staying in two rooms in a house belonging to his maternal aunt. He was a tailor by profession and employed as such in a cloth shop. One of his sons, Aakash had been suffering from asthma which required constant medication. The appellant's income was hardly sufficient to maintain his family and he was under stress in that regard. On 08.07.2008, it is stated that during the early hours of the morning while the members of the family were sleeping, he assaulted his wife Sangita and his two sons with the separated parts of a pair of sharp scissors and inflicted multiple stab injuries causing their instantaneous death. On his daughter Gaitri alias Pooja also, he inflicted stab injuries. However, she somehow could speak and asked why her father, the appellant was injuring her. The appellant father told her that the entire family had to go and he would also follow them. However, he gave her water to drink. Thereafter, he took her on his lap and pressed her mouth with a pillow with the intention of suffocating her, and yet the child did not succumb to death. He left the child in that condition, bolted the door from outside and went straight to the police station and reported the incident. An FIR was registered. His statement was recorded. In the meanwhile, the daughter Gaitri got assistance from a neighbour and was immediately treated at a hospital and thus she survived. She is the key witness-PW1. The neighbour is the maternal aunt of the accused and she is PW4.

9. The prosecution examined nine witnesses and based mainly on the version of PW1-Gaitri, the appellant was convicted under Sections 302 and 307. Gaitri alias Pooja was clear and consistent during the investigation as well as before the Sessions Court. In her evidence before the Court, she stated:

> "… My father, mother and all we children were in the house. My father assaulted my mother, my two brothers and me with the help of scissor. My two brothers and mother died

> on the spot. I was assaulted over my chest and abdomen and to my both hands. I asked my father as to why he was assaulting us although we did nothing. My father told me that all of us need to go and he would be following us. Then my father gave me water to drink. He then took me on his laps and then pressed my mouth with the help of pillow. He then went to Police Station. While going out he bolted the door from outside. One Sakharbai Sadashiv Sonwane was staying in the same house in their neighbourhood. I shouted for help. I told her to save us and that we were bleeding. She then opened the door. Then my uncle Anil Gaikwad came there and we were taken to Govt. Hospital at Gevrai for treatment. From there I was brought to Beed in the Civil Hospital by my uncle. Police came to me for making inquiry in the Hospital. I narrated the whole incident to them. The accused in the dock is my father. The accused was a tailor and he was working in somebody's shop owned by one Anil. I can identify the scissor shown to me today. (Witness identified Article No. 15 the scissor in the Court). I was in the Hospital for about 21 days."
>
> (Emphasis supplied)

In cross, she stated thus:

> "… We are financially poor. My father used to work in the shop for whole day and even for late nights during festival season. It is true that sometimes he remained in the shop for whole night and return back in the next day. He used to earn money by working in the shop for us. … It is not true to say that I am not able to tell who killed my mother and brothers as I was in sleep. … It is not true that I am deposing false that my father assaulted us. … It is not true to say that I am deposing against the accused only on the say of my uncle and the Police."
>
> (Emphasis supplied)

10. PW2 is the panch witness. PW3 is the doctor - Dr. Kranti Raut, who performed the autopsy. In the case of all the three deceased, the doctor has given the opinion that the death was caused due to hemorrhagic shock with heamothorax on account of multiple stab injuries to the vital organs. FSL report has confirmed that the blood on the clothes of the appellant and that of his deceased wife was of the same group. The doctor has also treated PW1 Gaitri alias Pooja and has referred in detail to the multiple injuries inflicted upon her. It is also deposed that injury no. 4-which is a stab wound is sufficient to cause death in the ordinary course of nature if timely treatment is not given. The doctor stated that all the injuries to the deceased persons as well as to the injured PW1-Gaitri are possible by the weapon-Article No. 6, scissors. PW4-Sakharbai is the aunt of the appellant. She has stated that the elder son of the appellant was suffering from asthma. She also deposed as follows:

> "… When I was sleeping in my house I got at about 5.30 a.m. I was washing utensils. I heard a sound from Gaitri asking me to open the door and that her father had assaulted them. I went near the room and found that the door was bolted from outside which I opened and went inside the room. I saw Sangita, Omkar, Aakash were lying in a pool of blood and they were dead. Gaitri had also bleeding injuries to her chest, stomach and chin. She told me that her father assaulted all of them with a scissor in that night. I shouted and went to Baban, Anil and called them. The said Anil took Gaitri to Hospital. Gaitri is also known by name Pooja. .."
>
> (Emphasis supplied)

In cross, she submitted that "the accused was a tailor. It is true that his financial condition was poor".

11. PW5 is the one who sold the scissors to the appellant. PW6 is the panch witness to the recovery of weapon of offence

and other dress worn by the accused. PW7 is the Police Sub-Inspector. According to him, the appellant had told him at around 5.30 a.m. that he had committed the murder of his wife and two sons and had injured his daughter Gaitri. The statement-Exhibit No.29 was recorded by him and appellant signed the same. PW8 is the Police Inspector who conducted the investigation. PW9 is the Police Inspector who prepared the inquest and spot panchnama. He collected the blood from the spot and the pillow cover soaked in blood. He also made the recovery of the scissors as disclosed by the accused. Photographs were also taken. We may also refer to the statement made by the appellant himself before the police on the basis of which the FIR was registered:

> "… In my family my son Omkar is constantly ill due to asthma. For the treatment of his ailment money was required which I had to borrow and hence I had become debt ridden. Due to the tension I could not concentrate on my work and I had to go on leave frequently. …Since I was fed up, I decided to leave the house, my wife and children would have died of hunger and ailment. Therefore, I had thought to relieve them myself."
>
> (Emphasis supplied)

Then he has narrated the manner in which he killed his wife and two sons. As far as assault on the daughter is concerned, he stated as follows:

> "… Thereafter I dealt 2-3 blows on chest of my daughter due to which she woke up and having seen me dealing blows she asked weepingly earnestly "papa why did you do so". At that time I replied "we all have to go, I am also coming". By saying so, I gave her water to drink and took her head on my lap. In order to kill her I pressed her mouth and nose but she was not dying. I waited for some time. Due to the incident which had happened I was terrified. Then I kept water near her and left her in injured condition.

Thereafter I removed my clothes worn by me at the time of commission of the crime. I wrapped the scissors used for the crime in a cloth and went to the police station and presented myself and informed the incident."

(Emphasis supplied)

12. Under Section 313 statement, however, he flatly denied everything but did not lead any evidence in defence.

13. The Sessions Court and the High Court have discussed in detail the conduct of the appellant. The courts have also considered his main contention that he was not involved in the incident. Both the Courts have found that it was not at all possible to appreciate his contentions since the normal conduct of a father in such circumstances would be first to help the child to obtain treatment either by himself or with the assistance of those residing in the neighbouring rooms and nearby. Suffice it to say that the evidence available on record, some of which we have referred to above, would establish beyond doubt that accused alone was involved in the commission of the offences.

14. We shall, hence, consider the question of sentence. The Sessions Court and the High Court are of the view that the case falls under the rarest of the rare category and the appellant did not deserve any mercy.

15. Before awarding a sentence of death, in view of Section 354(3) of the Cr.PC, the court has to first examine whether it is a case fit for awarding of life sentence and if not and only then, the death sentence can be awarded. At the risk of redundancy, we may note that the rule is life imprisonment for murder, and death is the exception for which special reasons are to be stated.

16. The death sentence has been relegated to the 'rarest of rare' cases after the landmark decision of the Constitution

Bench in *Bachan Singh vs. State of Punjab*[2]. The most significant aspect of the decision in Bachan Singh's case (supra) is the mandate laid down by the Constitution Bench that Courts must not only look at the crime but also the offender and give due consideration to the circumstances of the offender at the time of commission of the crime. This decision rules the field even today and no discussion on the subject of death penalty is complete without a reference to *Bachan Singh's* case (supra). To quote:

"201. … As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and, therefore, all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

xxx xxx xxx

209. There are numerous other circumstances justifying the

2. (1980) 2 SCC 684.

passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency – a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

(Emphasis supplied)

17. The three-Judge Bench decision in *Machhi Singh and Others vs. State of Punjab*[3] culled out the guidelines indicated in *Bachan Singh's* case (supra), which would be required to be applied to the facts of each case while imposing a sentence of death. Emphasis was laid in the decision in *Machhi Singh's* case (supra) on drawing a 'balance sheet' of mitigating and

3. (1983) 3 SCC 470.

aggravating factors. To quote:

"38. xxx xxx xxx

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even

after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

(Emphasis supplied)

18. When there are binding decisions, judicial comity expects and requires the same to be followed. Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity. No doubt, in case there are newer dimensions not in conflict with the ratio of larger bench decisions or where there is anything to be added to and explained, it is always permissible to introduce the same. Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in Bachan Singh and Machhi Singh cases. Thus, we are bound to analyze the facts in the light of the aggravating and mitigating factors indicated in the binding decisions which have influenced the commission of the crime, the criminal, and his circumstances, while considering the sentence.

19. In a recent decision in *Shankar Kisanrao Khade vs. State of Maharashtra*[4], this Court has scanned almost all the post Bachan Singh (supra) decisions rendered by this Court on death sentence and the principles laid down therein have been restated. Referring to the recent decisions (fifteen years), the principal reasons considered as aggravating factors for conferring death penalty have been summarized with reference

4. (2013) 5 SCC 546.

to the decisions in support of the same. To quote paragraph 122 of *Shankar Kisanrao's* case (supra):

"122. The principal reasons for confirming the death penalty in the above cases include:

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (*Jumman Khan*[5], *Dhananjoy Chatterjee*[6], *Laxman Naik*[7], *Kamta Tewari*[8], *Nirmal Singh*[9], *Jai Kumar*[10], *Satish*[11], *Bantu*[12,] *Ankush Maruti Shinde*[13], *B.A. Umesh*[14], *Mohd. Mannan*[15] and *Rajendra Pralhadrao Wasnik*[16]);

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (*Dhananjoy Chatterjee* (supra), *Jai Kumar* (supra), *Ankush Maruti Shinde* (supra) and Mohd. Mannan (supra));

5. Jumman Khan vs. State of U.P. , (1191) 1 SCC 752: (1991) SCC (Cri) 283.
6. Dhananjoy Chatterjee vs. State of W.B., (1994) 2 SCC 220: (1994) SCC (Cri) 358.
7. Laxman Naik vs. State of Orissa, (1994) 3 SCC 381: (1994) SCC (Cri) 656.
8. Kamta Tiwari vs. State of M.P., (1996) 6 SCC 250: (1996) SCC (Cri) 1298.
9. Nirmal Singh vs. State of Haryana, (1999) 3 SCC 670: (1999) SCC (Cri) 472.
10. Jai Kumar vs. State of M.P., (1999) 5 SCC 1: (1999) SCC (Cri) 638.
11. State of U.P. vs. Satish, (2005) 3 SCC 114: (2005) SCC (Cri) 642.
12. Bantu vs. State of U.P., (2008) 11 SCC 113: (2009) 1 SCC (Cri) 353.
13. Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667: (2009) 3 (Cri) 308.
14. B.A. Umesh vs. State of Karnataka, (2011) 3 SCC 85: (2011) 1 SCC (Cri) 801.
15. Mohd. Mannan vs. State of Bihar, (2011) 5 SCC 317: (2011) 2 SCC (Cri) 626.
16. Rajendra Pralhadrao Wasnik vs. State of Maharashtra, (2012) 4 SCC 37: (2012) 2 SCC (Cri) 30.

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (*Jai Kumar* (supra), *B.A. Umesh* (supra) and *Mohd. Mannan* (supra));

(4) the victims were defenseless (*Dhananjoy Chatterjee* (supra), *Laxman Naik* (supra), *Kamta Tewari* (supra), *Ankush Maruti Shinde* (supra), *Mohd. Mannan* (supra) and *Rajendra Pralhadrao Wasnik* (supra));

(5) the crime was either unprovoked or that it was premeditated (*Dhananjoy Chatterjee* (supra), *Laxman Naik* (supra), *Kamta Tewari* (supra), *Nirmal Singh* (supra), *Jai Kumar* (supra), *Ankush Maruti Shinde* (supra), *B.A. Umesh* (supra) and *Mohd. Mannan* (supra)) and in three cases the antecedents or the prior history of the convict was taken into consideration (*Shivu*[17], *B.A. Umesh* (supra) and *Rajendra Pralhadrao Wasnik* (supra))."

(Emphasis added)

20. The mitigating factors governing the award of life sentence in a murder case, have been summarized at paragraph 106. To quote:

"106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused [*Amit v. State of Maharashtra*[18] aged 20 years, *Rahul*[19] aged 24 years, *Santosh Kumar Singh*[20] aged 24 years, *Rameshbhai Chandubhai Rathod* (2)[21] aged 28 years and *Amit v. State of U.P.*[22] aged 28 years];

(2) the possibility of reforming and rehabilitating the accused (in *Santosh Kumar Singh* (supra) and *Amit v. State of U.P.* (supra) the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (*Nirmal Singh* (supra), *Raju*[23], *Bantu* (supra), *Amit v. State of Maharashtra* (supra), *Surendra Pal Shivbalakpal*[24], *Rahul* (supra) and *Amit v. State of U.P.* (supra));

(4) the accused was not likely to be a menace or threat or danger to society or the community (*Nirmal Singh* (supra), *Mohd. Chaman*[25], Raju (supra), *Bantu* (supra), *Surendra Pal Shivbalakpal* (supra), *Rahul* (supra) and *Amit v. State of U.P.* (supra));

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (*State of T.N. v. Suresh*[26], *State of Maharashtra v. Suresh*[27], *Bharat Fakira Dhiwar*[28], *Mansingh*[29] and *Santosh Kumar Singh* (supra));

17 Shivu vs. High Court of Karnataka, (2007) 4 SCC 713: (2007) 2 SCC (Cri) 686.

18. (2003) 8 SCC 93 : (2003) SCC (Cri) 1959.

19. Rahul vs. State of Maharastra, (2005) 10 SCC 322 : (2005) SCC (Cri) 1516.

20. Santosh Kumar Singh vs. State, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469.

21. (2011) 2 SCC 764 : (2011) 1 SCC (Cri) 883.

22. (2012) 4 SCC 107: (2012) 2 SCC (Cri) 590.

23. Raju vs. State of Haryana, (2001) 9 SCC 50: (2002) SCC (Cri) 408.

24. Surendra Pal Shivbalakpal vs. State of Gujarat, (2005) 3 SCC 127: (2005) SCC (Cri) 653.

25. Mohd. Chaman vs. State (NCT of Delhi), (2001) 2 SCC 28 : (2001) SCC (Cri) 278.

26. (1998) 2 SCC 372 : (1998) SCC (Cri) 751.

27. (2000) 1 SCC 471 : (2000) SCC (Cri) 263.

28. State of Maharashtra vs. Bharat Faikra Dhiwar, (2002) 1 SCC 622: (2002) SCC (Cri) 217.

29. State of Maharashtra vs. Man Singh, (2005) 3 SCC 131: (2005) SCC (Cri) 657.

(6) the crime was not premeditated (*Kumudi Lal*[30], *Akhtar*[31], *Raju* (supra) and *Amrit Singh*[32]);

(7) the case was one of circumstantial evidence (*Mansingh* (supra) and *Bishnu Prasad Sinha*[33].

In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (*Kumudi Lal* (supra)) and in another case because the Trial Court had awarded life sentence but the High Court enhanced it to death (*Haresh Mohandas Rajput*[34])."

(Emphasis added)

21. At this juncture, it might be useful to refer also to the decision in *Ediga Anamma's* case (supra). In that case, this Court has held that where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. To quote:

"26. ...Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be

30. Kumudi Lal vs. State of U.P., (1999) 4 SCC 108 : (1999) SCC (Cri) 491.

31. Akhtar vs. State of U.P., (1999) 6 SCC 60 : 1999 SCC (Cri) 1058.

32. Amrit Singh vs. State of Punjab, (2006) 12 SCC 79 : (2007) 2 SCC (Cri) 397.

33. Bishnu Prasad Sinha vs. State of Assam, (2007) 11 SCC 467 : (2008) 1 SCC (Cri) 766.

34. Haresh Mohandas Rajput vs. State of Maharastra, (2011) 12 SCC 56 : (2012) 1 SCC (Cri) 359.

compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302 read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanely opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. …"

(Emphasis supplied)

22. *Ediga Anamma's* case (supra) was given the stamp of approval in a subsequent decision by a three-Judge Bench in *Dalbir Singh vs. State of Punjab*[35] holding also that "undeserved adversities of childhood or later" would also be a mitigating factor.

23. This Court in *Ediga Anamma's* case (supra) has referred to a few other aggravating factors as well. To quote:

"26. … On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steal the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life."

(Emphasis supplied)

24. Socio-economic compulsions such as poverty are also

35. AIR 1979 SC 1384.

factors that are to be considered by Courts while awarding a sentence. This view has been taken in the decision in *Sushil Kumar vs. State of Punjab*[36] where this Court refrained from awarding the death sentence because of the extreme poverty of the accused. The facts in the case of *Sushil Kumar* (supra) are very similar to the present case. In that case also, the accused had committed the murder of his wife and two young children due to extreme poverty. Later, he allegedly attempted to take his own life by consuming some tablets. The accused had been sentenced to death by the trial court and the sentence was confirmed by the High Court. This Court, while reducing the sentence to life imprisonment observed:

> "46. Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members - his wife, minor son and daughter. There is nothing on record to show that appellant is a habitual offender. He appears to be a peace-loving, law abiding citizen but as he was poverty-stricken, he thought in his wisdom to completely eliminate him family so that all problems would come to an end. Precisely, this appears to be the reason for him to consume some poisonous substances, after committing the offence of murder.
>
> 47. No witness has complained about the appellant's bad or intolerable behaviour in the past. Many people had visited his house after the incident is indicative of the fact that he had cordial relations with all. He is now about thirty-five years of age and there appear to be fairly good chances of the appellant getting reformed and becoming a good citizen."
>
> (Emphasis supplied)

25. In the case before us, it has come in evidence that the appellant suffered from economic and psychic compulsions.

36. (2009) 10 SCC 434.

The possibility of reforming and rehabilitating the accused cannot be ruled out. The accused had no prior criminal record. On the facts available to the Court, it can be safely said that the accused is not likely to be menace or threat or danger to society. There is nothing to show that he had any previous criminal background. The appellant had in fact intended to wipe out the whole family including himself on account of abject poverty. This aspect of the matter has not been properly appreciated by both the Sessions Court and the High Court which held that the appellant had the intention to only wipe out others and had not even attempted, and he was not prepared either, for suicide. We are afraid the Courts have not appreciated the evidence properly. Had his daughter not interrupted him asking the question why he was killing her, his intended conduct would have followed, as is evident from his response that all of them needed to go from the world. The crucial and turning point of the change of heart is the conversation she had with him. It is significant to note that he had not permitted, in the way he executed the murder of his wife and two sons to let them even scream, let alone ask any question. It so happened by chance that despite the stab injuries inflicted on the daughter, she managed to weepingly question her father why he was acting in such a manner. The change of heart is also discernible from the fact that he had given water to the injured daughter. After this, he no longer used the weapon for finishing her. He tried once again by taking her to his lap and stifling her with the aid of a pillow. However, as can be seen from his own statement, he could not finish killing her. Thereafter, he went straight to the police station and gave a statement of what he had done.

26. If we analyse the facts of the case in the backdrop of the circumstances of the appellant at the time of commission of the offence and on applying the crime test and the criminal test, it is fairly clear that the case does not fall under the rarest of rare category of cases so as to warrant a punishment of death. The 'individually inconclusive and cumulatively marginal

facts and circumstances' tend towards awarding lesser sentence of life imprisonment.

27. In the above facts and circumstances of the case, while upholding the conviction of the appellant under Section 302 and Section 307 of IPC, we modify the sentence as follows:

(a) For offence under Section 302 of IPC, the appellant is sentenced to life imprisonment.

(b) For offence under Section 307 of IPC, the appellant is convicted to imprisonment for a period of seven years.

28. Imprisonment for life of a convict is till the end of his biological life as held by the Constitution Bench in *Gopal Vinayak Godse vs. The State of Maharashtra and Others*[37] case (supra). Hence, there is no point in saying that the sentences would run consecutively. However, we make it clear that in case the sentence of imprisonment for life is remitted or commuted to any specified period (in any case, not less than fourteen years in view of Section 433A of the Cr.PC.), the sentence of imprisonment under Section 307 of IPC shall commence thereafter.

29. The appeals are allowed as above.

R.P. Appeals partly allowed.

37. AIR 1961 SC 600.

DR. KULMEET KAUR MAHAL & ORS.
v.
STATE OF PUNJAB & ORS.
(Civil Appeal No. 7940 of 2013)

SEPTEMBER 11, 2013

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

EDUCATION:

Medical admissions – Admission to PG Medical Courses – Weightage to in service candidates – Clarificatory order by High Court in review petition, without disturbing the already allocated seats – Held: On facts, since the order does not deprive the appellants in getting admission into their preferred colleges or subjects, and they have already been admitted into various colleges and counseling is also over, it would not be in the interest of justice to disturb the admissions of appellants or contesting respondents – Legal questions left open.

Impleadment:

Medical admissions – Application for impleadment – Significance of time limit – Explained – Delay/Laches.

In the matter of quota of general category and in-service candidates for admission to PG Medical courses, the instant appeal was filed against the clarificatory order of the High Court to the effect that already allocated seats in the general category are not to be disturbed but whatever further seats remain vacant and/or are spill over from 60% quota, the RMOs would also compete, with the only difference that there would be weightage given to them as per Clause (ix) of Medical Council of India Regulations.

Dismissing the appeal, the Court.

HELD: 1.On facts, leaving the legal questions open, the order passed by the High Court in the review application does not deprive the appellants of their right to get admission into their preferred colleges or favourite subjects, and since the appellants and the RMOs have already been admitted to the various colleges and the counseling is also over, it would not be in the interest of justice to disturb the admission of the appellants or the contesting respondents. [para 6] [324-B-D]

2. In academic matters, the time limit has to be strictly viewed. In the instant case, the applicants should have approached the Court at the earliest opportunity. In the circumstances, there is no reason to entertain the impleadment application, which was filed belatedly. [para 7] [324-D-E]

Satyaprata sahoo & ors. .vs. State of orissa & ors. **2012 (10) SCR 204 = 2012 (8) SCC 203 - relied on.**

Case Law Reference:

2012 (10) SCR 204 relied on para 4

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7940 of 2013.

From the Judgment and Order dated 29.07.2013 of the High Court of Punjab and Haryana at Chandigarh in RA No. 89 of 2013 in LPA No. 1070 of 2013 in CWP No. 11206 of 2013.

Shyam Divan, Satinder S. Gulati, Kamaldeep Gulati for the Appellants.

P.S. Patwalia, Deepak Sibal, V. Shyamohan, Rayjith Mark, Uttara Babbar, Jagajit Singh Chhabra, Ashutosh K. Singh,

Sanjay Bansal, Reepak Kansal, G.K. Bansal, Arvind Kr. Sharma, Saurabh Mishra for the Respondents.

The Judgment of the Court was delivered by

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

2. Appellants are aggrieved by the order passed by the Punjab & Haryana High Court in Review Application No.89 of 2013 in LPA No.1070 of 2013, by which the Division Bench of the High Court clarified its earlier order dated 25.7.2013 stating as follows :-

> "We thus clarify that there has not to be disturbance of the already allocated seats in the general category but whatever further seats remain vacant and/or are spill over from 60% quota, the RMOs will also compete with the only difference that there would be weightage given to them as per Clause (ix) of Medical Council of India Regulations."

3. Appellants, who are nine in number and not made parties to the Review Petition, have questioned the order of the High Court on the following questions of law :-

> I. Whether the impugned order passed by the Hon'ble High Court is sustainable in the teeth of law laid down by this Hon'ble Court in CA No.5705-5706 of 2012 Satyabrata Sahoo & Ors. Vs. State of Orissa & Ors. vide judgment dated 03.08.2012 since, in the said case this Hon'ble Court was pleased to quash the clause of prospectus (to the extent that it provided for weightage to in-service candidates inspite of there being a reservation of seats for them to the extent of 50%) and held it to be *ultra vires*?
>
> II. Whether the Hon'ble High Court could have expanded the scope of a writ petition while deciding a Review Application by creating a new category of candidates of RMOs by giving additional weightage of marks to them on

the basis of their tenure of service within 40% open category seats for MD Course admissions?

III. Whether the Hon'ble High Court could have framed a new policy/new criteria without there being any provisions for the same either in the prospectus issued by Baba Farid University and/or in the Regulations issued by Medical Council of India, and which is contrary to the law laid down by this Hon'ble Court?

IV. Whether the Hon'ble High Court could have laid down new rules for admission to Post Graduate Medical Courses midway i.e. before the second counselling for the State of Punjab was to take place?

4. Shri Shyam Devan, learned senior counsel appearing for the Appellants, submitted that the High Court was not justified in granting the substantial reliefs in a review application filed in a dismissed appeal, confirming the judgment of the learned Single Judge. By the impugned order, the learned senior counsel submitted that the Division Bench of the High Court has created a new category of in-service candidates, and granted reservation carving out the same for the 40% quota earmarked for general category candidates for admission to MD course. At best they could seek a claim only for the 60% quota earmarked for in-service candidates and that itself is a moot question. The learned senior counsel, in support of his contention placed reliance on the judgment of this Court in *Satyabrata Sahoo & Ors. Vs. State of Orissa & Ors.,* (2012) 8 SCC 203. Learned senior counsel submitted that the RMOs cannot infiltrate into the 40% quota earmarked for the general category candidates depriving appellants of their choice of subject or college.

5. Shri P.S. Patwalia, learned senior counsel appearing for the RMOs submitted that the impugned order in no way deprives admission of the appellants, nor takes away their choice of subject or the college. Learned senior counsel tried

to demonstrate the same by producing a chart which throws considerable light on his plea. Shri Patwalia, learned senior counsel also submitted that even on merits the appellants have no case nor on equity.

6. We are of the view that the order passed by the High Court in the review application, as a matter of fact does not deprive the right of the appellants in getting admission into their preferred colleges or favourite subjects, even though we have our own reservation about the manner in which the High Court has entertained the review petition and granted the reliefs. But since the rights of the appellants are not adversely affected and the appellants and the RMOs have already been admitted to the various colleges and the counselling is also over, it would not be in the interest of justice to disturb the admission of the appellants or the contesting respondents.

7. We also find no reason to entertain the application for impleadment, which was filed after a period of one month from the date of passing of the impugned order. In academic matters, the time limit has to be strictly viewed and against the impugned order, candidates, if had any grievance, ought to have approached this Court at the earliest opportunity, which they did not. In such circumstances, we find no reason to entertain the Impleadment Application.

8. We, however, do not propose to give our stamp of approval to the clarification issued by the High Court in the review application, which we order, would be restricted to the facts of this case. Therefore, all legal questions arising out of that order are left open to be decided in an appropriate case.

9. The appeal, therefore, stands dismissed, so also application for impleadment. There shall be no order as to costs.

R.P. Appeal dismissed.

MANOHAR LAL SHARMA
v.
M.C.I. AND OTHERS
(Writ Petition (Civil) No. 590 of 2013)

SEPTEMBER 12, 2013.

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

Education/Educational Institution:

Medical education – Renewal of permission granted for third batch of MBBS –Subsequently rejected by Medical Council of India – Held: MCI has got the power to conduct a surprise inspection to find out whether the deficiencies pointed out have been rectified or not, especially when the College submits a compliance report – In the instant case, deficiencies pointed out by MCI team in its report are fundamental and very crucial, which cannot be ignored in the interest of medical education — MCI is duty bound to cancel the request if fundamental and minimum requirements are not satisfied — In the circumstances, MCI has rightly passed the order rejecting the approval for renewal of permission.

Indian Medical Council Act, 1956:

Medical Council of India – Powers and responsibilities of, as regards maintaining standards of medical education – Explained – Held: MCI, while deciding to grant permission, is not functioning as a quasi-judicial authority, but only as an administrative authority — Rigid rules of natural justice are, therefore, not contemplated – MCI has got power to conduct surprise inspection, which contemplates no notice – It has no power to dilute the statutory requirements — Minimum Standard Requirements for the Medical College for 150 Admissions Annually Regulations, 1999 - Schedule II – Natural justice.

Establishment of Medical College Regulations (Amendment) Act, 2010 (Part II):

r.8(3)(1) – Medical College – "Opportunity and time to rectify the deficiencies" – Held: After the inspection is carried out, compliance report is called for only to ascertain whether the deficiencies pointed out were rectified or not — If MCI is not satisfied with compliance, it can conduct a surprise inspection — After that, no further time or opportunity to rectify the deficiencies is contemplated nor further opportunity of being heard, is provided – In the instant case, order of MCI is not vitiated as violative of principles of natural justice, especially, when no allegation of bias or mala fide has been attributed against the doctors who conducted the surprise inspection – Administrative law – Natural justice – Opportunity of hearing.

The Medical College in the instant case, was established during the year 2011-12 and it admitted 150 M.B.B.S. students for that year. Renewal of permission for the second batch was sought for the academic year 2012-13. The MCI after conducting an inspection and considering the compliance report submitted by the College, informed the College by communication dated 27.06.2012, its decision not to grant renewal of the permission sought for. The Medical College approached the High Court, which directed to conduct a fresh inspection after giving an opportunity of hearing to the College. During the pendency of the special leave petition before the Supreme Court, the direction issued by the High Court was carried out and an inspection was conducted by the MCI Team and as not much major deficiencies were noticed, the Supreme Court disposed of the SLP. The MCI, accordingly, granted renewal of permission for the academic year 2013-14. However, on receipt of reports of routine inspection conducted on 1/2 April, 2013, and surprise inspection conducted on

06.07.2013, pointing out several deficiencies, the Board of Governors decided to reject the renewal of permission granted for the academic year 2013-14. The College authorities then apprised the MCI of the order passed by the Supreme Court on 27.09.2012. The MCI recalled its letter dated 14.07.2013 issued to the College and issued the Letter of Permission dated 15.07.2013 granting permission for admission of a batch of 150 MBBS students for the academic year 2013-14. The said order was challenged in the instant writ petition. The MCI also preferred I.A. No.2 of 2013 in SLP(C) No.28480 of 2012 seeking clarification/modification of the order dated 27.09.2012.

Disposing of the matters, the Court

HELD: 1.1. It is the legislative mandate that when a new medical college is established or the existing medical college seeks to open a new or higher course of study or training, for accommodating the increased admission capacity, it would be in a position to offer the minimum standards of medical education as prescribed by the MCI u/s 19A or, as the case may be, u/s 20 in the case of post-graduate medical education. Schedule II of the Minimum Standard Requirements for the Medical College for 150 Admissions Annually Regulations, 1999 deals with equipment required for various departments in the college and hospital. The requirements are statutorily prescribed and, therefore, the Board of Governors of MCI has no power to dilute the statutory requirements mentioned in the Regulations. [para 15 and 17] [341-C-D; 342-G-H; 343-A]

1.2. MCI is a body constituted under the provisions of the Indian Medical Council Act, 1956 and has been given the responsibility of discharging the duty of maintenance of the standards of medical education in the country. It has the power to supervise the qualifications or eligibility

standards for admission into the medical institutions. MCI on the basis of regular inspection and compliance reports, is legally obliged to form an opinion with regard to the capacity of the college to provide necessary facilities in respect of staff, equipments, accommodation, training and other facilities to ensure proper functioning of the medical college or for increase of admission capacity. [para 13 and 15] [338-F-G; 339-F-G]

State of Kerala v. Kumari T. P. Roshana and Others **1979 (2) SCR 974 = AIR 1979 SC 765** *India v. State of Karnataka and Others* **1998 (3) SCR 740 = (1998) 6 SCC 131, relied on.**

1.3. The MCI has got the power to conduct a surprise inspection to find out whether the deficiencies pointed out by the MCI have been rectified or not, especially when the College submits a compliance report. Surprise inspection naturally contemplates no notice. Surprise inspection, in the instant case, was conducted to ascertain whether compliance report could be accepted and whether the deficiencies pointed out in the regular inspection were rectified or not. MCI , by pointing out the deficiencies noticed by the Inspection Team, gives an opportunity to the College to rectify the same. It is the duty of the College to submit the compliance report, after rectifying the deficiencies. The MCI can conduct a surprise inspection to ascertain whether the deficiencies had been rectified and the compliance report be accepted or not. [para 18] [343-B-E]

1.4. The MCI, while deciding to grant permission, is not functioning as a quasi-judicial authority, but only as an administrative authority. Rigid rules of natural justice are, therefore, not contemplated or envisaged. Rule 8(3)(1) of the Establishment of Medical College Regulations (Amendment) Act, 2010 (Part II), provides for only an "opportunity and time to rectify the deficiencies".

Compliance report is called for only to ascertain whether the deficiencies pointed out were rectified or not. If the MCI is not satisfied with the manner of compliance, it can conduct a surprise inspection. After that, no further time or opportunity to rectify the deficiencies is contemplated, nor further opportunity of being heard, is provided. [para 19] [343-F-H]

1.5. In the instant case, the deficiencies pointed out by the MCI team in its report dated 06.07.2013 are fundamental and very crucial, which cannot be ignored in the interest of medical education. MCI and the College authorities have to bear in mind, what is prescribed is the minimum, if the MCI dilutes the minimum standards, they will be doing violence to the statutory requirements. MCI is duty bound to cancel the request if fundamental and minimum requirements are not satisfied. The infirmities pointed out by the Inspection Team are serious deficiencies. [para 20] [344-A-D]

1.6. The order of MCI is not vitiated as violative of principles of natural justice, especially, when no allegation of bias or mala fide has been attributed against the doctors who conducted the surprise inspection on 06.07.2013. When the Inspection Team consists of doctors of unquestionable integrity and reputation, who are experts in the field, there is no reason to discard the report of such inspection. In the circumstances, the MCI has rightly passed the order rejecting the approval for renewal of permission of 3rd batch of 150 MBBS students granted for the academic year 2013-14. [para 21] [344-E-G]

Case Law Reference:

1979 (2) SCR 974	**relied on**	**para 14**
1998 (3) SCR 740	**relied on**	**para 14**

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Civil) No. 590 of 2013.

WITH

I.A. No.2 in SLP (Civil) No. 28480 of 2012.

A.D.N. Rao, Abhishek Agarwal, K. Sarada Devi for the Petitioner and petitioner-in-person.

P.S. Patwalia, Vikas Singh, Amit Kumar, Atul Kumar, Avijit Mani Tripathi, Ankit Rajgharia, Gaurav Sharma for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in these cases, concerned with the legal validity of the approval granted by the Medical Council of India (for short "the MCI") dated 15th July, 2013 for renewal of permission for admission of the third batch of 150 M.B.B.S. students at Chintpurni Medical College & Hospital (for short "the College") for the academic year 2013-14. The above mentioned College was established during the year 2011-12 and it admitted 150 M.B.B.S. students for that year. Renewal of permission for the second batch was sought for the academic year 2012-13. The MCI carried out an inspection on 19/20th April, 2012 and noticed various deficiencies and, in addition, one fake faculty was also presented before the Inspection Team. Copy of the assessment report was placed before the Board of Governors of the MCI. The Board of Governors, therefore, issued a show cause notice dated 20.6.2012 to the faculty, stating as follows:

"Chintpurni Medical College & Hospital, Pathankot was assessed on 19th and 20th April, 2012 by Assessors of MCI and you have been shown as Associate Professor in the Department of Chest & TB. It was declared in the

declaration form submitted to MCI by the College authorities of Chintpurni Medical College and Hospital, Pathankot that you have joined the college on 07.06.2011 and have joined the college on 07.06.2011 and have been working in the department of Chest & TB since then.

Simultaneously, you were produced before the assessment team of MCI on 20th and 21st April , 2012 at S.N. Medical College, Agra as Associate Professor in the Department of Chest & TB and it was declared in the declaration form submitted to MCI that you have joined in the college on 19.04.2012.

Since, it is clear that you have been working at both the medical colleges simultaneously, you are required to explain as to why action be not taken against you for the above said misrepresentation.

You are therefore directed to appear before the Secretary, Medical Council of India on 25.06.2012 along with your explanation failing which Council would be free to initiate action as deemed fit including cancellation of registration."

2. MCI also sent a letter dated 22.06.2012 to the Medical College stating that the deficiencies pointed out by the Inspection Team of the MCI on 19/20 April 2012 were of serious nature and, hence, Board of Governors had decided not to renew the permission to admit 2nd batch of students, however, the Medical College was given an opportunity to present their case on 25.06.2012.

3. The College, in response to the letter, sent a compliance report dated 23/25-06.2012. The Board of Governors of the MCI, after considering the assessment report, nature of deficiencies and the explanation submitted by the College in the personal hearing, finally decided not to grant renewal of permission for admitting fresh batch of 150 M.B.B.S. students for the academic year 2012-13. Communication dated 27.06.2012, in this regard, was sent by the MCI to the College.

4. The College then filed Writ Petition No.12368 of 2012 before the Punjab and Haryana High Court challenging the order dated 27.06.2012 seeking a *writ of certiorari* to quash the decision taken by the Board of Governors of the MCI on 22.06.2012 and 27.06.2012 and also for a direction to admit the second batch of MBBS students for the academic year 2012-13. The learned Single Judge of the High Court passed an interim order on 02.08.2012 directing the MCI to conduct another inspection to assess the deficiencies pointed out earlier. Aggrieved by the same, the MCI filed LPA No.1228 of 2012 before the Division Bench of the High Court. The LPA was disposed of by the Division Bench on 10.09.2012 nullifying the decision of the Board of Governors of the MCI dated 29.05.2012 and directed a fresh inspection after giving an opportunity of hearing to the College and it was permitted to place all materials before the Inspection Team. Aggrieved by the same, the MCI preferred Special Leave Petition (C) No.28480 of 2012. By the time, the direction issued by the High Court was carried out and an inspection was conducted by the MCI Team and not much major deficiencies were noticed and the assessment report of September 2012 was placed before the Board of Governors on 21.09.2012, which accepted the report. The said fact was brought to the notice of this Court and this Court disposed of SLP(C) No.28480 of 2012 on 27.09.2012. Operative portion of the order reads as follow:

"…….

However, learned senior counsel appearing for the MCI stated that in obedience to the direction of the High Court the inspection was conducted on 19.09.2012 and the report of the Inspection Team was accepted by the Board of Governors on 21.09.2012. Under such circumstances, we find that there is no impediment in granting permission for the 2013-14 batch. Appropriate admission orders, therefore, be passed within one month."

5. The MCI, in obedience to the direction issued by this

Court passed an order on 25.10.2012 granting permission to the College for renewal of permission for admission of the third batch of MBBS students for the academic year 2013-14. The MCI, in the meantime, conducted a routine inspection on 1/2 April, 2013 to verify whether the Medical College is maintaining infrastructure, facilities, faculty and clinical material etc. or not and certain deficiencies were noticed and conveyed to the College directing them to rectify the same and submit a compliance report. The College then submitted its compliance report, which was placed before the Board of Governors in its meeting held on 19.06.2013, and the following order was passed:

> "**Chintpurni Medical College & Hospital, Pathankot, Punjab for Renewal of permission of 3rd Batch of 150 MBBS students —** The Board of Governors considered the assessment report dated 1st-2nd April, 2013 along with the notes of the Undergraduate Committee and the compliance report submitted by the College authorities of Chintpurni Medical College & Hospital, Pathankot, Punjab for renewal of permission of 3rd batch of 150 MBBS students and decided to verify the compliance submitted by the college authorities by way of physical verification assessment."

6. The Board of Governors, following the above decision, decided to conduct a surprise inspection by a team of two doctors, namely, Dr. Mukesh Kalra and Dr. Ashok Agarwal. The Inspection Team was directed to verify as to whether the College had rectified the deficiencies by looking to the compliance report as well as to verify the credibility of a complaint received against the College. Surprise inspection was conducted by the Team on 06.07.2013 and following deficiencies were pointed out:

1. At first we visited the Emergency Services of the hospital. On our observation only one junior resident

was there with one or two nursing staff. There was one bed occupied and one or two OPD patients seen in emergency of the hospital.

2. Then we met the Dean and Principal of the college and asked them to arrange for the videography which they said was difficult to arrange. Then we took some videos and photographs in our personal camera if MCI wants we can provide the same.

3. We took complete round of all the departments' wards, OPD and verified the working and presence of faculty at 10.30 am. List is enclosed for reference. This was around total 15 teachers in all specialties and 5 (JR+SRs). There were one or two patients in each OPDs. There were no IPD patients in any ward and any paramedical and medical staff available in any of the ward.

4. Then we verified the compliance of last inspection. Regarding student accommodation there was only one girl's hostel of 4 floors with two floors ready (15 rooms on ground floor and 22 rooms in first floor with capacity of 3 students in one room). Rest two floors were under renovation. No boy's hostel was there. The boys were housed in two villas (No. 3 and No. 4) which were meant for faculty. There was no nurse's hostel. They were housed in Ist villa. The no. 2 villa was occupied by director and total of 5 villas were there, which were meant for senior faculty. There were two other buildings under construction, one of 3 bed room flats (8 flats) and another of 2 bed room flats (8 flats) were under construction and out of which in one building of 3 bed room flats, two ground floor flats were ready and occupied by male students. No other resident accommodation is available for teaching and non teaching staff.

5. Only one batch of 150 students is admitted as last year in 2012-13 and no batch was admitted after that in 2012-13.

6. On being asked we were not provided with AERB approval documentary proof and list of histopathology and cytopathological investigations done on the day of inspection. MRD record regarding histopathology and cytopathology was not given for verification.

7. At 2 pm we did the head count by previous declaration forms submitted in last inspection to MCI. The list is enclosed for reference. There were 44 faculty members (108 required) and 6 residents (60SR required, 75JR required) including tutors (29 required) verified. Although their physical presence could be verified but there was no address proof shown on being asked: we were told that rest of the staff is on summer vacation and college provided the list of faculty on leave which is enclosed for reference. But only 6 residents were verified and residents are not provided any summer holidays. We did not agree to this version of holidays from college authorities.

8. At 4 pm we again took round of the hospital and verified the computerized record provided by college. We could not verify the census of last day (5-07-13) from wards. The census showed 243 IPD patients but in morning round there was no patient in the wards. On the day of inspection the record showed 518 patients but we hardly saw any patients. We feel not above 100 patients would have come to hospital on the day of inspection till 3 pm. Therefore, the hospital record was not authenticated physically.

9. The pharmacological and forensic Medicine department was not having concrete roof top.

10. The nursing college is shown part of medical college building and is not separate.

11. The library has external space for reading for students. The required 2400 sq.m. space is there.

12. On an average 3-4/day both major and minor surgeries are done in all subjects. The OT's were equipped but looked unused. In July till the day of the inspection 6 major surgeries were done in all subjects.

13. A demand draft for Rs.3 lacs was asked from college as instructed from MCI. The Director Principal gave a letter that it will be forwarded in one week time as today (on inspection day) is Saturday and bank is closed here. The copy of letter is enclosed."

7. The College having come to know about the surprise inspection made a request on 08.07.2013 to the Board of Governors of the MCI to afford them a personal hearing to present their case. The Board of Governors, however, met on 10.07.2013 and having come to know about the gross deficiencies pointed out by the MCI Team in its surprise inspection report dated 06.07.2013, decided to reject the renewal of permission granted for the academic year 2013-14. Copy of the order was communicated to the College vide its letter dated 14.07.2013.

8. The College authorities then approached the MCI and placed the order passed by this Court on 27.09.2012, wherein this Court had ordered that there is no impediment in granting permission for the academic year 2012-13. The Board of Governors, so as to give effect to this Court's order, recalled

their earlier letter dated 14.07.2013 issued to the College and, in obedience to the directions of this Court, issued the Letter of Permission (in short "LoP") dated 15.07.2013 granting permission for admission of a batch of 150 MBBS students for the academic year 2013-14. It is that order that has been challenged in Writ Petition (C) No.590 of 2013. After getting the legal opinion the MCI also preferred, as already stated, I.A. No.2 of 2013 in SLP(C) No.28480 of 2012 seeking clarification/modification on the order dated 27.09.2012.

9. We have heard counsel on either side at length. We are in this case primarily concerned with the question whether the MCI was justified in passing the order dated 14.07.2013 rejecting the request for renewal of permission for the 3rd batch of MBBS students for the year 2013-14.

10. Shri Vikas Singh, learned senior counsel appearing for the College, submitted that the decision taken, rejecting the request for renewal of permission for the year 2013-14, was illegal, since the College had rectified the deficiencies pointed out and that the order was passed in violative of principles of natural justice. Learned senior counsel submitted that the College was also not given any opportunity to file the objection to the report dated 06.07.2013, before the same was accepted by the Board of Governors rejecting the request for renewal of permission. Learned senior counsel also submitted that since the inspection was conducted on a holiday, some deficiencies/ infirmities might have been noticed by the Inspection Team, but those infirmities were not that serious to reject permission sought for. Learned senior counsel submitted that, for the year 2012-13, the College could not admit the 2nd batch of MBBS students, consequently, the parameters followed by the team for giving an adverse report were incorrect and those aspects also could not be brought to the notice of the Board of Governors of the MCI. Learned senior counsel also submitted that, in any view, the College is willing to have yet another inspection by the inspection team.

11. Shri P.S. Patwalia, learned senior counsel appearing for the MCI, and Shri Amit Kumar, counsel for the MCI, submitted that the Board of Governors was justified in passing an order on 14.07.2013, after having noticed the serious deficiencies pointed out by the surprise Inspection Team in their inspection dated 06.07.2013. Learned senior counsel submitted that the deficiencies pointed out by the Inspection Team are fundamental in nature, hence, could not be brushed aside in the larger public interest and also in the interest of the student community. Learned senior counsel also submitted that deficiencies were pointed out to the College when regular inspection was conducted and the College was given an opportunity to rectify those deficiencies. Surprise inspection revealed that those deficiencies were not rectified and, hence, the order was issued on 14.07.2013 refusing renewal for the year 2013-14.

12. Shri Manohar Lal Sharma, appearing-in-person, pointed out that there is no reason to discard the report of the Inspection Team dated 06.07.2013 and that the College authorities had committed fraud in not placing the correct materials before the Board of Governors of the MCI and also before the Inspection Team.

Discussions:

13. MCI is a body constituted under the provisions of the Indian Medical Council Act, 1956 and has been given the responsibility of discharging the duty of maintenance of the standards of medical education in the country. It has the power to supervise the qualifications or eligibility standards for admission into the medical institutions. This Court in *State of Kerala v. Kumari T. P. Roshana and Others* AIR 1979 SC 765, observed as follows:

> "16. The Indian Medical Council Act, 1956 has constituted the Medical Council of India as an expert body to control the minimum standards of medical education and to

regulate their observance. Obviously, this high-powered Council has power to prescribe the minimum standards of medical education. It has implicit power to supervise the qualifications or eligibility standards for admission into Medical Institutions. Thus there is an over invigilation by the Medical Council to prevent sub-standard entrance qualifications for medical courses."

14. The necessity of proper facilities, including teaching faculty, clinical materials, has been highlighted by this Court in *Medical Council of India v. State of Karnataka and Others* (1998) 6 SCC 131, which reads as follows:

> **"**A medical student requires gruelling study and that can be done only if proper facilities are available in a medical college and the hospital attached to it has to be well equipped and the teaching faculty and doctors have to be competent enough that when a medical student comes out, he is perfect in the science of treatment of human beings and is not found wanting in any way. The country does not want half-baked medical professionals coming out of medical colleges when they did not have full facilities of teaching and were not exposed to the patients and their ailments during the course of their study."

15. MCI on the basis of the reports, regular and compliance, is legally obliged to form an opinion with regard to the capacity of the college to provide necessary facilities in respect of staff, equipments, accommodation, training and other facilities to ensure proper functioning of the medical college or for increase of admission capacity. Section 10A of the Indian Medical Council Act, 1956 deals with the permission for establishment of new medical college, new course of study etc. Sub-section (7) of Section 10A is extracted hereunder for easy reference:

> "**10A. Permission for establishment of new medical college, new course of study.-**

xxx xxx xxx

xxx xxx xxx

7. The Council, while making its recommendations under clause (b) of sub-section (3) and the Central Government, while passing an order, either approving or disapproving the scheme under sub-section (4), shall have due regard to the following factors, namely:-

(a) whether the proposed medical college or the existing medical college seeking to open a new or higher course of study or training, would be in a position to offer the minimum standards of medical education as prescribed by the Council under section 19A or, as the case may be, under section 20 in the case of postgraduate medical education.

(b) whether the person seeking to establish a medical college or the existing medical college seeking to open a new or higher course of study or training or to increase its admission capacity has adequate financial resources;

(c) whether necessary facilities in respect of staff, equipment, accommodation, training and other facilities to ensure proper functioning of the medical college or conducting the new course or study or training or accommodating the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme.

(d) whether adequate hospital facilities, having regard to the number of students likely to attend such medical college or course of study or training or as a result of the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme;

(e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such medical college or course of study or training by persons having the recognised medical qualifications;

(f) the requirement of manpower in the field of practice of medicine; and

(g) any other factors as may be prescribed."

It is the legislative mandate that when a new medical college is established or the existing medical college seeks to open a new or higher course of study or training, for accommodating the increased admission capacity it would be in a position to offer the minimum standards of medical education as prescribed by the MCI under Section 19A or, as the case may be, under Section 20 in the case of post-graduate medical education.

16. The Indian Medical Council (Amendment) Act, 2010 confers the following powers on the Board of Governors as per Section 3B(b), which reads as follows:

3B. During the period when the Council stands superseded,—

xxx xxx xxx

(b) The Board of Governors shall—

(i) Exercise the powers and discharge the functions of the Council under this Act and for this purpose, the provisions of this Act shall have effect subject to the modification that references therein to the Council shall be construed as references to the Board of Governors;

(ii) grant independently permission for establishment of new medical colleges or opening a new or higher course of study or training or increase in admission capacity in any course of study or training referred to in section 10A or giving the person or college concerned a reasonable opportunity of being heard as provided under section 10A without prior permission of the Central Government under that section, including exercise of the power to finally approve or disapprove the same; and

(iii) dispose of the matters pending with the Central Government under section 10A upon receipt of the same from it."

17. MCI, with the previous sanction by the Central Government, in exercise of its powers conferred by Sections 10A and 33 of the Indian Medical Council Act, 1956, made the Regulations known as the Establishment of Medical College Regulations, 1999. Regulation 8 of the Regulations 1999 deals with grant of permission for establishment of new college. Application/scheme submitted by the applicants is evaluated and the verification takes place by conducting physical inspection by the team of inspectors of the MCI. The Board of Governors may grant LoP to the applicant for making admissions in the first year of MBBS course in the medical college and the permission is renewed every year subject to the college achieving the yearly target mentioned in "Minimum Standard Requirements for the Medical College for 150 Admissions Annually Regulations, 1999". Schedule I of the above mentioned Regulation provides for accommodation in the medical college and its teaching hospital. Schedule II deals with equipment required for various departments in the college and hospital. The requirements are statutorily prescribed and, therefore, the Board of Governors has no power to dilute the

statutory requirements mentioned in the above mentioned Regulations.

18. We have also gone through the report of the surprise Inspection Team dated 06.07.2013 submitted by Dr. Mukesh Kalra and Dr. Ajay Agarwal. The MCI has got the power to conduct a surprise inspection to find out whether the deficiencies pointed out by the MCI have been rectified or not, especially when the College submits a compliance report. Surprise inspection naturally contemplates no notice, if the notice is given in advance, it would not be a surprise inspection and will give room for the College to hoodwink the assessors by springing a surprise, by making perfect what was imperfect. Surprise inspection, in this case, was conducted to ascertain whether compliance report could be accepted and to ascertain whether the deficiencies pointed out in the regular inspection were rectified or not. By pointing out the deficiencies, MCI is giving an opportunity to the College to rectify the deficiencies, if any noticed by the Inspection Team. It is the duty of the College to submit the compliance report, after rectifying the deficiencies. The MCI can conduct a surprise inspection to ascertain whether the deficiencies had been rectified and the compliance report be accepted or not.

19. MCI, while deciding to grant permission or not to grant permission, is not functioning as a quasi-judicial authority, but only as an administrative authority. Rigid rules of natural justice are, therefore, not contemplated or envisaged. Rule 8(3)(1) of the Establishment of Medical College Regulations (Amendment) Act, 2010 (Part II), provides for only an "opportunity and time to rectify the deficiencies". Compliance report is called for only to ascertain whether the deficiencies pointed out were rectified or not. If the MCI is not satisfied with the manner of compliance, it can conduct a surprise inspection. After that, no further time or opportunity to rectify the deficiencies is contemplated, nor further opportunity of being heard, is provided.

20. We have already dealt with, *in extenso*, the deficiencies pointed out by the MCI team in its report dated 06.07.2013. In our view, the deficiencies pointed out are fundamental and very crucial, which cannot be ignored in the interest of medical education and in the interest of student community. MCI and the College authorities have to bear in mind, what is prescribed is the minimum, if the MCI dilutes the minimum standards, they will be doing violence to the statutory requirements. MCI is duty bound to cancel the request if fundamental and minimum requirements are not satisfied or else College will be producing half-backed and poor quality Doctors and they would do more harm to the society than service. In our view, the infirmities pointed out by the Inspection Team are serious deficiencies and the Board of Governors of the MCI rightly not granted approval for renewal of permission for the 3rd batch of 150 MBBS students for the academic year 2013-14.

21. We are also of the view that such an order is not vitiated by violation of principles of natural justice, especially, when no allegation of bias or mala fide has been attributed against the two doctors who constituted the Inspection Team, which conducted the surprise inspection on 06.07.2013. When the Inspection Team consists of two doctors of unquestionable integrity and reputation, who are experts in the field, there is no reason to discard the report of such inspection. In such circumstances, we are of the view that the MCI has rightly passed the order rejecting the approval for renewal of permission of 3rd batch of 150 MBBS students granted for the academic year 2013-14. Consequently, Writ Petition (C) No.590 of 2013 is allowed and IA No.2 of 2013, filed in SLP(C) No.28480 of 2012, is disposed of, as above.

R.P. Matters disposed of.

STATE OF U.P.

v.

M/S LAKSHMI SUGAR & OIL MILLS LTD. AND ORS.

(Civil Appeal No. 8085 of 2013 etc).

SEPTEMBER 12, 2013.

[T.S. THAKUR AND JAGDISH SINGH KHEHAR, JJ.]

UTTAR PRADESH SUGAR UNDERTAKINGS (ACQUISITION) ACT, 1971:

s.2(h)(vi) read with s.3 – 'Scheduled undertaking' – Vesting of, in Sugar Corporation – Land of sugar factory shown in revenue records as "Parti Kadim Tilla" (land not cultivated for a long time and in the form of hillock), held by consolidation authorities as vested in the Corporation – High Court directing to restore the name of sugar Company in revenue records – Held: All the three statutory authorities concurrently held that there was no evidence on record to show that the subject land was ever held or occupied by the respondent-Company for agricultural purposes or that any agricultural activity was ever carried out on the same -- These concurrent findings of fact could not have been reversed by the High Court in its writ jurisdiction -- Therefore, the subject land has been rightly taken as vested in the Corporation.

CONSTITUTION OF INDIA 1950:

Art.226 – Writ jurisdiction of High Court – Scope of – High Court reversing the concurrent findings of all the three consolidation authorities – Held: Whether or not the respondent-company held or occupied the subject land for cultivation was essentially a question of fact, answered against the company -- High Court failed to appreciate that it was not sitting in appeal over the findings recorded by the authorities below -- It could not reappraise the material and hold that the

land was held or occupied for cultivation and substitute its own finding for that of the authorities -- High Court, thus, committed an error – Uttar Pradesh Sugar Undertakings (Acquisition) Act, 1971.

The sugar-factory belonging to the respondent-company stood vested in the appellant-U.P. Sugar Corporation w.e.f. 28.10.1984, in terms of s.3 of the U.P. Sugar Undertakings (Acquisition) Act, 1971. The Consolidation Officer by an order dated 2.9.1992 directed that the subject land belonging to sugar-factory be recorded in the name of the appellant-Corporation in the revenue records. The appeal of the respondent was dismissed by the Settlement Officer, Consolidation and its revision was dismissed by the District Consolidation Director/Collector. However, the High Court in writ petition reversed the orders of the consolidation authorities and directed to delete the name of the appellant-Corporation and restore that of the respondent-sugar-Company in the revenue records.

Allowing the appeals, the Court

HELD: 1.1. Section 2(h)(vi) of the U.P. Sugar Undertakings (Acquisition) Act, 1971 lays down that all lands, other than those held or occupied for purposes of cultivation and grovelands, are treated as being part of the 'scheduled undertaking' which would upon acquisition vest in the appellant-Corporation, provided such lands and buildings are "held or occupied for purposes of the sugar factory". The test is whether the asset or any interest therein is held or occupied 'for purpose of a sugar factory'. If the answer is in the affirmative, the same is treated to be a part of the scheduled undertaking that would vest in the appellant-Corporation upon acquisition. [para 14] [354-G-H; 355-C]

1.2. It is evident not only from a plain reading of s.2(h)

but also the interpretation placed upon the same by this Court that grovelands and lands held for cultivation are excluded from the definition of undertaking. But all other lands and buildings if held or occupied for the purpose of the sugar factory would comprise the undertaking and would upon acquisition vest in the Corporation. [para 16] [356-B]

1.3. In the case at hand, it was not the case of the respondent-company that the land in question was groveland nor was it the case of the company that the land even though not meant for cultivation was held for a purpose other than the sugar factory. All the three statutory authorities concurrently held that there was no evidence on record to show that the subject land was ever held or occupied by the respondent-company for agricultural purposes or that any agricultural activity was ever carried out on the same. These concurrent findings of fact could not have been reversed by the High Court in its writ jurisdiction. Whether or not the respondent-company held or occupied the subject land for cultivation was essentially a question of fact, which had been answered by statutory authorities against the company. The High Court failed to appreciate that it was not sitting in appeal over the findings recorded by the authorities below. It could not reappraise the material and hold that the land was held or occupied for cultivation and substitute its own finding for that of the authorities. In as much as the High Court did so, it committed an error. The revenue record clearly belied the assertion of the respondent company and described the land as "Parti Kadim Tilla" which meant that the land has not been cultivated for a long time and is in the form of a hillock. [para 17-18] [356-C-E; 357-G-H; 358-A-B]

1.4. Besides, the land in question was excluded from the application of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 only because it was treated as

industrially attached to the sugar factory. Thus, it could not be treated to be held or occupied for cultivation, for the purposes of U.P. Sugar Undertakings (Acquisition) Act, 1971. Therefore, the subject land has been rightly taken as vested in the Corporation. [para 19-20] [358-C-D, E-F, G-H]

1.5. Further, the land in question is situate in the immediate vicinity of the sugar factory. Distance between the factory and the asset held by the company may not be a true test for determining whether the same is a part of the undertaking, but in the absence of any evidence showing cultivation, the close proximity of the land to the factory is a strong circumstance that cannot be ignored. [para 20] [358-H; 359-A-B]

U.P. State Sugar Corporation v. Burwal Sugar Mills Co. Ltd. and Ors. **2004 (2) SCR 605 = (2004) 4 SCC 98 distinguished.**

1.6. In the circumstance, the order passed by the High Court cannot be sustained and is set aside. [para 21]

Case Law Reference:

2004 (2) SCR 605 distinguished para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8085 of 2013.

From the Judgment & Order dated 30.04.2010 of the High Cout of Judicature at Allahabad, Bench at Lucknow in WP No. 187 of 2007.

WITH

Civil Appeal No. 8086 of 2013.

Shobha Dixit, Ardhendumauli Kumar Prasad, R.K.S.

Yadav, Viplav Sharma, Nilanjana Banerjee, Vishnu Sharma for the Appellant.

H. Ahmadi, Arjun Hharkauli, Rohan Sharma for the Respondent.

The Judgment of the Court was delivered by

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

2. These appeals arise out of a Judgment and Order dated 30th April, 2010 passed by the Lucknow Bench of the High Court of Judicature at Allahabad, whereby writ petition No.187 of 2007 filed by the respondent-company has been allowed with a direction to respondents 4 to 6 to delete the name of the appellant-U.P. State Sugar Corporation from the relevant revenue records and restore that of the respondent-Company. That direction followed a finding recorded by the High Court that the land in dispute being agricultural land had not vested in the appellant-Corporation under the provisions of The U.P. Sugar Undertakings (Acquisition) Act, 1971. The mandamus issued by the High Court includes a further direction for delivery of possession of the disputed parcel of land to the respondent-company within a period of one month from the date of presentation of a certified copy of the impugned judgment and order.

3. The respondent-Lakshmi Sugar and Oil Mills Limited established a sugar factory in District Hardoi of the State of Uttar Pradesh as early as in the year 1933. Several such sugar mills having gone sick in the State of Uttar Pradesh, the State legislature enacted what is known as Uttar Pradesh Sugar Undertakings (Acquisition) Act, 1971. Twelve private sugar manufacturing units in the State of Uttar Pradesh were acquired by the State Government under the said Act and vested in the appellant-Corporation so as to revive such sick mills and, thereby, protect the interest of cane growers in the State. Section 3 of the Act, inter alia, provided that *"on the appointed*

day, every scheduled undertaking shall, by virtue of this Act, stand and be deemed to have stood transferred and vested in the Corporation free from any debt, mortgage charge or other encumbrance or lien, trust or similar obligation (excepting any, lien or other obligation in respect of any advance on the security of any sugar stock or other stock in trade) attaching to the undertaking." The expression "scheduled undertaking" was defined in Section 2(h) of the Act, inter alia, to mean an undertaking engaged in the manufacture or production of sugar by means of vacuum pans and with the aid of mechanical power in a factory specified in any of the Schedules to the Act and comprising plants, machinery and other equipments and assets enumerated thereunder.

4. The respondent-sugar factory, it is common ground, figured at Item-7 of the Second Schedule to the Act and, therefore, stood vested in the appellant-Corporation with effect from 28th October, 1984, the date appointed for vesting of undertakings specified in the said schedule in terms of notification dated 27th October, 1984. Possession of the respondent-Sugar Mill was taken over by District Magistrate, Hardoi on 28th October, 1984 and handed over to the appellant-Corporation.

5. Consolidation proceedings appear to have started in Village Nanakganj Grunt, Pargana Gopamau, Tehsil and District Hardoi sometime in June, 1986 and a mutation in respect of land held by the respondent-Company and situated at Dheer Maholia passed by the SDO, Sadar, Hardoi on 14th February, 1987. A similar order of mutation was passed for another parcel of land situated at Nagheta by the SDO, Sadar, Hardoi on 19th February, 1987. In regard to the third parcel of land situate in village Nanakganj Trust, the appellant-Corporation acting through its General Manager addressed a letter dated 26th August, 1992 to the Consolidation Officer, Hardoi requesting him to record the name of the appellant-Corporation in place of the respondent-Company. The letter

pointed out that the said parcel of land had been acquired by the State Government and stood vested in the appellant-Corporation with effect from 28th October 1984 under the provisions of the U.P. Sugar Undertakings (Acquisition) Act, 1971 read with the Amendment Act of 1985.

6. The Consolidation Officer registered the request as Case No.9760 and initiated proceedings in which he issued notices to the respondent-M/s Lakshmi Sugar Mills at its registered office. The respondent-Company remained unrepresented even after the notice was pasted in public places and announcement by beat of drum regarding the proceedings. The Consolidation Officer eventually passed an order on 2nd September, 1992 directing that land measuring 122.4.0 Bighas in Khata No.132 in CH 23, shall be shown in the ownership of the appellant-Corporation in place of the respondent-company.

7. Against the order passed by the Consolidation Officer the respondent-company appealed to the Settlement Officer, Consolidation, Hardoi who dismissed the same by his Order dated 24th January, 1997. The respondent-Company then preferred a revision before the District Consolidation Director/ Collector, Hardoi who concurred with the view taken by the officers below and dismissed the Revision Petition on 6th December, 2006.

8. Aggrieved by the orders passed by the Consolidation authorities, the respondent-Company preferred Writ Petition No.187 (Consolidation) of 2007 before the Lucknow Bench of the High Court of Allahabad. By its order dated 30th April, 2010 impugned in these appeals, the High Court has allowed Writ Petition No.187 (Consolidation) of 2007 and quashed the orders passed by the Consolidation authorities with the directions to which we have made a reference in the beginning of this judgment.

9. On behalf of the appellant-Corporation, it was strenuously argued that the High Court had fallen in error, in

interfering with the order passed by the Consolidation Officer and those passed in appeal and revision filed against the same, in all of which it had been concurrently held that the land in dispute was a part of the undertaking as defined in Section 2(h) of the Act as the same was not held or occupied by the company for agricultural purposes. The High Court had, it was contended, over-stepped its jurisdiction in reversing a finding of fact upon a reappraisal of the evidence as if it was sitting in appeal over the orders passed by the authorities below. There was, according to the learned counsel, overwhelming evidence to show that the land in question was at no point of time used for cultivation by the respondent-Company or held for any such purpose. The entire extent was, argued the learned counsel, used for industrial purpose and recorded as “Parti Kadim Tilla”, which meant that it had not been cultivated for a very long time and hence was a part of the undertaking which upon acquisition vested in the appellant-Corporation.

10. Mr. Huzefa Ahmadi, learned senior counsel appearing for the respondent-Company argued that under the scheme of the Acquisition Act, it was necessary to establish a nexus between the asset sought to be acquired/taken over and the undertaking. It was only if such a nexus is established that the property under the said Act would vest in the State or the Corporation and not otherwise. Reliance in support of that submission was placed upon the Aims and Objectives of the Act, and the decision of this Court in *U.P. State Sugar Corporation v. Burwal Sugar Mills Co. Ltd. and Ors.* (2004) 4 SCC 98. No such nexus, was according to the learned counsel, established in the case at hand, as according to the respondent-Company the land in question was not used or meant for the use of the undertaking, that was taken over by the State. The takeover of the undertaking did not, however, mean takeover of the company or such of its assets as had no nexus with the undertaking. The High Court had recorded a finding that no such nexus was established between the undertaking and the land in question which quite clearly proved

the absence of an essential requirement for the land to vest in the appellant-Corporation.

11. The Statement of Objects and Reasons for the enactment of the Uttar Pradesh Sugar Undertakings (Acquisition) Act, 1971 referred to problems which certain sugar mills of the State had created for the cane-growers and labourers and thereby adversely impacted the general economy of the areas where such mills were situate. The legislation, therefore, provided for acquisition of such mills, payment of compensation for the same and for the replacement of the dues of cane-growers, labourers as also of the Government out of the amount of compensation so payable. The Preamble of the Act states as follows:

> *"An Act to provide, in the interest of the general public, for the acquisition and transfer of certain sugar undertakings, and for matters connected therewith or incidental thereto."*

12. Section 3 of the Act deals with vesting of the schedule undertaking and is in the following terms:

> "***Section 3****: Vesting: On the appointed day, every schedule undertaking shall, by virtue of this Act, stand and be deemed to have stood transferred to and vest and be deemed to have vested in the Corporation free from any debt, mortgage, charge or other encumbrance or lien trust or similar obligation (excepting any lien or other obligation in respect of any advance on the security of any sugar stock or other stock-in-trade) attaching to the undertaking.*
>
> *Provided that any such debt, mortgage, charge or other encumbrance or lien, trust or similar obligation shall attach to the compensation referred to in Section 7, in accordance with the provisions of that section, in substitution for the undertaking:*

> *Provided further that a debt, mortgage, charge or other encumbrance or lien, trust or similar obligation created after the scheduled undertaking or any property or asset comprised therein had been attached or a receiver appointed over it, in any proceedings for realisation of any tax or cess or other dues recoverable as arrears of revenue shall be void as against all claims for dues recoverable as arrears of revenue."*

13. We are in the present appeal concerned only with Section 2(h) (vi) of the Act which may be reproduced for ready reference:

> *"2(h) "scheduled undertaking" means an undertaking engaged in the manufacture or production of sugar by means of vacuum pans and with the aid of mechanical power in factory specified [in any of the schedules of this Act], and comprises –*
>
> *xxx xxx xxx*
>
> *(vi) all lands (other than lands held or occupied for purposes of cultivation and grovelands) and buildings held or occupied for purposes of that factory (including buildings pertaining to any of the properties and assets hereinbefore specified, and guest houses and residences of directors, managerial personnel, staff and workmen or of any other person as lessee or licensee, and any store houses, molasses, tanks, roads, bridges, drains culverts, tubewells, water storage or distribution system and other civil engineering works) including any leasehold interest therein"*

14. A plain reading of the above would show that all lands other than those held or occupied for purposes of cultivation and grovelands are treated as being part of the 'scheduled undertaking' which would upon acquisition vest in the appellant-Corporation, provided such lands and buildings are "held or occupied for purposes of the sugar factory". What is important

is that buildings pertaining to any of the property and assets specified in Section 2(h) (i) to (xii) including guest houses and residences of directors, managerial personnel, staff and workmen or of any other person as lessee or licensee including any store houses, molasses, tank, roads, bridges, drains, culverts, tubewells, water storage or distribution system and other civil engineering works including lease hold interest therein are also treated as part of the scheduled undertaking. The test, therefore, is whether the asset or any interest therein is held or occupied 'for purpose of a sugar factory'. If the answer is in the affirmative, the same is treated to be a part of the scheduled undertaking that would vest in the appellant- Corporation upon acquisition.

15. In *Burwal Sugar Mills* case (supra) on which Mr. Ahmadi placed reliance the question that fell for consideration before this Court was whether the registered office of the company that had set up the sugar factory comprised the undertaking and could, therefore, be taken over by the State or the Corporation. A two-Judge Bench of this Court held that the intention of the legislature clearly was to take over only such land and buildings as are connected with or were in use for purposes of factory. The registered office of the company, observed this Court, was located at House No.54/14, Canal Range, Kanpur, and in the absence of any material to show that the premises in question was being used or occupied for the storage of sugar or as a guest house or for residence of any director of the factory as was alleged on behalf of the Corporation, there was no question of treating the building used as registered office of the Company as a part of the undertaking. This Court noticed the difference between a company owning the undertaking and the sugar undertaking itself and held that while a company is a much wider entity, the undertaking is only one of the assets of the company. The legislature deliberately did not touch the company and provided for acquisition of only the undertaking. This Court on that reasoning held that handing over of the possession of the registered office of the company to the

Corporation was illegal and contrary to the provisions of the Act.

16. It is evident not only from a plain reading of Section 2(h) (supra) but also the interpretation placed upon the same by this Court that grovelands and lands held for cultivation are excluded from the definition of undertaking. But all other lands and buildings if held or occupied for the purpose of the sugar factory would comprise the undertaking and would upon acquisition vest in the Corporation.

17. In the case at hand the respondent-company had claimed the lands in question to be exempted from acquisition and take over on the ground that the same were held and occupied for cultivation. It was not the case of the respondent-company that the lands in question were groveland nor was it the case of the Company that the land even though not meant for cultivation was held for a purpose other than the sugar factory. Whether or not the respondent-company held or occupied the land in dispute for cultivation was, therefore, the only question that fell for consideration which question was essentially a question of fact answered against the company by all the three statutory authorities concurrently on the basis of material available with them. The authorities held that the land in question was never held or occupied by the respondent-Company for cultivation purposes. The exemption claimed by the respondent-company was on that basis declined and the land held to have vested in the Corporation as part of the undertaking. The following passage from the order passed by the Settlement Officer (Consolidation) Hardoi is relevant:

> "*Copies of U.P. Sugar Undertaking (Acquisition) Act 1971 (as amended) and CH Form 21 (A) relating to the disputed land has been filed wherein in Column 6 the name of Laxmi Sugar Mill is registered. In Column 8 the disputed land is shown outside consolidation and in column 24 the same is shown as parti zadid on site, parti usar, rugged terrain and uneven hillocks. In this manner there is no evidence/ entry regarding any cultivation on*

this land or the disputed land to be an agriculture land. Accordingly, the disputed land is found not to be an agricultural land. The disputed land has been acquired in favour of U.P. Sugar Corporation Limited Unit Hardoi under aforesaid gazette. If the appellant had any objection in that regard then, as per law, he was to lodge proceedings against notification before the Hon'ble High Court, but in this regard there is no evidence available on records. Therefore the allegation that the disputed land is an agriculture land and therefore the same is to be registered in the name of Laxmi Sugar and Oil Mills Limited, Hardoi instead of U.P. Sugar Corporation Limited, is baseless and devoid of merits. The disputed land has been acquired in favour of U.P. State Sugar Corporation Limited. It is for this reason the learned consolidation officer has rightly registered the same in the name of U.P. Sugar Corporation Limited Unit Hardoi and the portion of the aforesaid land registered in Account No. 82, 49 of Village Dheear Maholia and Account No. 245 of Village Nagheta has already been registered in the name of U.P. Sugar Corporation Limited Unit Hardoi after deletion of the name of Laxmi Sugar & Oil Mills by the S.D.O. Hardoi vide his order dated 14.02.1987. Accordingly, the order of Learned Consolidation Officer is lawful and proper and does not warrant any interference. The appeal does not have any force and is devoid of merit."

(emphasis supplied)

18. The order passed by the District Consolidation Director/ Collector, Hardoi also concurred with the view taken by the Officers below and held that there was no evidence on record to show that the subject land was ever held or occupied for agricultural purposes or that any agricultural activity was ever carried out on the same. These concurrent findings of fact, in our opinion, could not have been reversed by the High Court in its writ jurisdiction. The High Court obviously failed to

appreciate that it was not sitting in appeal over the findings recorded by the authorities below. It could not reappraise the material and hold that the land was held or occupied for cultivation and substitute its own finding for that of the authorities. In as much as the High Court did so, it committed an error. It is noteworthy that the revenue record clearly belied the assertion of the respondent company and described the land as "Parti Kadim Tilla" which meant that the land has not been cultivated for a long time and is in the form of a hillock.

19. It was next argued by learned counsel for the appellant that the claim for exemption from acquisition was even otherwise unfounded keeping in view the fact that the land in question had been treated as exempted under Section 6(1)(a) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 on the ground that the same was held for industrial purposes being a part of the sugar factory. If the land in question was indeed held for cultivation purposes as alleged by the company, it could not remain immune to the rigors of the Ceiling Act. It was excluded from the application of the said Act only because it was treated as industrially attached to the sugar factory. The respondent-company has not been able to effectively refute that contention of the appellant-Corporation. If the land had indeed been treated as industrial for purposes of the Ceiling Act we find it difficult to see how the same could be treated to be held or occupied for cultivation, for the purposes of U.P. Sugar Undertakings (Acquisition) Act, 1971.

20. As noticed earlier it is not the case of the respondent-company that although the land was non-agricultural and although the same was held and occupied for industrial purposes, the industrial purpose for which it was held by the company was un-related to the sugar factory. No such plea having been raised or urged at any stage, the subject land has been rightly taken as vested in the Corporation. The land in question is situate in the immediate vicinity of the sugar factory. The fact situation is thus completely different from that of *Burwal*

Sugar Mills case (supra) where the registered office of the company sought to be taken over was in Kanpur while the sugar factory was itself at Baragaon. Distance between the factory and the asset held by the company may not be a true test for determining whether the same is a part of the undertaking but in the absence of any evidence, showing cultivation, the close proximity of the land to the factory is a strong circumstance that cannot be ignored.

21. In the circumstance, therefore, we find it difficult to uphold the order passed by the High Court not only because the High Court acted as if it was sitting in appeal over the findings of fact recorded by the authorities below but also because the High Court failed to notice that the land was exempted from the Ceiling Act on the ground of being used for industrial purpose which in the context of the present case meant that it was used for the purpose of sugar factory. These appeals, accordingly, succeed and are hereby allowed, the judgment and order passed by the High Court is set aside and Writ Petition No.187 of 2007 filed by the respondent-company dismissed but in the circumstances, without any order as to costs.

R.P. Appeals allowed.

RESURGENCE INDIA

v.

ELECTION COMMISSION OF INDIA & ANR.

(Writ Petition (Civil) No. 121 of 2008)

SEPTEMBER 13, 2013

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

Constitution of India, 1950:

Art. 19(1)(a) – Freedom of speech and expression – Right to know – Voter's right to know about the candidate contesting the election – Explained – Held: Citizen's right to know of the candidate who represents him in Parliament/State Assembly will constitute an integral part of Art.19(1)(a); and any act, which is derogative of the fundamental rights is ultra vires — Purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Art.19(1)(a) — The citizens are entitled to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting.

Representation of the People Act, 1951:

s.33-A read with ss. 36 and 125-A – Right to information – Candidates contesting the election – Filing of nomination paper – Affidavit with particulars left blank – Furnishing of information as required under sub-s.(1) of s.33-A and as laid down in the judgments of Supreme Court in Association for Democratic Reforms and People's Union for Civil Liberties – Principles culled out and directions issued – Held: Every candidate is obligated to file an affidavit with relevant information with regard to his/her criminal antecedents, assets and liabilities and educational qualifications — Filing of affidavit with particulars left blank will render the affidavit

nugatory – If a candidate fails to fill the blanks even after reminder by Returning Officer, the nomination paper is fit to be rejected – Power of Returning Officer to reject nomination paper must be exercised very sparingly but the bar should not be laid so high that justice itself is prejudiced – It is clarified that Para 73 of the judgment in People's Union for Civil Liberties will not come in the way of Returning Officer to reject the nomination paper when affidavit is filed with particulars left blank.

s.36 read with s.33-A – Scrutiny of nomination – Duty of Returning Officer – Explained – Furnishing of relevant information – Held: Returning Officer can compel a candidate to furnish information relevant on the date of scrutiny — Election Commission already has a standard draft format for reminding the candidates to file an affidavit as stipulated – Another clause may be inserted in the format for reminding the candidates to fill the blanks with relevant information thereby conveying the message that no affidavit with particulars left blank will be entertained.

s.125 A(i) – Filing of false affidavit and filing of affidavit with particulars left blank – Held: Filing of affidavit with particulars left blank will be directly hit by s.125A(i) — However, as the nomination paper itself is rejected by Returning Officer, there is no reason to penalize the candidate again for the same act by prosecuting him/her — If the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank are treated at par, it will result in breach of fundamental right guaranteed under Art.19(1)(a) of the Constitution, viz., 'right to know', which is inclusive of freedom of speech and expression.

During the Punjab Legislative Assembly Elections, 2007, the petitioner-organization noticed large scale irregularities in most of the affidavits filed by the candidates of different political parties as regards

furnishing of information relating to candidate's conviction/acquittal/discharge in any criminal offence in the past, any criminal case pending against him, information regarding assets of the candidate as well as of his/her spouse and dependants etc. as was required consequent upon judgments of the Supreme Court in *Association for Democratic Reforms*[1] ***and*** *People's Union for Civil Liberties*[2] ***(PUCL).*** **The petitioner, therefore, made a representation to the Election Commission of India regarding large number of non-disclosures in the affidavits filed by the contestants in the State and poor level of scrutiny by the Returning Officers. The Election Commission of India expressed its inability in rejecting the nomination papers solely due to furnishing of false/ incomplete information in the affidavits, in view of the judgment in *PUCL.* The petitioner filed the instant writ petition for issuance of specific directions to effectuate meaningful implementation of the judgments in.** *Association for Democratic Reforms* **and *PUCL,* and also to direct the respondents to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants are complete in all respects and to reject the affidavits having blanks.**

Disposing of the petition, the Court

HELD: 1.1. The Returning Officers derive the power to reject the nomination papers on the ground that the contents to be filled in the affidavits are essential to effectuate the intent of the provisions of the Representation of the People Act, 1951 and as a consequence, leaving the affidavit blank will in fact make it impossible for the Returning Officer to verify whether

1. *Union of India v. Association for Democratic Refroms* 2002 (3) SCR 696.
2. *People's Union for Civil Liberties (PUCL) and Another vs. Union of India & Anr.* 2003 (2) SCR 1136.

the candidate is qualified or disqualified which indeed will frustrate the object behind filing the same. [Para 16] [376-C-E]

Shaligram Shrivastava vs. Naresh Singh Patel **2002 (5) Suppl. SCR 585 = (2003) 2 SCC 176 – relied on.**

1.2. This Court, in *Association for Democratic Reforms,* held that a voter has the elementary right to know full particulars of a candidate who is to represent him in Parliament and such right to get information is universally recognized natural right flowing from the concept of democracy and is an integral part of Art.19(1)(a) of the Constitution of India. It was further held that the voter's speech or expression in case of election would include casting of votes, as voter speaks out or expresses by casting of vote. For this purpose, information about the candidate to be selected is a must. Thus, in unequivocal terms, it is recognized that the citizen's right to know of the candidate who represents him in Parliament/State Assembly will constitute an integral part of Art.19(1)(a) of the Constitution; and any act, which is derogative of the fundamental rights is at the very outset *ultra vires*. With this background, s.33A was inserted in the Representation of the People Act, 1951 with effect from 24.08.2002, the purpose being to effectuate the right contemplated in *Association for Democratic Reforms.* All the candidates were mandated to disclose the criminal antecedents u/s.33A by filing an affidavit as prescribed along with the nomination paper filed u/s.33(1) of the RP Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, every candidate is obligated to file an affidavit with relevant information with regard to his/her criminal antecedents, assets and liabilities and educational qualifications. [Paras 17, 18 and 19] [376-E, 378-B-H; 379-A]

Union of India vs. Association for Democratic Reforms and Another **2002 (3) SCR 696 = (2002) 5 SCC 294– relied on.**

1.3. Filing of affidavit stating that the information given in the affidavit is correct, but leaving the contents blank would not fulfill the objective behind filing the same. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Art.19(1)(a) of the Constitution. For that purpose, the Returning Officer can compel a candidate to furnish information relevant on the date of scrutiny. The Election Commission already has a standard draft format for reminding the candidates to file an affidavit as stipulated. Another clause may be inserted in the format for reminding the candidates to fill the blanks with the relevant information thereby conveying the message that no affidavit with particulars left blank will be entertained. If the Election Commission accepts the nomination papers in spite of particulars left blank in the affidavits, it will directly violate the fundamental right of the citizen to know the criminal antecedents, assets and liabilities and educational qualification of the candidate, and will rescind the verdict in *Association for Democratic Reforms.* Para 73 of the in *People's Union for Civil Liberties* judgment nowhere contemplates a situation where it bars the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank. [Paras 20, 21, 23 and 26] [379-B-C, D-E; 380-H; 381-A, G-H]

People's Union for Civil Liberties (PUCL) and Another vs. Union of India & Anr. **2003 (2) SCR 1136 = (2003) 4 SCC 399 – relied on.**

2.1. Section 125A of the RP Act lays down that the act of failure on the part of the candidate to furnish relevant information, as mandated by s.33A will result in

prosecution of the candidate. If the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank are treated at par, it will result in breach of fundamental right guaranteed under Art.19(1)(a) of the Constitution, viz., 'right to know', which is inclusive of freedom of speech and expression as interpreted in *Association for Democratic Reforms.* [para 24 and 25] [381-C-D, E-F]

2.2. The principles that emerge from the enunciation of law in the judgments of this Court can be summarized in the form of following directions:

(i) The voter has the elementary right to know full particulars of a candidate who is to represent him in Parliament/Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Art.19(1)(a) of the Constitution.

(ii) The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Art.19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

(iii) Filing of affidavit with particulars left blank will render the affidavit nugatory.

(iv) It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect

to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. The power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

(v) It is clarified that Para 73 of the judgment in *People's Union for Civil Liberties* case will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with particulars left blank.

(vi) The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

(vii) Filing of affidavit with particulars left blank will be directly hit by s.125A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, there is no reason to penalize the candidate again for the same act by prosecuting him/her. [Para 27] [382-B-H; 383-A-C]

Case Law Reference:

2002 (3) SCR 696	**relied on**	**Para 1**
2003 (2) SCR 1136	**relied on**	**Para 1**
2002 (5) Suppl. SCR 585	**relied on**	**Para 14**

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Civil) No. 121 of 2008.

A. Mariarputham, Prashant Bhushan, Rohit K. Singh, Meenakshi Arora, A. Radhakrishna, Yusuf Khan, B. Krishna

Prasad, Ritu Bhardwaj for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. This writ petition, under Article 32 of the Constitution of India, has been filed to issue specific directions to effectuate meaningful implementation of the judgments rendered by this Court in *Union of India vs. Association for Democratic Reforms and Another* (2002) 5 SCC 294 and *People's Union for Civil Liberties (PUCL) and Another vs. Union of India & Anr.* (2003) 4 SCC 399 and also to direct the respondents herein to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants are complete in all respects and to reject the affidavits having blank particulars.

Background:

2. In order to maintain purity of elections and to bring transparency in the process of election, this Court, in *Association for Democratic Reforms* (supra), directed the Election Commission of India-Respondent No. 1 herein to issue necessary orders, in exercise of its power under Article 324 of the Constitution, to call for information on affidavit from each candidate seeking election to the Parliament or a State Legislature as a necessary part of his nomination paper furnishing therein information relating to his conviction/acquittal/ discharge in any criminal offence in the past, any case pending against him of any offence punishable with imprisonment for 2 years or more, information regarding assets (movable, immovable, bank balance etc.) of the candidate as well as of his/her spouse and that of dependants, liability, if any, and the educational qualification of the candidate.

3. Pursuant to the above order, the Election Commission, vide order dated 28.06.2002, issued certain directions to the candidates to furnish full and complete information in the form of an affidavit, duly sworn before a Magistrate of the First

Class, with regard to the matters specified in *Association for Democratic Reforms* (supra). It was also directed that non-furnishing of the affidavit by any candidate or furnishing of any wrong or incomplete information or suppression of any material information will result in the rejection of the nomination paper, apart from inviting penal consequences under the Indian Penal Code, 1860. It was further clarified that only such information shall be considered to be wrong or incomplete or suppression of material information which is found to be a defect of substantial character by the Returning Officer in the summary inquiry conducted by him at the time of scrutiny of nomination papers.

4. In *People's Union for Civil Liberties (PUCL)* (supra), though this Court reaffirmed the aforementioned decision but also held that the direction to reject the nomination papers for furnishing wrong information or concealing material information and verification of assets and liabilities by means of a summary inquiry at the time of scrutiny of the nominations cannot be justified.

5. Pursuant to the above, the Election Commission, vide order dated 27.03.2003, held its earlier order dated 28.06.2002 non-enforceable with regard to verification of assets and liabilities by means of summary inquiry and rejection of nomination papers on the ground of furnishing wrong information or suppression of material information.

6. Again, the Election Commission of India, vide letter dated 02.06.2004 directed the Chief Electoral Officers of all the States and Union Territories that where any complaint regarding furnishing of false information by any candidate is submitted by anyone, supported by some documentary evidence, the Returning Officer concerned should initiate action to prosecute the candidate concerned by filing formal complaint before the appropriate authority.

Brief facts:

7. In the above backdrop, the brief facts of the case in hand are as under:- Resurgence India-the petitioner herein is a non-governmental organization (NGO) registered under the Societies Registration Act, 1860 and is working for social awakening, social empowerment, human rights and dignity. During Punjab Legislative Assembly Elections, 2007, the petitioner-organization undertook a massive exercise under the banner "Punjab Election Watch' and affidavits pertaining to the candidates of six major political parties in the State were analyzed in order to verify their completeness. During such campaign, large scale irregularities were found in most of the affidavits filed by the candidates.

8. On 09.02.2007, the petitioner-organization made a representation to the Election Commission of India regarding large number of non-disclosures in the affidavits filed by the contestants in the State of Punjab and poor level of scrutiny by the Returning Officers. Vide letter dated 20.02.2007, the Election Commission of India expressed its inability in rejecting the nomination papers of the candidates solely due to furnishing of false/incomplete information in the affidavits in view of the judgment in *People's Union for Civil Liberties (PUCL)* (supra).

9. Being aggrieved of the same, the petitioner-organization has preferred this petition for the issuance of a writ of *mandamus* to make it compulsory for the Returning Officers to ensure that the affidavits filed by the contestants should be complete in all respects and to reject those nomination papers which are accompanied by incomplete/blank affidavits. The petitioner-organization also prayed for deterrent action against the Returning Officers in case of acceptance of such incomplete affidavits in order to remove deficiencies in the format of the prescribed affidavit.

10. Heard Mr. Prashant Bhushan, learned counsel for the petitioner-organization, Ms. Meenakshi Arora, learned counsel

for the Election Commission of India-Respondent No. 1 herein and Mr. A. Mariarputham, learned senior counsel for the Union of India.

Prayer/Relief Sought for:

Stand of the Petitioner-Organization:

11. The Petitioner-organization pleaded for issuance of appropriate writ/direction including the writ of *mandamus* directing the respondents herein to make it compulsory for the Returning Officers to ensure that the affidavits filed by the candidates are complete in all respects and to reject those nomination papers, which are accompanied by blank affidavits.

Stand of the Election Commission of India:

It is the stand of the Election Commission of India that the judgment in *People's Union for Civil Liberties (PUCL)* (supra) does not empower the Returning Officers to reject the nomination papers solely due to furnishing of false/incomplete/ blank information in the affidavits signed by the candidates. In succinct, they put forth the argument that they do not have any latitude for rejecting the nomination papers in view of the above mentioned judgment. However, learned counsel for the Election Commission of India made an assertion that the Election Commission too is of the opinion that incomplete nomination papers must be rejected. Hence, the Election Commission of India sought for clarification in that regard.

Stand of the Union of India:

The Union of India also put forth the similar contention as raised by the Election Commission. Interestingly, the Union of India also raised a query as to how this Court will be justified in accepting the nomination paper with false information but rejecting the nomination paper for filing affidavit with particulars left blank and hence prayed that both the abovesaid situations must be treated at par.

Discussion:

12. Both the petitioner-organisation and the respondent/ UOI sought divergent remedies against the same situation viz., wherein the affidavit filed by the candidate stating the information given as correct but the particulars of the same are left blank. The petitioner-organisation is seeking for rejection of nomination paper in such a situation whereas the Union of India is pleading for treating it at par with filing false affidavit and to prosecute the candidate under Section 125A of the Representation of the People Act, 1951 (in short 'the RP Act').

13. In order to appreciate the issue involved, it is desirable to refer the relevant provisions of the RP Act. Sections 33A, 36 and 125A of the RP Act read as under:

> **"33A. Right to information**.—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether –
>
> (i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;
>
> (ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more.
>
> (2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form veryfying the information specified in sub-section (1).

> (3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.
>
> **36. Scrutiny of nomination.**—(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.
>
> (2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:—
>
> (a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely: Articles 84, 102, 173 and 191,
>
> Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or
>
> (b) that there has been a failure to comply with any of the provisions of section 33 or section 34 ; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in clause (b) or clause (c) of sub-section (2) shall be deemed to authorize the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement, of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a

disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.

125A. Penalty for filing false affidavit, etc.—A candidate who himself or through his proposer, with intent to be elected in an election,-

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) gives false information which he knows or has reason to believe to be false; or

(iii) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

14. In view of the above, the power to reject the nomination paper by the Returning Officer on the instance of candidate filing the affidavit with particulars left blank can be derived from the reasoning of a three-Judge Bench of this Court in *Shaligram Shrivastava vs. Naresh Singh Patel* (2003) 2 SCC 176. In the aforesaid case, the nomination paper of a candidate got rejected at the time of scrutiny under Section 36(2) of the RP Act on the ground that he had not filled up the proforma prescribed by the Election Commission wherein the candidate was required to state whether he had been convicted or not for

any offence mentioned in Section 8 of the RP Act. In actual, the candidate therein had filed an affidavit stating that the information given in the proforma was correct but the proforma itself was left blank. The candidate therein coincidentally raised somewhat similar contention as pleaded by the Union of India in the present case. The candidate pleaded that his nomination paper could not be rejected on the ground that he had not filled up the proforma prescribed since no such proforma was statutorily provided under the provisions of the Act or under the rules framed thereunder. It was contended that the Commission could not legislate to prescribe a proforma; at best it can only be an executive instruction of the Election Commission whereas the petitioner had filled the proforma prescribed under the Rules, which did not suffer from any defect.

15. Although, the grounds of contention may not be exactly similar to the case on hand but the reasoning rendered in that verdict will come in aid for arriving at a decision in the given case. In order to arrive at a conclusion in that case, this Court traversed through the objective behind filing the proforma. The proforma mandated in that case was required to be filed as to the necessary and relevant information with regard to the candidate in the light of Section 8 of the RP Act. This Court further held that at the time of scrutiny, the Returning Officer is entitled to satisfy himself whether the candidate is qualified and not disqualified, hence, the Returning Officer was authorized to seek such information to be furnished at the time or before scrutiny. It was further held that if the candidate fails to furnish such information and also absents himself at the time of the scrutiny of the nomination papers, then he is obviously avoiding a statutory inquiry being conducted by the Returning Officer under Section 36(2) of the RP Act relating to his being not qualified or disqualified in the light of Section 8 of the RP Act. It is bound to result in defect of a substantial character in the nomination. This Court further held as under:-

"17. In the case in hand the candidate had failed to furnish

such information as sought on the pro forma given to him and had also failed to be present personally or through his representative at the time of scrutiny. The statutory duty/ power of Returning Officer for holding proper scrutiny of nomination paper was rendered nugatory. No scrutiny of the nomination paper could be made under Section 36(2) of the Act in the light of Section 8 of the Act. It certainly rendered the nomination paper suffering from defect of substantial character and the Returning Officer was within his rights in rejecting the same."

16. It is clear that the Returning Officers derive the power to reject the nomination papers on the ground that the contents to be filled in the affidavits are essential to effectuate the intent of the provisions of the RP Act and as a consequence, leaving the affidavit blank will in fact make it impossible for the Returning Officer to verify whether the candidate is qualified or disqualified which indeed will frustrate the object behind filing the same. In concise, this Court in *Shaligram* (supra) evaluated the purpose behind filing the proforma for advancing latitude to the Returning Officers to reject the nomination papers.

17. In the light of the above reasoning, now let us assess the facts of the given case. In *Association for Democratic Reforms* (supra), this Court arrived at a decision that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and it would include their decision of casting votes in favour of a particular candidate. This Court further held that if there was a disclosure by a candidate with regard to his criminal antecedents, assets and liabilities and educational qualification, then it would strengthen the voters in taking appropriate decision of casting their votes. This Court further stated as under:-

"38. If right to telecast and right to view to sport games and right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why

the right of a citizen/voter - a little man - to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a). In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry, which makes democracy a farce. Therefore, casting of vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information, which includes freedom to hold opinions. Entertainment is implied in freedom of 'speech and expression' and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy.

46. …4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

…7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters's speech or expression in case of election would include casting of votes, that is to say, **voter speaks out or expresses by casting vote.** For this purpose, information about the

candidate to be selected is a must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. **The little man may think over before making his choice of electing law-breakers as law-makers."**

18. Thus, this Court held that a voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament and such right to get information is universally recognized natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution. It was further held that the voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Thus, in unequivocal terms, it is recognized that the citizen's right to know of the candidate who represents him in the Parliament will constitute an integral part of Article 19(1)(a) of the Constitution of India and any act, which is derogative of the fundamental rights is at the very outset *ultra vires*.

19. With this background, Section 33A of the RP Act was enacted by Act 72 of 2002 with effect from 24.08.2002. Thus, the purpose of the Act 72 of 2002 was to effectuate the right contemplated in *Association for Democratic Reforms* (supra). However, the legislators did not incorporate all the suggestions as directed by this Court in the above case but for mandating all the candidates to disclose the criminal antecedents under Section 33A by filing an affidavit as prescribed along with the nomination paper filed under Section 33(1) of the RP Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, at present, every candidate is obligated to file an affidavit with relevant information with regard to their

criminal antecedents, assets and liabilities and educational qualifications.

20. Let us now test whether the filing of affidavit stating that the information given in the affidavit is correct but leaving the contents blank would fulfill the objective behind filing the same. The reply to this question is a clear denial. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India. The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting. When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory.

21. For that purpose, the Returning Officer can very well compel a candidate to furnish information relevant on the date of scrutiny. We were appraised that the Election Commission already has a standard draft format for reminding the candidates to file an affidavit as stipulated. We are of the opinion that along with the above, another clause may be inserted for reminding the candidates to fill the blanks with the relevant information thereby conveying the message that no affidavit with blank particulars will be entertained. We reiterate that it is the duty of the Returning Officer to check whatever the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

22. We also clarify to the extent that in our coherent opinion the above power of rejection by the Returning Officer is not barred by Para 73 of *People's Union for Civil Liberties (PUCL)* (supra) which reads as under:-

> "73. While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in Assn for Democratic Reforms case, the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the 'documentary proof'. Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time prima facie it appears that the Election Commission is required to revise its instructions in the light of directions issued in Assn for Democratic Reforms case and as provided under the Representation of the People Act and its third Amendment**.**"

23. The aforesaid paragraph, no doubt, stresses on the importance of filing of affidavit, however, opines that the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary inquiry at the time of scrutiny of the nominations cannot be justified since in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. This Court was of the opinion that if sufficient time is provided, the candidate may be in a position to produce proof to contradict the objector's version*.* The object behind penning down the aforesaid reasoning is to accommodate genuine situation where the candidate is trapped by false allegations and is unable to rebut the allegation within a short time. Para 73 of

the aforesaid judgment nowhere contemplates a situation where it bars the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank. Therefore, we hereby clarify that the above said paragraph will not come in the way of the Returning Officer to reject the nomination paper if the said affidavit is filed with blank columns. The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank, if he desires that his nomination paper be accepted by the Returning Officer.

24. At this juncture, it is vital to refer to Section 125A of the RP Act. As an outcome, the act of failure on the part of the candidate to furnish relevant information, as mandated by Section 33A of the RP Act, will result in prosecution of the candidate. Hence, filing of affidavit with blank space will be directly hit by Section 125A(i) of the RP Act. However, as the nomination paper itself is rejected by the Returning officer, we find no reason why the candidate must again be penalized for the same act by prosecuting him/her.

25. If we accept the contention raised by Union of India, viz., the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank should be treated at par, it will result in breach of fundamental right guaranteed under Article 19(1)(a) of the Constitution, viz., 'right to know', which is inclusive of freedom of speech and expression as interpreted in *Association for Democratic Reforms* (supra).

26. In succinct, if the Election Commission accepts the nomination papers in spite of blank particulars in the affidavits, it will directly violate the fundamental right of the citizen to know the criminal antecedents, assets and liabilities and educational qualification of the candidate. Therefore, accepting affidavit with blank particulars from the candidate will rescind the verdict in *Association for Democratic Reforms* (supra). Further, the subsequent act of prosecuting the candidate under Section

125A(i) will bear no significance as far as the breach of fundamental right of the citizen is concerned. For the aforesaid reasons, we are unable to accept the contention of the Union of India.

27. **What emerges from the above discussion can be summarized in the form of following directions:**

(i) The voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament/ Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.

(ii) The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

(iii) Filing of affidavit with blank particulars will render the affidavit nugatory.

(iv) It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

(v) We clarify to the extent that Para 73 of *People's Union for Civil Liberties case* (supra) will not come in the way of the

Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.

(vi) The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

(vii) Filing of affidavit with blanks will be directly hit by Section 125A(i) of the RP Act However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her.

28. The Writ Petition is disposed of with the above directions.

R.P. Writ Petition disposed of.

H. P. SCHEDULED TRIBES EMPLOYEES FEDERATION & ANR.

v.

HIMACHAL PRADESH S. V. K. K. & ORS.

INTERLOCUTORY APPLICATION NO. 6 OF 2012

IN

SPECIAL LEAVE PETITION (C.) NO. 30143 OF 2009

SEPTEMBER 13, 2013

[SURINDER SINGH NIJJAR AND PINAKI CHANDRA GHOSE, JJ.]

SERVICE LAW:

Reservation in promotion – Consequential seniority – Compliance of direction in M. Nagaraj's case – State of Himachal Pradesh issuing circulars dated 7.9.2007 and 23.1.2010 – Plea of State Government to await the finalization of 117th Constitution Amendment – Held: The material on record indicates the intention of the State not to comply with the earlier decision to implement the policy of reservation in promotions and the grant of consequential seniority – State Government, directed to take a final decision on the issue — The proposed 117th Constitutional Amendment would not adversely affect the merits of the claim of petitioner, for grant of promotion with consequential seniority.

Practice and Procedure:

Statement made by counsel before Court – Disposal of case accordingly — Held: When a statement is made before the court it is, as a matter of course, assumed that it is made sincerely and is not an effort to over-reach the court — The statement by the counsel is not expected to be flippant, mischievous, misleading and certainly not false — This confidence in statements made by the counsel is founded on

the assumption that the counsel is aware that he is an officer of the court.

On 7.9.2007, with a view to give effect to the 85th Amendment to the Constitution, the State of Himachal Pradesh issued instructions by letter No. PER (AP)-C-F (1)-1/2005, and thereby provided for assignment of consequential seniority to the members of Scheduled Castes and Scheduled Tribes in service under the State. The policy was to take effect from 17.6.1995. The instructions were challenged by respondent No. 1 and the High Court by order dated 18.09.2009 relying upon *M. Nagaraj*[1], allowed the writ petition, and quashed the instructions dated 07.09.2007 as the State Government had issued the instructions without collecting the (quantifiable) data. The State Government by letter dated 16.11.2009, rescinded the instructions dated 07.09.2007. The judgment of the High Court dated 18.09.2009 was challenged in SLP (Civil) No. 30143 of 2009 by Himachal Pradesh Schedules Tribes Employees Federation, and Himachal Pradesh SC/ST Government Employees Welfare Association. By order dated 26.04.2010, the Supreme Court disposed of the SLP No. 30143 of 2009 and the contempt petition No. 27 of 2010 on the undertaking given by the State to collect more details with regard to representation of SCs/STs and to pass appropriate orders. The State Government was stated to have collected the necessary data. Thereafter I. A. No. 6 was filed by the petitioner seeking a direction to the State to take a decision on the issue of reservation on the basis of data already collected or submitted to Cabinet Sub Committee on 25.04.2011. The Court, by order dated 06.09.2012, directed the State Government to take the necessary policy decision on the question of providing reservation to the members of Scheduled Castes and

1. *M. Nagaraj & Ors. v. Union of India & Ors.* 2006 (7) Suppl. SCR 336.

Scheduled Tribes in the matter of promotion in the services within the State. On 31.01.2013, the State directed that since the Constitution (117the Amendment) Bill, 2012 was pending consideration in Parliament, the matter regarding implementation of Constitution (85th Amendment) Act, 2001 in the State may be deferred. On 04.02.2013, the State Government sought modification of the restriction placed by the Court by order dated 07.01.2013, whereby the State was directed not to make any promotions. The State Government prayed that the existing reservation system in promotions be continued till the finalization of matter relating to the Constitution (117th Amendment) Bill, 2012.

Allowing the I. A., the Court

HELD: 1.1. The issue relates only to ensuring that the respondent-State implements its own decisions. The only excuse given by the State for not implementing its decision dated 31.01.2013 is the pendency of the 117th Amendment Bill. The State had admitted that necessary data had been collected and placed before the Cabinet Sub-Committee on 25.04.2011, which has the base as on 31.10.2009. The State also affirmed that fresh data showing the position as on 30.06.2011 would be available shortly. Therefore, it is patently apparent that there is no impediment in the way of the respondent State to take the necessary policy decision on the basis of the available data. Non-compliance of the direction in *M. Nagaraj* was the sole reason for which the High Court has quashed the instructions dated 07.09.2007. With the collection of the necessary data, there exists no justifiable reason not to take the required decision. [para 28] [402-E-H; 403-A]

1.2. The State has taken a policy decision for implementation of the 85th Constitution Amendment Act. Instructions dated 07.09.2007, had been issued for

implementation of the policy decision. In these instructions, the Government had decided to grant seniority to SC/ST employees. But this circular dated 07.09.2007 was withdrawn by Circular dated 16.11.2209. However, the implementation of this Circular was stayed by this Court on 04.12.2009. The State then issued another Circular No. PER(AP)-C-F(1)/2009 dated 20.01.2010 withdrawing circular dated 16.11.2009. Thus, the situation prevalent prior to the Circular dated 07.09.2007 was again operative for making promotions. Thereafter another Circular was issued on 23.01.2010 amending the circular dated 16.11.2009 by substituting words "wherever reservation is available" with the words "wherever consequential seniority by virtue of reservation will be applicable." The issuance of so many circulars is indication of the intention of the State not to comply with the earlier decision to implement the policy of reservation in promotions and the grant of consequential seniority. Therefore, a statement was made before this Court on 26.04.2010 on the basis of which the SLP was disposed of. This Court is of the opinion that the statement was only to avoid a decision on merits with regard to the correctness of the impugned judgment of the High Court. [para 29] [403-C-H; 404-A-B]

2.1. When a statement is made before this Court it is, as a matter of course, assumed that it is made sincerely and is not an effort to over-reach the court. Numerous matters even involving momentous questions of law are very often disposed of by this Court on the basis of the statement made by the counsel for the parties. The statement is accepted as it is assumed without doubt, to be honest, sincere, truthful, solemn and in the interest of justice. The statement by the counsel is not expected to be *flippant, mischievous, misleading and certainly not false*. This confidence in statements made by the counsel is founded on the assumption that the counsel is aware

that he is an officer of the Court. [para 30] [404-B-D]

Rendel v. Worsley **(1967) 1 QB 443 - referred to.**

2.2. In the instant case, on 26.04.2010 a statement was made on behalf of the State Government that "the state intends to collect more details with regard to representation of the SCs/STs and to pass appropriate orders within a reasonable time, i.e., approximately within three months after collecting the necessary details and datas." It can not be said that the applicants are seeking a mandamus to adopt a policy in reservation. They want the State to implement its own decisions. [para 30] [405-B-C, D-E]

2.3. The final excuse offered by the State is that it awaits the finalization of the 117th Constitution Amendment. The reasons put forward for not honouring the statement solemnly made to this Court on 26.04.2010 cannot be accepted. This Court has been more than considerate to the requests made by the State for extension of time. The proposed 117th Constitutional Amendment would not adversely affect the merits of the claim of the petitioners for grant of promotion with consequential seniority. The purpose of amendment is to remove any impediment in the grant of consequential seniority upon promotion on the basis of reservation. [para 32-33] [405-G-H; 406-A-B, E-F]

2.4. Furthermore, the proposed amendment is to be introduced with retrospective effect from 17.6. 1995. In this view of the matter, there can be no impediment in the way of the State Government to implement the policy of reservation which existed till the issuance of the various instructions prior to the making of the Statement before this Court on 26.4. 2010. The State Government is directed to take a final decision on the issue either on the basis of the data already submitted to the Cabinet Sub-Committee on 25.4.2011 or on the basis of the data

reflecting the position as on 30.6.2011. [para 34-35] [408-G-H; 409-B]

M. Nagaraj & Ors. Vs. Union of India & Ors. **2006 (7) Suppl. SCR 336 = 2006 (8) SCC 212 – referred to.**

Karam Chand Vs. Haryana State Electricity Board & Ors. **1988 (3) Suppl. SCR 702 = 1989 (1) Suppl. SCC 342,** *Indra Sawhney & Ors. Vs. Union of India & Ors.* **1992 (2) Suppl. SCR 454 = 1992 (3) Suppl. SCC 217;** *R.K. Sabharwal & Ors. Vs. State of Punjab & Ors.,* **1995 (2) SCR 35 = 1995 (2) SCC 745;** *Salauddin Ahmed & Anr. Vs. Samta Andolan* **2012 (7) SCR 402 = 2012 (10) SCC 235,** *Union of India & Ors. Vs. Virpal Singh Chauhan & Ors.* **1995 (4) Suppl. SCR 158 = 1995 (6) SCC 684,** *Ajit Singh Januja & Ors. Vs. State of Punjab & Ors.* **1996 (3) SCR 125 = 1996 (2) SCC 715,** *Chander Pal & Ors. Vs. State of Haryana* **1997 (10) SCC 474,** *Jagdish Lal & Ors. Vs. State of Haryana & Ors.* **1997 (6) SCC 538,** *Ajit Singh & Ors. (II) Vs. State of Punjab & Ors.* **1999 (2) Suppl. SCR 521 = 1999 (7) SCC 209;** *Suraj Bhan Meena & Anr. Vs. State of Rajasthan & Ors.* **2010 (14) SCR 532= 2011(1) SCC 467; *and*** *Uttar Pradesh Power Corporation Limited Vs. Rajesh Kumar & Ors.* **2012 (4) SCR 118 = 2012 (7) SCC 1;** *C.A. Rajendran Vs. Union of India (UOI) & Ors.* **1968 (1) SCR 721; and** *Union of India Vs. R. Rajeshwaran & Anr.* **2003 (9) SCC 294 - cited.**

Case Law Reference:

1988 (3) Suppl.SCR 702	**cited**	**para 6**
1992 (2) Suppl. SCR 454	**cited**	**para 7**
1995 (2) SCR 35	**cited**	**para 7**
2006 (7) Suppl. SCR 336	**referred to**	**para 10**
2012 (7) SCR 402	**cited**	**para 21**
1995 (4) Suppl. SCR 158	**cited**	**para 22**
1996 (3) SCR 125	**cited**	**para 22**
1996 (2) SCC 715	**cited**	**para 22**

1997 (10) SCC 474	**cited**	**para 22**
1997 (6) SCC 538	**cited**	**para 22**
1999 (2) Suppl. SCR 521	**cited**	**para 22**
2010 (14) SCR 532	**cited**	**para 22**
2012 (4) SCR 118	**cited**	**para 22**
1968 (1) SCR 721	**cited**	**para 23**
2003 (9) SCC 294	**cited**	**para 23**
(1967) 1 QB 443	**referred to**	**para 30**

CIVIL APPELLATE JURISDICTION : I.A. No. 6

IN

SLP (Civil) No(s). 30143 of 2009.

Wtih

Contempt Petition (C) No. 91 of 2013.

IN

SLP (Civil) No. 30143 of 2009.

From the Judgment & Order dated 18.09.2009 of the High Court of Himachal Pradesh at Shimla in Civil Writ Petition Transferred No. 2628 of 2008.

Vijay Hansaria, Dr. Rajeev Dhawan, Kanika Singh, Ashok Mathur, Debasis Misra, Kiran Suri, S.J. Amith, Suryanaryana Singh, Pragati Neekhra, Varinder Kumar Sharma, P.V. Yogeswaran for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This Interlocutory Application No.6 was filed on 16th March, 2012, by the appellants herein in the S.L.P. (Civil) No. 30143 of 2009, seeking direction to the State of Himachal Pradesh to take a decision on the issue of reservation in promotions on basis of data already collected or submitted to Cabinet Sub Committee on 25th April, 2011 within a period of one month. For the

purpose of adjudicating the present I.A., it would be pertinent to make a reference to facts concerning S.L.P. (Civil) No. 30143 of 2009 that was disposed of by this Court on 26th April, 2010.

2. SLP (Civil) No. 30143 of 2009 was filed against judgment and order dated 18th September, 2009 passed by the High Court of Himachal Pradesh. By the said judgment/ order, the High Court allowed the CWP-T No. 2628 of 2008 and thereby quashed the instructions dated 7th September, 2007 issued by the State of Himachal Pradesh. The said instructions made provision for reservation in promotions with consequential seniority in favour of Scheduled Castes and Scheduled Tribes in all classes of posts in services under the State.

3. The aforesaid S.L.P. was disposed of on 26th April, 2010 by passing the following order:-

> "The State of Himachal Pradesh has issued a Circular on 07.09.2007 as regards the promotion of SCs/STs in the State service. The said circular was challenged by the respondent no.1 and the circular was quashed by the High Court by the impugned judgment. Learned counsel appearing for the State submits that the circular issued on 07.09.2007 has since been withdrawn as the State intends to collect more details with regard to representation of SCs/ STs and to pass appropriate orders within reasonable time i.e. approximately within three months after collecting necessary details and datas. The petitioner would be at liberty to take appropriate steps, if any adverse order is passed. This Special Leave Petition and the Contempt Petition are thus disposed of finally."

4. Although the present I.A.No.6 is filed in the disposed of SLP, it would be appropriate to notice the manner, in which the order dated 16th April, 2010 came to be passed.

5. On 27th November, 1972, Government of India issued instructions vide letter No. 27-2/71-Estt(SCT), whereby provision was made for providing reservation in promotion for the members of Scheduled Castes and Scheduled Tribes. On 24th April, 1973, State of Himachal Pradesh issued instructions vide Letter No. 2-11/72-DP (Appt.), whereby reservation was provided for promotion of employees. On 9th/13th August, 1973, State of Himachal Pradesh issued instructions vide Letter No 2-11/72-DP (Apptt.), and thereby, followed the Reservation policy of the Union Government relating to promotion for the members of Scheduled Castes and Scheduled Tribes. It may be mentioned here that the Reservation Policy of the Union Government was set out in Letter/Order dated 2nd March, 1972, 24th March, 1972 and 11th August, 1972, 28th October 1972, 30th January, 1973 and 12th March, 1973.

6. Meanwhile on 31st October, 1988, this Court in the case of *Karam Chand Vs. Haryana State Electricity Board & Ors.,*[1] approved the grant of consequential seniority in promotions given to Scheduled Castes and Scheduled Tribes. The State of Himachal Pradesh, by instructions vide letter No. PER (AP-II) F (1)-1/87 dated 31st January, 1989, introduced Reservation Roster in both direct recruitment and promotions.

7. Later, a Constitution Bench of this Court in *Indra Sawhney & Ors. Vs. Union of India & Ors.*[2] held that reservation in promotion is not permissible under Article 16(4) of Constitution and directed to discontinue such reservations after 5 years. Thereafter, in *R.K. Sabharwal & Ors. Vs. State of Punjab & Ors.,*[3] this court held that the operation of roster must stop running when the prescribed quota of posts have been occupied by the reserved category. It was in this backdrop that the Parliament of India enacted Constitution (77th Amendment)

1. (1989) Supp 1 SCC 342.
2. 1992 (Supp) 3 SCC 217.
3. 1995 (2) SCC 745

Act, 1995, thereby adding Article 16(4A) which permits the State to provide reservation in matters of promotion to Scheduled castes and Scheduled Tribes. In 2001, Parliament approved Constitution (85th Amendment) Act, permitting promotions with consequential seniority to government service.

8. On 7th September, 2007, with a view to give effect to the 85th Amendment to the Constitution, the State of Himachal Pradesh issued instructions vide letter No. PER (AP)-C-F (1)-1/2005, and thereby provided for assignment of consequential seniority to the members of Scheduled Castes and Scheduled Tribes in service under the State. The policy was to take effect from 17th June, 1995. The instructions further provided, as under:-

> "Thus as a result of this decision of State Government to implement the aforesaid amendment with effect from 17.6.1995, State Government employees belonging to Scheduled Castes and Scheduled Tribes shall also be entitled to consequential seniority on promotion by virtue of rule of reservation. However, controlling factors or compelling reasons, namely, backwardness and inadequacy of representation which enable the State to provide for reservation keeping in mind the over all efficiency of State administration under Article 335 will continue to apply with mandatory compliance of Constitutional requirement of Ceiling limit of 50% quantitative limitation. Moreover it is made clear that in the State of Himachal Pradesh the State Government has already made provision for reservation in promotion after due consideration prior to 19.10.2006, thus, collection of data as mandated by para 124 of the judgment in M.Nagaraj case (AIR 2007 Sc.71) is not required."

9. The instructions were challenged by respondent No.1 herein by filing Original Application No. 19 of 2008 before the Himachal Pradesh Administrative Tribunal, Shimla. Since the Administrative Tribunal was thereafter abolished, the O.A. was

transferred to be heard and adjudicated by the High Court of Himachal Pradesh at Shimla and was renumbered as Civil Writ Petition –T No. 2628 of 2008. By the impugned order dated 18th September, 2009, the High Court allowed the writ petition, and quashed the instructions dated 7th September, 2007.

10. In its judgment, the High Court *inter alia* relied upon the law laid down in *M. Nagaraj & Ors. Vs. Union of India & Ors.*[4] The High Court noticed that the State was bound to collect data to show that the so called backward classes are actually backward and they are inadequately represented in the service under the State. It was also held that the State has to provide for reservations in such a manner that the efficiency of administration is not adversely affected. The High Court then proceeded to determine that whether such an exercise was undertaken by the State while issuing instructions dated 7th September, 2007. The High Court came to the conclusion that the State admittedly has not carried out any such exercise to collect such data. The reason provided by the State for not carrying out such an exercise was that since there was already a policy for providing reservation in promotion in the State prior to the judgment in *Indra Sawhney's* case (supra), collection of data as mandated in *M. Nagaraj's* case (supra) is not required. It was also urged on behalf of the State that the decision for providing reservations in promotions was taken after "due consideration". These reasons were rejected by the High Court, and it was held that:

> "'Due Consideration' is totally different from collecting quantifiable data. This exercise has to be conducted and no reservation in promotion can be made without conducting such an exercise. Therefore, the State cannot be permitted to make reservations till such exercise is carried out and clear-cut quantifiable data is collected on the lines indicated in *M.Nagaraj's* case. We may also point

4. (2006) 8 SCC 212.

out that other than making vague reference to "due consideration" having been done, till date the State has not produced before us any clear-cut quantifiable data which could establish the need for reservation.

Merely because the amended provision of the Constitution enable the State to make reservation is no ground not to collect data. Therefore, the instructions have to be struck down as being violate of the law laid down in M. Nagaraj's case by the Apex Court."

11. In compliance with the aforesaid directions, the State of Himachal Pradesh, vide letter No. PER (AP)-C-F (1)01/2009 dated 16th November, 2009, rescinded the instructions dated 7th September, 2007. In the letter (dated 16th November, 2009), the State of Himachal Pradesh also directed that all the promotions made on or after 7th September, 2007 may be regulated in accordance with the procedure applicable prior to the said date. The letter also made it clear that promotion policy has to be interpreted in the manner "as if the instructions dated 7th September, 2007 and subsequent instructions thereof had never been issued."

12. The judgment of the High Court dated 18th September, 2009 was challenged in the Civil Appeal @ SLP (Civil) No. 30143 of 2009, filed by Himachal Pradesh Schedules Tribes Employees Federation, and Himachal Pradesh SC/ST Government Employees Welfare Association. This Court, by order dated 4th December, 2009 issued notice and granted interim stay on the operation of the impugned judgment. Meanwhile, the State Government withdrew the instructions dated 16th November, 2009 and issued fresh instructions vide letter dated 20th January, 2010, which were further amended by letter dated 16th March, 2010. By the aforesaid two letters, the Government Departments were refrained from making further promotions where consequential seniority is involved.

13. By order dated 26th April, 2010, this Court disposed

of the S.L.P. (Civil) No. 30143 of 2009 and the contempt petition No. 27 of 2010 on the undertaking given by the State. In the said order, this court *inter alia* observed as under:

"Learned counsel appearing for the State submits that the circular issued on 07.09.2007 has since been withdrawn as the State intends to collect more details with regard to representation of SCs/STs and to pass appropriate orders within reasonable time i.e. approximately within three months after collecting necessary details and datas (*sic*). The petitioner would be at liberty to take appropriate steps, if any adverse order is passed. This Special Leave Petition and the Contempt Petition are thus disposed of finally."

14. This Court, by order dated 7th July, 2010, dismissed I.A. No. 5 in the aforesaid SLP seeking modification/ clarification of the aforesaid order.

15. It appears that the State of Himachal Pradesh collected the necessary data as on 31st December, 2011. This is evident from the answers given to the Assembly Question Unstarred No.196, to which the reply was given on 4th April, 2012. The question was specific in the following terms:

"(a) How much is the present SC/ST backlog in the State; and

(b) What steps the Government is taking to fill-up the backlog of these categories?"

The answer to the aforesaid question (a) and (b) was that

"The necessary information is at Annexure - "A"."

16. A perusal of the Annexure-A shows that the details of backlog position of Scheduled Castes/Scheduled Tribes in direct recruitment and promotion in the services of the State and Boards/Corporations/Public Sector Undertakings etc. as

on 31st December, 2011, is clearly indicated.

17. It was in this backdrop that I.A. No. 6 came to be preferred by the petitioner herein on 16th March, 2012, seeking a direction to the State to take a decision on the issue of reservation on the basis of data already collected or submitted to Cabinet Sub Committee on 25th April, 2011 within a period of one month. The petitioner also prayed for stay on all the promotions, pending the decision taken in this case. This Court, by order dated 6th September, 2012, directed inter alia as under:

> "In our opinion, in the facts and circumstances of this case, it is necessary for the State of Himachal Pradesh to take the necessary policy decision on the question of providing reservation to the members of Scheduled Castes and Scheduled Tribes in the matter of promotion in the services within the State of Himachal Pradesh, within a period eight weeks from the date of receipt of a copy of this order."
>
> The State of Himachal Pradesh is directed to place on record the compliance report before the next date of hearing."

This direction was given upon consideration of the submission of the State in its reply to this I.A. dated 4th July, 2012, that the petitioners themselves had reservations with regard to the data placed before the Cabinet Sub-Committee on 25th April, 2011. Accordingly, the Government decided to collect afresh data and material showing position as on 30th June, 2011. According to the respondent State, the policy decision would have to relate to the data showing the position as on 30th June, 2011, which would be available shortly.

18. On 2nd November, 2012, an I.A. was filed by the State of Himachal Pradesh in the Civil Appeal, seeking extension of time for complying with the order of this Court until 31st January,

2013. By order dated 7th January, 2013, this Court granted extension to the State of Himachal Pradesh as sought and further directed it not to make any promotions in the meantime. On 11th January, 2013, the State of Himachal Pradesh issued instructions to all the departments to stop granting promotions. On 31st January, 2013, the State of Himachal Pradesh in Letter No. PER (AP)-C-F(1)-2/2011 noticed that since the Constitution (117th Amendment) Bill, 2012 is pending consideration in the Parliament, the matter regarding implementation of Constitution (85th Amendment) Act, 2001 in the state may be deferred. It was also decided that the instructions dated 11th January, 2013 issued pursuant to interim order dated 7th January, 2013 in I.A. No. 6 of 2012 in SLP (Civil) No. 30143 of 2009 will continue in operation in the meantime. On 4th February, 2013, the State of Himachal Pradesh sought modification of the restriction placed by this Court by order dated 7th January, 2013, whereby the State was directed not to make any promotions. The stand taken in the said affidavit was that since the Constitution (117th Amendment) Bill, 2012 is pending consideration in the Parliament, the matter regarding implementation of Constitution (85th Amendment) Act, 2001 in the state may be deferred. The State Government also prayed that the existing reservation system in promotions be continued till the finalization of matter relating to the Constitution (117th Amendment) Bill, 2012.

Submissions:

19. Mr. Vijay Hansaria, learned senior counsel appeared for the appellants. Whereas, Dr. Rajeev Dhawan, learned senior counsel appeared for the respondent no.1, State of Himachal Pradesh.

20. Mr. Hansaria submitted that the State Government has already taken a decision to provide reservation in promotion. In its order dated 31st January, 2013, the State Government mentions that the existing system for providing reservation, prior to order dated 7th September, 2007 will continue. Therefore,

mandamus is to be issued not for providing reservations but to direct the State to implement its own policy decision.

21. Mr. Hansaria further submitted that the data collected by the State reveals that there is backlog in the government services. Further, it was submitted that data was available to the State Government on 31st October, 2009, but this fact was suppressed from this Court. It was also argued that the defence put by the State that they deferred the matter concerning implementation of 85th Amendment on the ground of 117th Amendment Bill is without any basis since it already has the data. Thus, they must take a decision thereon. Learned senior counsel relied upon *Salauddin Ahmed & Anr. Vs. Samta Andolan,*[5] to submit that this Court had earlier directed the State to comply with the directions given in *M. Nagaraj* (supra) and *Suraj Bhan Meena* (supra).

22. Dr. Dhawan, learned senior counsel, firstly, reiterated the well known principles concerning the concept of reservation laid down by this Court in the following cases: *Indra Sawhney* (supra), *R.K.Sabharwal* (supra), *Union of India & Ors. Vs. Virpal Singh Chauhan & Ors.*[6]*, Ajit Singh Januja & Ors. Vs. State of Punjab & Ors.*[7]*, Chander Pal & Ors. Vs. State of Haryana*[8]*, Jagdish Lal & Ors. Vs. State of Haryana & Ors.,*[9] *Ajit Singh & Ors. (II) Vs. State of Punjab & Ors.*[10] Dr. Dhawan relied upon *M. Nagaraj's* case (supra), and submitted that this Court has laid down certain conditions which are required to be complied with by the State before providing Reservation under Article 16(4). The learned senior counsel relied on the following observations of this Court:

5. (2012) 10 SCC 235.
6. (1995) 6 SCC 684.
7. (1996) 2 SCC 715.
8. (1997) 10 SCC 474.
9. (1997) 6 SCC 538.
10. (1999) 7 SCC 209)

> "As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."

Further, Dr. Dhawan submitted that this Court, applying the aforesaid ratio in *M. Nagaraj's* case(supra), quashed the reservation policy of the respective states in *Suraj Bhan Meena & Anr. Vs. State of Rajasthan & Ors.*[11] and *Uttar Pradesh Power Corporation Limited Vs. Rajesh Kumar & Ors.*[12]

23. Dr. Dhawan further submitted that no mandamus would lie to order reservations or de-reservations because Article 16(4), (4A) & (4B) are enabling provisions. Learned senior counsel relied upon *C.A. Rajendran Vs. Union of India (UOI) & Ors.*[13] *Union of India Vs. R. Rajeshwaran & Anr.*[14] and *Ajit Singh (II)'s* case (supra).

11. (2011) 1 SCC 467.
12. (2012) 7 SCC 1.
13. 1968 (1) SCR 721.
14. (2003) 9 SCC 294.

24. We have very carefully considered the submissions made by the learned counsel for the parties.

25. Undoubtedly, in the case of *C.A. Rajendran* (supra), this Court has held as follows:-

> "Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. In other words, Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately represented in the Services of the State. We are accordingly of the opinion that the petitioner is unable to make good his submission on this aspect of the case."

26. Similarly, in *R.Rajeshwaran* (supra), this Court observed as follows:-

> **"9.** In Ajit Singh (II) v. State of Punjab this Court held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Language of Article 15(4) is identical and the view in Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan and Superintending Engineer, Public Health v. Kuldeep Singh that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and, therefore, these two judgments cannot be held to be laying down the correct law. In these circumstances, neither the respondent in the present case could have sought for a direction nor the High Court could have granted the same."

27. The aforesaid dicta reiterated the earlier

pronouncement of this Court in *Ajit Singh (II)'s* case (supra), wherein this Court observed as follows:-

> **28.** We next come to the question whether Article 16(4) and Article 16(4-A) guaranteed any fundamental right to reservation. It should be noted that both these articles open with a non obstante clause — "Nothing in this Article shall prevent the State from making any provision for reservation…." (emphasis supplied) There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4-A) on the other. There is no directive or command in Article 16(4) or Article 16(4-A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4-A) is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963.

28. In our opinion, the reliance placed on the aforesaid observations by Dr. Dhwan is misplaced. Controversy herein is not about whether the court can issue mandamus to introduce the policy of reservation. The issue relates only to ensuring that the respondent-State implements its own decisions. The only excuse given by the State for not implementing its decision dated 31st January, 2013 is the pendency of the 117th Amendment Bill. As noticed earlier, the State had admitted in answer to the unstarred Assembly question that necessary data had been collected. Furthermore, in the reply dated 4th July, 2012 to this application the State has admitted the existence of the data which was placed before the Cabinet Sub-Committee on 25th April, 2011, which has the base as on 31st October, 2009. The State also affirmed that fresh data showing the position as on 30th June, 2011, would be available shortly. Therefore, it is patently apparent that there is no impediment in the way of the respondent State to take the necessary policy decision on the basis of the available data. Non-compliance of the direction in *M. Nagaraj* was the sole

reason for which the High Court had quashed the instructions dated 7th September, 2007. With the collection of the necessary data, there exists no justifiable reason not to take the required decision.

29. The State has very skilfully avoided a decision on merits in SLP (C) No.30143 of 2009. Thereafter, it is a series of false starts to avoid the implementation of their own decision and the directions issued by this Court. In our opinion, that this cat and mouse game has gone far enough. Therefore, we will not content ourselves with the justification that the State has to await the outcome of the 117th Amendment. We see no relevance of the amendment to the implementation by the State of its earlier decision making reservation in promotions. It has taken a policy decision for implementation of the 85th Constitution Amendment Act. Instructions dated 7th September, 2007 had been issued for implementation of the policy decision. In these instructions, H.P. Government had decided to grant seniority to SC/ST employees. But this circular dated 7th September, 2007 was withdrawn in compliance of the High Court judgment by issuing Circular No. PER(AP)-CF(1)-1/2009 dated 16th November, 2009. But the implementation of this Circular was stayed by this Court in SLP (C) No.30143 of 2009 on 4th December, 2009. The State then issued another Circular No. PER(AP)-C-F(1)-1/2009 dated 20th January, 2010 withdrawing circular dated 16th November, 2009. Thus, the situation prevalent prior to the Circular dated 7th September, 2007 was again operative for making promotions. Thereafter another Circular was issued on 23rd January, 2010 amending the circular dated 16th November, 2009 by substituting words "wherever reservation is available" with the words "wherever consequential seniority by virtue of reservation will be applicable." The issuance of so many circulars is indication of the intention of the State not to comply with the earlier decision to implement the policy of reservation in promotions and the grant of consequential seniority. Therefore, a clever statement was made before this Court on

26th April, 2010 on the basis of which the SLP was disposed of. We are of the opinion that the statement was only to avoid a decision on merits with regard to the correctness of the impugned judgment of the High Court.

30. When a statement is made before this Court it is, as a matter of course, assumed that it is made sincerely and is not an effort to over-reach the court. Numerous matters even involving momentous questions of law are very often disposed of by this Court on the basis of the statement made by the learned counsel for the parties. The statement is accepted as it is assumed without doubt, to be honest, sincere, truthful, solemn and in the interest of justice. The statement by the counsel is not expected to be *flippant, mischievous, misleading and certainly not false*. This confidence in statements made by the learned counsel is founded on the assumption that the counsel is aware that he is an officer of the Court. Here we would like to allude to the words of Lord Denning, in the case of *Rendel vs. Worsley*[15] about the conduct expected of an Advocate. "As an advocate, he is a minister of justice equally with the Judge……I say "all he *honourably* can" because his duty is not only to his client. He has a duty to the Court which is *paramount*. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflicts with his duty to the court. The code which requires a Barrister to do all this is not a code of law. It is the

15. [1967] 1 QB 443.

code of honour." In our opinion, the aforesaid dicta of Lord Denning is an apt exposition of the very high standard of moral, ethical and professional conduct expected to be maintained by members of the legal profession. We expect no less of an Advocate/Counsel in this country. Here, in this case, on 26th April, 2010 a statement was made on behalf of the State of H.P. that "the state intends to collect more details with regard to representation of the SCs/STs and to pass appropriate orders within a reasonable time, i.e., approximately within three months after collecting the necessary details and datas." Having very deftly avoided a decision on merits in the SLP (C) No.30143 of 2009, the State has totally failed to live up to the solemn statement made to this Court. It has hedged and hemmed and prevaricated from 26th April, 2010 till date. Inspite of the requisite data being available, the policy of reservation already adopted by the State has not been implemented. We, therefore, do not agree with Dr. Dhawan that the applicants are seeking a mandamus to adopt a policy in reservation. From the above narration, it is evident that the applicants want the State to implement its own decisions.

31. The prayer is :

"Direct the Respondent/State Government to decide the case in time bound manner on the basis of data already available/submitted to Cabinet Sub Committee on 25.4.2011 within a period of one month and ;

Further direct stay on all promotions pending decision taken in this Case."

32. The final excuse offered by the State for not granting the aforesaid relief is that the State now awaits the finalisation of the 117th Constitution Amendment. We decline to accept the reasons put forward for not honouring the statement solemnly made to this Court on 26th April, 2010. This Court has been more than considerate to the requests made by the State for extension of time. This last excuse about awaiting the

finalisation of the proposed 117th Constitutional Amendment is the proverbial last straw on the camel's back. As stated earlier, the proposed 117th Constitutional Amendment would not adversely affect the merits of the clam of the petitioner for grant of promotion with consequential seniority. By the aforesaid proposed amendment, the existing Article 16 clause (4A) is to be substituted by the following clause 4A:-

"(4A) Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward and nothing in this article or in article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State."

33. A bare perusal of the aforesaid would show that the purpose of amendment is to remove any impediment in the grant of consequential seniority upon promotion on the basis of reservation. The aforesaid conclusion is stated explicitly in the Statement of Objects and Reasons for the proposed 117th Constitutional amendment. For facility of reference, the Statement of Objects and Reasons is reproduced hereunder:-

"Statement of Objects and Reasons

The Scheduled Castes and the Scheduled Tribes have been provided reservation in promotions since 1955. This was discontinued following the judgment in the case of Indra Sawhney Vs. Union of India, wherein it was held that it is beyond the mandate of Article 16(4) of the Constitution of India. Subsequently, the Constitution was amended by the Constitution (Seventy-seventh Amendment) Act, 1995

and a new clause (4A) was inserted in article 16 to enable the Government to provide reservation in promotion in favour of the Scheduled Castes and the Scheduled Tribes. Subsequently, clause (4A) of article 16 was modified by the Constitution (Eighty-fifth Amendment) Act, 2001 to provide consequential seniority to the Scheduled Castes and the Scheduled Tribes candidates promoted by giving reservation.

The validity of the constitutional amendments was challenged before the Supreme Court. The Supreme Court while deliberating on the issue of validity of Constitutional amendments in the case of *M. Nagaraj Vs. UOI & Ors.,* observed that the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation in promotion.

Relying on the judgment of the Supreme Court in M. Nagaraj case, the High Court of Rajasthan and the High Court of Allahabad have struck down the provisions for reservation in promotion in the services of the State of Rajasthan and the State of Uttar Pradesh, respectively. Subsequently, the Supreme Court has upheld the decisions of these High Courts striking down provisions for reservation in respective States.

It has been observed that there is difficulty in collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. Moreover, there is uncertainty on the methodology of this exercise.

Thus, in the wake of the judgment of the Supreme Court in M. Nagaraj case, the prospects of promotion of the employees belonging to the Scheduled Castes and the Scheduled Tribes are being adversely affected.

Demands for carrying out further amendment in the Constitution were raised by various quarters. A discussion on the issue of reservation in promotion was held in Parliament on 3-5-2012. Demand for amendment of the Constitution in order to provide reservation for the Scheduled Castes and the Scheduled Tribes in promotion has been voiced by the Members of Parliament. An All-Party Meeting to discuss the issue was held on 21-08-2012. There was a general consensus to carry out amendment in the Constitution, so as to enable the State to continue the scheme of reservation in promotion for the Scheduled Castes and the Scheduled Tribes as it existed since 1995.

In view of the above, the Government has reviewed the position and has decided to move the constitutional amendment to substitute clause (4A) of article 16, with a view to provide impediment-free reservation in promotion to the Scheduled Castes and the Scheduled Tribes and to bring certainty and clarity in the matter. It is also necessary to give retrospective effect to the proposed clause (4A) of article 16 with effect from the date of coming into force of that clause as originally introduced, that is, from the 17th day of June, 1995."

34. The aforesaid leaves no manner of doubt that the amendment is with the view to provide *impediment free* reservation in promotion to the Scheduled-Castes and Scheduled-Tribes and to bring certainty and clarity in the matter. Furthermore, the aforesaid proposed amendment is to be introduced with retrospective effect from 17th June, 1995. In view of the above, there can be no impediment in the way of the State Government to implement the policy of reservation which existed till the issuance of the various instructions prior to the making of the Statement before this Court on 26th April, 2010. It is time to put an end to this charade; this never ending

process of extensions and hold the State to honour its statements.

35. We, therefore, allow this Interlocutory Application and direct the State of Himachal Pradesh to take a final decision on the issue either on the basis of the data already submitted to the Cabinet Sub-Committee on 25th April, 2011 or on the basis of the data reflecting the position as on 30th June, 2011, within a period of three months from today. Till a final decision is taken, the direction restraining the State of Himachal Pradesh from making any promotion shall continue.

R.P. I.A. allowed.

STANDARD CHARTERED BANK

v.

DHARMINDER BHOHI AND OTHERS

(Civil Appeal No. 8486 of 2013)

SEPTEMBER 13, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002:

Delay in disposal of cases and granting of adjournments by DRT and DRAT – Object of the Act – Explained -- Held: Delay in disposal of application by DRT and appeal by DRAT has the potentiality of creating a corrosion in the economic spine of the country – Grant of an adjournment should be an exception and not a routine and mechanical matter – Tribunals are expected to act in quite promptitude, so that an ingenious litigant does not take recourse to dilatory toctics -- In the case at hand, there was no reason for DRAT to keep on adjourning the matter and finally dispose it by passing an extremely laconic order -- A curative step is warranted and Chairman and Members of DRAT shall endeavour to remain alive to the obligations as expected of them by such special legislations, namely, SARFAESI Act and RDB Act – Adjournments.

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993:

ss.19 and 22 – Object of the Act and the procedure before Tribunal – Held: DRT and DRAT shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to the rules framed -- They have been conferred

powers to regulate their own procedure, as the very purpose of their establishment is to expedite disposal of applications and appeals preferred before them -- They have the character of specialized institutions with expertise and have been conferred jurisdiction to decide the lis in speedy manner so that the larger public interest, that is, the economy of the country does not suffer.

s.19(25) – Powers of Tribunal – Held: s.19(25) confers limited powers -- Tribunal has been given power under the statute to pass such other orders and give such directions as to give effect to its orders or to prevent abuse of its process or to secure the ends of justice -- Tribunal is required to function within the statutory parameters – It does not have any inherent powers – Tribunal cannot assume the role of a court of different nature which can grant "liberty to initiate any action against the bank" -- Taking note of a submission made at the behest of auction purchaser and then proceed to say that he is at liberty to file any action against bank for any omission committed by it, has no sanction of law -- Therefore, the observation, namely, "liberty is also given to the auction purchaser to file action against the bank for any omission committed by it", is deleted -- Judgment of High Court whereby it has declined to interfere with the grant of liberty by DRAT is also set aside.

Respondent no. 1 obtained a home loan from the appellant-Bank on 17.5.1999, and on his failure to repay the same, the Bank proceeded to sell the mortgaged property, which he had purchased from respondent no. 2- developer. Respondent no. 1 filed an application u/s 17(1) read with s.19 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act). The matter was taken to DRAT and then to High Court. Meanwhile the property was sold and respondent no. 3, the auction purchaser, deposited the required amount. However, the

DRT, by its order dated 25.10.2005 granted time to the borrower to deposit the entire amount with the bank and the developer, and Rs. 1 lakh to auction purchaser-respondent no. 3, as compensation. Respondent no. 1 filed an appeal before the DRAT, which, by an interim order directed him to deposit Rs.7.55 lakhs with the Bank, and while disposing of the appeal, inter alia, directed the Bank to return Rs.25,60,000/- to auction-purchaser-respondent no. 3 and granted liberty to respondent no. 3 to file action against appellant-Bank "for any omission committed by it". The writ petition filed by the Bank was dismissed.

Partly allowing the appeal, the Court

HELD: 1.1. Delay in disposal of the application by the DRT and the appeal by DRAT has the potentiality of creating a corrosion in the economic spine of the country. It is significant to note that though the appeal was admitted by the DRAT on 14.11.2005, yet the same was disposed of on 20.5.2010 almost after four and half years. The DRAT has totally forgotten the obligation cast on it under the RDB Act and also has remained quite oblivious of the salient features and the seminal purpose of SARFAESI Act. [para 2 and 12] [416-H; 417-A; 423-C-D]

1.2. The intendment of SARFAESI Act is for speedy recovery of dues to the bank. In this backdrop, the tribunals are expected to act in quite promptitude regard being had to the nature of the lis and see to it that an ingenious litigant does not take recourse to dilatory tactics. Neither the DRT nor the appellate tribunal can afford to sit over matters as that would fundamentally frustrate the purpose of the legislation. A tribunal dealing with an appeal should not allow adjournments for the asking. It should be kept uppermost in mind by the Presiding Officer of the tribunal that grant of an

adjournment should be an exception and not a routine and mechanical matter. [para 20] [429-B-E]

Mardia Chemicals Ltd. And others v. Union of India and Others **2004 (3) SCR 982 = 2004 (4) SCC 311;** *Authorised Officer, Indian Overseas Bank and another v. Ashok Saw Mill* **2009 (11) SCR 599 = 2009 (8) SCC 366;** *United Bank of India v. Satyawati Tondon and others* **2010 (9) SCR 1 = 2010 (8) SCC 110;** *Transcore v. Union of India and another* **2006 (9) Suppl. SCR 785 = 2008 (1) SCC 125'** *Official Liquidator, Uttar Pradesh and Uttarakhand v. Allahabad Bank and others* **(2013) 4 SCC 381 – referred to.**

1.3. In the case at hand, there was no reason for the DRAT to keep on adjourning the matter and finally dispose it by passing an extremely laconic order. Such a delineation by the DRAT only indicates its apathy and indifference to the role ascribed to it under the enactment and the trust bestowed on it by the legislature. A curative step is warranted and the Chairman and the members of the DRAT shall endeavour to remain alive to the obligations as expected of them by such special legislations, namely, the SARFAESI Act and the RDB Act. Besides, the Tribunal as well as the DRAT has to rise to the occasion, for delay in adjudication of these types of litigations brings a long term disaster. [para 20-21] [429-E-G; 430-C-D]

1.4. Be it noted, the principal purpose is to see that recovery of dues which is essential function of any banking institution does not get halted because of procrastinated delineation by the tribunal. The legislature by s. 22 of the RDB Act has provided that the DRT and the appellate tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to the rules framed. They have been conferred powers to regulate their own procedure as given to them, as the very

purpose of their establishment is to expedite disposal of the applications and the appeals preferred before them. They have the character of specialized institutions with expertise and conferred jurisdiction to decide the lis in speedy manner so that the larger public interest, that is, the economy of the country does not suffer. But in the case at hand the DRAT did not dispose of the appeal for four and a half years. [para 21] [429-G-H; 430-A-C]

1.5. The procedure of tribunals has been elaborately stated in s.19 of the RDB Act. Sub-s.(25) of s.19 makes it quite clear that the tribunal has been given power under the statute to pass such other orders and give such directions to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Thus, the tribunal is required to function within the statutory parameters. The tribunal does not have any inherent powers and it is limpid that s.19(25) confers limited powers. [para 27] [432-G-H; 433-A]

Upper Doab Sugar Mills Ltd. v. Shahdara (Delhi) Saharanpur Light Rly. Co. Ltd. **1963 SCR 333 =** *Union of India v. Orient Paper and Industries Limited* **2009 (16) SCC 286;** *Union of India v. R. Gandhi, President, Madras Bar Association* **2010 (6) SCR 857 = 2010 (11) SCC 1;** *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala* **1962 SCR 339 = 1961 AIR 1669;** *Jaswant Sugar Mills Ltd. v. Lakshmi Chand* **1963 Suppl. SCR 242 = 1963 AIR 677,** *Associated Cement Companies Ltd. v. P.N. Sharma* **1965 SCR 366 = 1965 AIR 1595; and** *Kihoto Hollohan v. Zachillhu* **1992 (1) SCR 686 = 1992(2) Suppl. SCC 651 – relied on.**

1.6. The sacrosanct purpose with which the tribunals have been established is to put the controversy to rest between the banks and the borrowers and any third party who has acquired any interest. They have been conferred jurisdiction by special legislations to exercise a particular power in a particular manner as provided under the Act.

It cannot assume the role of a court of different nature which really can grant "liberty to initiate any action against the bank". It is only required to decide the lis that comes within its own domain. If it does not fall within its sphere of jurisdiction it is required to say so. Taking note of a submission made at the behest of the auction purchaser and then proceed to say that he is at liberty to file any action against the bank for any omission committed by it, has no sanction of law. The said observation is wholly bereft of jurisdiction, and indubitably is totally unwarranted in the obtaining factual matrix. Therefore, the observation, namely, "liberty is also given to the auction purchaser to file action against the bank for any omission committed by it", is deleted. Such grant of liberty was not within the domain of the tribunal regard being had to its limited jurisdiction under such special legislation and further, especially, when the bank was not a party to the compromise. The judgment of the High Court whereby it has declined to interfere with the grant of liberty by the DRAT is also set aside. [para 30-31] [435-B-G]

1.7. DRAT is required to adjudicate the lis in an apposite manner. It is hearing an appeal from an order passed by the DRT. It cannot afford to pass a laconic order. However, this Court refrains from remitting the matter to the DRAT for the reasons, namely, (i) the auction purchaser has not challenged the order passed by the DRAT before the High Court nor has he come to this Court and further, the grievance of the bank was only with regard to grant of liberty; and (ii) with the efflux of time the bank has realized its money and the property has changed hands. In the circumstances, it is unnecessary to direct the DRAT to proceed with the appeal de novo. [para 32] [436-A, B-D]

Case Law Reference:

2004 (3) SCR 982	**referred to**	**para 14**
2009 (11) SCR 599	**referred to**	**para 15**
2010 (9) SCR 1	**referred to**	**para 16**
2006 (9) Suppl. SCR 785	**referred to**	**para 17**
(2013) 4 SCC 381	**referred to**	**para 19**
1963 SCR 333	**relied on**	**para 27**
2009 (16) SCC 286	**relied on**	**para 27**
2010 (6) SCR 857	**relied on**	**para 28**
1962 SCR 339	**relied on**	**para 28**
1963 Suppl. SCR 242	**relied on**	**para 28**
1965 SCR 366	**relied on**	**para 28**
1992 (1) SCR 686	**relied on**	**para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8486 of 2013.

From the Judgment & Order dated 16.07.2010 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 4694 of 2010.

Sanjay Jain, Sanjeev Sagan, Chandra Bhushan Prasad, A. Ansari for the Appellant.

Jatin, Krishan Kumar, Mohit D. Ram for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal depicts a factual score where this Court is constrained to say that delay in disposal of the

application by the Debts Recovery Tribunal and the appeal by Debt Recovery Appellate Tribunal have the effect potentiality of creating a corrosion in the economic spine of the country. It exposits a factual expose' which is not only perplexing but usher in a sense of puzzlement which in the ultimate eventuate compels one to ask: "How long can the financial institutions would suffer such procrastination? How far the public interest be put to hazard because of small, and sometimes contrived individual interest? To what extent the defaulters be given protection in the name of balancing the stringent powers vested on the banks and the statutory safegurards prescribed in favour of loanees? Even assuming there are legal lapses and abuses, how long the statutory tribunals take to put the controversy to rest being oblivious of the fact that the concept of flexibility is insegragably associated with valuation of any asset? One is bound to give a wake up call and we so do by saying "Tasmat Uttistha Kaunteya"; "Awake, Arise, 'O' Partha".

3. The present appeal, by special leave, is directed against the judgment and order dated 16.7.2010 passed by the High Court of Delhi in Writ Petition (C) No. 4694 of 2010.

4. The facts which are essential to be stated are that the appellant-bank sanctioned home loan of Rs.12.00 lacs to the respondent No. 1 on 17.5.1999 payable in equal monthly instalments and in lieu of that the borrower mortgaged the property which was purchased from the developer, the respondent No. 2 herein. Since the respondent No. 1 failed to pay the instalments, the loan account was declared as "non performing asset" in terms of the NPA guidelines issued by the Reserve Bank of India. On 28.12.20012 the appellant-bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act) to the respondent No. 1 directing him to pay the amount due as on 27.12.2002. Since the respondent No. 1 did not make any payment till 27.11.2004, the Tehsildar, Gurgaon took

possession of the mortgaged property as per the order of the District Magistrate and handed over the same to the appellant-bank. On 10.3.2005 the appellant-bank in order to sell the said property published possession-cum-sale notice in the leading newspapers stating the terms and conditions of the public auction. In response to the said notice the respondent No. 3 submitted its bid form dated 10.3.2005 for purchasing the said property by way of auction. The said action was challenged by filing an application under Section 17(1) read with Section 19 of the SARFAESI Act before the Debt Recovery Tribunal (DRT). The application was presented on 15.3.2005 before the DRT II, Delhi and the concerned Presiding Officer declined to pass any order and sought appropriate directions from the Debt Recovery Appellate Tribunal (DRAT) for transfer of the said application to some other DRT. As no order was passed by the DRAT, the matter was again placed before the DRT II on 25.10.2005 and on that day the DRT was informed that the bank had already taken over possession of the property in question and put the same into auction for sale. The borrower preferred a writ petition before the High Court on 17.5.2005 and the High Court directed the borrower to deposit certain amount with the bank and further directed status quo, as regards the property, to be maintained. Eventually, the High Court vide order dated 25.7.2005 only directed the DRT to dispose of the appeal within two months. While finally disposing of the writ petition the High Court opined that though no order was passed by the DRT as the Presiding Officer was awaiting orders from the appellate forum, the bank ought not have decided to sell the property to render the appeal of the borrower to become infructuous and tried to non-suit him.

5. Be it noted, the DRAT vide its order dated 3.6.2005 transferred the case to another Debt Recovery Tribunal. As the property was sold in auction, the auction purchaser, the third respondent herein, filed an application for impleadment which was allowed. Before the DRT her stand was that she had deposited the entire amount of Rs.25.60 lacs with the bank and

if the borrower was still interested to retain his property, he had to purchase it from her. The DRT by its order dated 25.10.2005 adverted to the facts, assertions made in the application filed by the borrower, reply filed by the bank and appreciating the evidence on record came to hold that there was no infirmity in the Statement of Accounts of the bank and thereafter taking into consideration the facts and circumstances granted 15 days time to the borrower to pay the entire amount to the bank and the developer, M/s. Unitech, and Rs.1.00 lac as compensation to the auction purchaser. Thereafter, the DRT directed as follows: -

> "In case the applicant/appellant fails to deposit this amount within 15 days, the appeal/application be treated as dismissed and respondent No. 1 is free to confirm the sale in favour of the auction purchaser. The amount deposited by the applicant herein during the pendency of present proceedings as per the order of Hon'ble High Court of Delhi be given due adjustment."

6. The borrower instead of complying with the said order, preferred appeal No. 267 of 2005 before the DRAT which, on 14.11.2005, admitted the appeal and passed the following interim order: -

> "Pending passing further orders, the appellant shall deposit a sum of Rs.7.55 lakhs directly to the 1st respondent-bank. However, there shall be stay of implementation of the order in favour of the 2nd and 3rd respondent."

7. It is apt to state here that the appeal was directed to be posted on 7.12.2005. The bank filed a reply before the DRAT highlighting the consistent default by the borrower. The auction purchaser, the third respondent herein, did not file an appeal before the DRAT but on 25.1.2006 filed an application under Section 151 of the Code of Civil Procedure. The DRAT took up the application on 7.9.2007 and observed that as the purchaser had already been impleaded as a party to the

appeal, she would have the right to address the Court and, accordingly disposed of the application. As the factual narration would reveal the appeal was adjourned from time to time and, eventually on 20.5.2010, the DRAT passed the following order: -

> "Counsel for the parties present. I have heard them at length. Counsel for the appellant is ready to pay the entire amount up to date minus the penal interest for which no provision was made in that context. The column of penalty portion was left blank and no amount was mentioned therein therefore I am of the considered view that the appellant has not to pay the penal interest. The residue amount be paid to the bank within 45 days from today as agreed.
>
> The builder has already recovered the amount of Rs.7,11,745/- from the bank. That amount will be paid by the appellant to the bank directly within 45 days as agreed. The appellant will also pay Simple Interest @ 9% from the date of payment to the builder till its realization within 45 days.
>
> As agreed by the Auction Purchaser he is ready to accept Rs.5 lacs as costs from the appellant and would not insist for auction sale and would surrender his rights in favour of the appellant.
>
> The said amount be deposited with the Registrar of this court within the period of 45 days failing which the appeal shall stand dismissed on this deposit as well as other deposits stated above. The auction purchaser can withdraw this.
>
> Liberty is also given to the Auction Purchaser to file action against the bank for any omission committed by it. Liberty is given to the appellant as well as to the builder to get the Registry executed in favour of the appellant within

two months thereafter i.e. after the elapse of 45 days mentioned above. Stamp duty etc. will be paid by the appellant.

The bank is further directed to furnish the statement of account minus the penal clause within ten days.

The bank is further directed to return the amount deposited by the Auction Purchaser in the sum of Rs.25,60,000/- along with the normal interest @ 9% per annum simple without prejudice to his right against the bank.

The matter stand disposed off. Auction Purchaser and the appellant are directed to sign this order."

8. Aggrieved by the aforesaid order the bank preferred writ petition and raised two contentions, namely (i) the DRAT had modified a reasonable and detailed order passed by DRT by a cryptic order, and (ii) that the DRAT erred in granting liberty to the third respondent to initiate any action against the bank for any omission. The High Court, by the impugned order, in the first paragraph dealt with the element of the claim of penal interest and opined that the grievance of the bank was baseless. Thereafter, adverting to the grant of 9% interest towards deposit made by the auction purchaser with the bank, observed that there was no error in the same as the money was lying with the bank. Thereafter, the writ court proceeded to observe as follows:-

"Learned counsel for the auction purchaser points out that, in fact, this interest of 9 per cent is really not full compensation but only part compensation as liberty has been granted to the auction purchaser to pursue the remedy against the bank as according to the auction purchaser this property was auctioned by the petitioner bank without even disclosing the factum of the lis pending between the owner and the bank in the DRT. We see no

reason to exercise our extraordinary writ jurisdiction under Article 226 of the Constitution of India."

9. Mr. Sanjay Jain, learned senior counsel appearing for the appellant, submitted that though two issues were raised before the High Court, yet he would confine his relief to the second one, namely, grant of liberty to the third respondent to initiate any action against the bank for any omission. It is urged by him that the High Court has fallen into error by opining that there was no justification to exercise jurisdiction under Article 226 of the Constitution of India whereas the factual matrix warranted deletion of such an observation by the DRAT as a tribunal has no jurisdiction to grant such liberty and, especially, when a settlement between the borrower and auction purchaser had been arrived at. Learned counsel would submit that the DRAT had really not addressed to any issue and, after recording a settlement in a most laconic manner, recorded the observations which really deserved to be quashed by the High Court. It is further canvassed by Mr. Jain that the High Court should have taken note of the fact that the order passed by the DRAT had already been complied with and it was absolutely unnecessary to drag the bank to a further litigation which is contrary to the spirit of SARFAESI Act and the purpose of Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short "the RDB Act") It is also contended that the DRAT failed to take note of the prayer made by the appellant therein and for no manifest reason the matter was kept pending for more than four and half years.

10. Mr. Mohit Dham, learned counsel appearing for the respondent No. 1, contended that he had paid the dues of the bank within the time fixed by the DRAT and thereafter he had also transferred the property in favour of a third party due to financial difficulties. In essence, submission of learned counsel is that putting the clock back is likely to cause serious jeopardy to him.

11. Mr. Jatin, learned counsel appearing for the auction

purchaser, submitted that on the basis of the liberty he had already filed a suit in the Delhi High Court and is entitled to pursue the remedy because of action was taken in hot haste in by the bank in putting the property into auction without indicating that litigation was going on between the borrower and the bank. It is urged by him had the said fact was made known the third respondent would not have participated in the auction. It is argued by him that his claim for damages cannot be nullified and hence, the decision of the High Court is absolutely defensible and does not require to be interfered with.

12. Before we dwell upon the jurisdiction of the DRAT to give such a liberty to the auction purchaser, we think that it is absolutely imperative, in the case at hand, to take note of the fact that though the appeal was filed before the DRAT on 7.11.2005 and admitted on 14.11.2005, yet the same was disposed of on 20.5.2010 almost after four and half years. We are at pains to say that the DRAT has totally forgotten the obligation cast on it under the RDB Act and also has remained quite oblivious of the salient features and the seminal purpose of SARFAESI Act.

13. In this context, we may fruitfully refer to the Objects and Reasons of the SARFAESI Act. The relevant part of it reads as follows: -

> "The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow place of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respects of these areas."

14. In *Mardia Chemicals Ltd. And Others v. Union of India and Others*[1], after referring to the Statement of Objects and Reasons this Court dealt with the submission that existing rights of private parties under a contract cannot be interfered with, more particularly, putting one party in an advantageous position over the other. In that context, the three-Judge Bench observed thus:-

> "As discussed earlier as well, it may be observed that though the transaction may have the character of a private contract yet the question of great importance behind such transaction as a whole having far-reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions, more particularly when financing is through banks and financial institutions utilizing the money for the people in general, namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact on the socio-

1. (2004) 4 SCC 311.

economic drive of the country. The two aspects are intertwined which are difficult to be separated."

In the said case, it was further rules thus: -

"81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

15. In *Authorised Officer, Indian Overseas Bank and Another v. Ashok Saw Mill*[2], though in a different context, the Court has expressed thus: -

"33. It is clear that while enacting the SARFAESI Act the legislature was concerned with measures to regulate securitization and reconstruction of financial assets and enforcement of security interest. The Act enables the banks and financial institutions to realize long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery of reconstruction."

Thereafter, the Bench proceeded to state thus: -

2. (2009) 8 SCC 366.

"36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee."

16. *In United Bank of India v. Satyawati Tondon and Others*[3], this Court restated the purpose of bringing the SARFAESI Act and in that context observed the role of the tribunal as under: -

"23. Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt.

24. Sub-section (5) of Section 17 prescribes the time-limit

3. (2010) 8 SCC 110.

of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously."

17. In *Transcore v. Union of India and Another*[4], the Court, while discussing about the various provisions of the SARFAESI Act, expressed thus: -

"60. Value of an asset in an inflationary economy is discounted by "time" factor. A right created in favour of the bank/FI involves corresponding obligation on the part of the borrower to see that the value of the security does not depreciate with the passage of time which occurs due to his failure to repay the loan in time."

We have referred to the aforesaid authorities to show that speedy disposal of the application and the appeal are fundament objects of the enactment and "time factor" has inextricable nexus with the sustenance of economy.

18. Having discussed about the purpose and legislative intendment of the SARFAESI Act we think it appropriate to refer to the legislative purpose of the RDB Act. We are absolutely conscious that this was an earlier legislation and because it could not become that effective, the SARFAESI Act was enacted. While dealing with the purpose of the said legislation and how it works, this Court in Satyawati Tondon (supra) has observed that an analysis of the provisions of the DRT Act shows that primary object of that Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act

4. (2008) 1 SCC 125.

not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. Thereafter the Division Bench proceeded to state thus:-

"7. For few years, the new dispensation worked well and the officers appointed to man the Tribunals worked with great zeal for ensuring that cases involving recovery of the dues of banks and financial institutions are decided expeditiously. However, with the passage of time, the proceedings before the Tribunals became synonymous with those of the regular courts and the lawyers representing the borrowers and defaulters used every possible mechanism and dilatory tactics to impede the expeditious adjudication of such cases. The flawed appointment procedure adopted by the Government greatly contributed to the malaise of delay in disposal of the cases instituted before the Tribunals."

19. In *Official Liquidator, Uttar Pradesh and Uttarakhand v. Allahabad Bank and Others*[5], though in a different context, this Court observed that the RDB Act has been enacted in the backdrop that the banks and financial institutions had been experiencing considerable difficulties in recovering loans and enforcement of securities charged with them and the procedure for recovery of debts due to the banks and financial institutions which were being followed had resulted in a significant portion of the funds being blocked. Emphasis has been laid on blocking of funds in unproductive assets, the value of which deteriorates with the passage of time. That apart, the purpose of the RDB Act, as is evincible, is to provide for establishment

5. (2013) 4 SCC 381.

of Tribunals and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. Section 17 of the RDB Act deals with jurisdiction, powers and authority of the Tribunals. It confers jurisdiction on the Tribunal to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

20. Thus, the intendment of this legislation is for speedy recovery of dues to the bank. In this backdrop, the tribunals are expected to act in quite promptitude regard being had to the nature of the lis and see to it that an ingenious litigant does not take recourse to dilatory tactics. It may be aptly noted that an action taken by the bank under SARFAESI Act is subject to assail before the DRT and a further appeal to the DRAT. Neither the DRT nor the appellate tribunal can afford to sit over matters as that would fundamentally frustrate the purpose of the legislation. In the case at hand, we really fail to fathom what impelled the DRAT to keep on adjourning the matter and finally dispose it by passing an extremely laconic order. It is really perplexing. A tribunal dealing with an appeal should not allow adjournments for the asking. It should be kept uppermost in mind of the Presiding Officer of the tribunal that grant of an adjournment should be an exception and not to be granted in a routine and mechanical matter. In the case at hand, such a delineation by the DRAT only indicates its apathy and indifference to the role ascribed to it under the enactment and the trust bestowed on it by the legislature. A curative step is warranted and we expect the Chairman and the members of the DRAT shall endeavour to remain alive to the obligations as expected of them by such special legislations, namely, the SARFAESI Act and the RDB Act.

21. Be it noted, the principal purpose is to see that recovery of dues which is essential function of any banking institution does not get halted because of procrastinated delineation by

the tribunal. It is worthy to note that the legislature by its wisdom under Section 22 of the RDB Act has provided that the DRT and the appellate tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to the rules framed. They have been conferred powers to regulate their own procedure as given to them. It is so, for the very purpose of their establishment is to expedite disposal of the applications and the appeals preferred before them. They have the character of specialized institutions with expertise and conferred jurisdiction to decide the lis in speedy manner so that the larger public interest, that is, the economy of the country does not suffer. But, a pregnant one, in the case at hand the DRAT did not dispose of the appeal for four and a half years. We can only say that apart from the curative step the tribunal as well as the DRAT has to rise to the occasion, for delay in adjudication of these type of litigations brings a long term disaster. A cute slumber shall not do.

22. The grievance of the bank does not end here. On the contrary this is the beginning of the end. Accentuating the grievance, it is submitted by Mr. Jain, learned senior counsel for the appellant, that the DRAT travelled beyond the prayer made by the borrower inasmuch as the borrower in essentiality had prayed for grant of compensation and alternatively extension of time for sixty days. Due to the pendency of the appeal before the tribunal, submits Mr. Jain, the extension of time melted into total insignificance. Despite that, as the order would indicate, a consensus was arrived at between the auction purchaser and the borrower and the same is clear from the order, as the DRAT had directed that the auction purchaser and the borrower would sign the order. The bank was not a party to the said adjustment or consensus. The bank was only directed to refund the amount along with 9% interest and that has been done without recording a finding whether the bank was really at fault or not and, more so, when the borrower had exhibited a non-challant attitude not to pay back the money or to deposit the amount as directed by the High Court. Learned

senior counsel is also critical of the order passed by the High Court which has declined to address the core issue by stating that there was no need to exercise the extraordinary writ jurisdiction under Article 226 of the Constitution. Learned senior counsel would submit that the High Court has failed in its constitutional duty to scrutinise whether a liberty of the present nature could have been granted by the tribunal, clothed with such special and restricted jurisdiction.

23. Presently to the spectrum of jurisdiction. Section 17 of the SARFAESI Act allows any person, including a borrower, aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by secured creditor to submit an application to the DRT having jurisdiction in the manner within 45 days from the date of such measures have been taken. Sub-section (3) of Section 17 empowers the DRT to question the action taken by the secured creditor and the transaction entered into by virtue of Section 13(4) of the SARFAESI Act. It has been held in Ashok Saw Mill (supra) that the legislature by virtue of incorporation of sub-section (3) in Section 17 has gone to the extent of vesting the DRAT with authority to set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Section 18 of the SARFAESI Act makes provision for an appeal to the appellate authority from any order made by the Debts Recovery Tribunal. The Debts Recovery Tribunal, needless to say, has the same jurisdiction as conferred under Section 17 of the RDB Act. In this context, Section 19 of the SARFAESI Act is worth reproducing: -

> **"19. Right of borrower to receive compensation and costs in certain cases. –** If the Debts Recovery Tribunal or the Court of District Judge, on an application made under section 17 or section 17A or the Appellate Tribunal or the High Court on an appeal preferred under section 18 or section 18A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder and directs the secured creditors to return such secured assets to the concerned borrowers, such borrower shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B."

24. We have reproduced the aforesaid section to point out that the legislature has brought in this provision by way of substitution by Act 30 of 2004 with effect from 11.11.2004 to confer jurisdiction on the DRT and DRAT to entertain a plea of the borrower for grant of compensation and costs.

25. At this juncture, we may clarify that we do not intend to dwell upon the subtle distinction between the compensation and damages as canvassed at the Bar as that is not needed in this case. The thrust of the matter is whether DRAT has the jurisdiction to grant any liberty and, more so, in a case when the borrower and the auction purchaser have entered into a compromise. As has been stated earlier, the bank was not a party to the compromise.

26. Section 19 of the RDB Act, occurring in Chapter IV of the Act, deals with procedure of tribunals. Sub-section (25) of Section 19 reads as follows: -

> "(25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

27. The aforesaid provision makes it quite clear that the tribunal has been given power under the statute to pass such other orders and give such directions to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Thus, the tribunal is required to function within the statutory parameters. The tribunal does not have any inherent

powers and it is limpid that Section 19(25) confers limited powers. In this context, we may refer to a three-Judge Bench decision in *Upper Doab Sugar Mills Ltd. v. Shahdara (Delhi) Saharanpur Light Rly. Co. Ltd.*[6] wherein it has been held that when the tribunal has not been conferred with the jurisdiction to direct for refund, it cannot do so. The said principle has been followed in *Union of India v. Orient Paper and Industries Limited*[7].

28. In *Union of India v. R. Gandhi, President, Madras Bar Association*[8], the Constitution Bench, after referring to the opinion of Hidayatullah, J. in *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala*[9], the pronouncements in *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*[10], *Associated Cement Companies Ltd. v. P.N. Sharma*[11] and *Kihoto Hollohan v. Zachillhu*[12], ruled thus: -

> **"45.** Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and tribunals. They are:
>
> (i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts.
>
> (ii) Courts are exclusively manned by Judges. Tribunals

6. AIR 1963 SC 217.
7. (2009) 16 SCC 286.
8. (2010) 11 SCC 1.
9. AIR 1961 SC 1669.
10. AIR 1963 SC 677.
11. AIR 1965 SC 1595.
12. 1992 Supp (2) SCC 651..

> can have a Judge as the sole member, or can have a combination of a judicial member and a technical member who is an "expert" in the field to which the tribunal relates. Some highly specialised fact-finding tribunals may have only technical members, but they are rare and are exceptions.
>
> (iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."

29. From the principles that have been culled out by the Constitution Bench, it is perceptible that a tribunal is established under a statute to adjudicate upon disputes arising under the said statute. The tribunal under the RDB Act has been established with a specific purpose and we have already focused on the same. Its duty is to see that the disputes are disposed of quickly regard being had to the larger public interest. It is also graphically clear that the role of the tribunal has not been fettered by technicalities. The tribunal is required to bestow attention and give priority to the real controversy before it arising out of the special legislations. As has been stated earlier, it is really free from the shackles of procedural law and only guided by fair play and principles of natural justice and the regulations formed by it. The procedure of tribunals has been elaborately stated in Section 19 of the RDB Act.

30. It is apt to note here that Section 34 of the SARFAESI Act bars the jurisdiction of the civil court. It reads as follows: -

> **"34. Civil court not to have jurisdiction. –** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this

Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."

Section 34 of the RDB Act provides that the said Act would have overriding effect. We have referred to the aforesaid provisions to singularly highlight that the sacrosanct purpose with which the tribunals have been established is to put the controversy to rest between the banks and the borrowers and any third party who has acquired any interest. They have been conferred jurisdiction by special legislations to exercise a particular power in a particular manner as provided under the Act. It cannot assume the role of a court of different nature which really can grant "liberty to initiate any action against the bank". It is only required to decide the lis that comes within its own domain. If it does not fall within its sphere of jurisdiction it is required to say so. Taking note of a submission made at the behest of the auction purchaser and then proceed to say that he is at liberty to file any action against the bank for any omission committed by it has no sanction of law. The said observation is wholly bereft of jurisdiction, and indubitably is totally unwarranted in the obtaining factual matrix. Therefore, we have no hesitation in deleting the observation, namely, "liberty is also given to the auction purchaser to file action against the bank for any omission committed by it".

31. As we have directed for deletion for the same reasons we also set aside the judgment of the High Court whereby it has declined to interfere with the grant of liberty by the DRAT. This being the only prayer by Mr. Jain, it is answered in the affirmative in his favour by stating that such grant of liberty was not within the domain of the tribunal regard being had to its limited jurisdiction under such special legislation and further, especially, when the bank was not a party to the compromise.

32. Before parting with the case, we are obliged to deal

with another aspect. DRAT is required to adjudicate the lis in an apposite manner. It is hearing an appeal from an order passed by the DRT. It cannot afford to pass a laconic order. Learned counsel for the auction purchaser endeavoured hard to impress us that the order being a cryptic one this Court should set aside the same and remit the matter to the DRAT. The said prayer has been seriously opposed by Mr. Jain, learned senior counsel for the appellant-bank and Mr. Dham, learned counsel for the borrower. Two aspects weigh in our mind not to take recourse to such a mode, namely, (i) the auction purchaser has not challenged the order passed by the DRAT before the High Court nor has he come to this Court and further Mr. Jain has restricted his argument only with regard to grant of liberty; and (ii) with the efflux of time the bank has realized its money and the property has changed hands. It can be stated with certitude that it is absolutely unnecessary to direct the DRAT to proceed with the appeal de novo. Hence, we refrain from adopting the said course.

33. Resultantly, the appeal is allowed to the extent indicated hereinabove. In the facts and circumstances of the case there shall be no order as to costs.

R.P. Appeal partly allowed.

M/S. TATA IRON & STEEL CO. LTD.
v.
STATE OF JHARKHAND & ORS.
(Civil Appeal No. 8246 of 2013)

SEPTEMBER 16, 2013

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

Industrial Disputes Act, 1947:

s.10(1) – Reference of disputes to Labour Court – Jurisdiction of Labour Court – Explained.

s.10(1) – Reference of dispute to Labour Court – Defective reference – Held: In the instant case, the reference does not reflect the real dispute between the parties — On the contrary, the manner in which the reference is worded, shall preclude the appellant to put forth and prove its case as it would deter the Labour Court to go into those issues – The reference also implies that the appropriate Government has itself decided the contentious issues and assumed the role of an adjudicator which is, otherwise, reserved for the Labour Court/ Industrial Tribunal – The reference being defective, is quashed – Appropriate Government directed to make reference afresh, incorporating real essence of the dispute as discussed in the judgment.

The appellant sold its cement division to M/s Lafarge India Pvt. Ltd in terms of Business Transfer Agreement (BTA) dated 9.3.1999 which was to be effected from 1.11.1999. According to the appellant, consequent upon the agreement, the employees working in its cement division including respondent Nos. 8-82 were also taken over by M/s Lafarge and the latter issued them fresh letters of appointments. Subsequently, the said employees submitted a statement of demand to the

appellant on 15.9.2003, stating that they were directed to work with M/s. Lafarge without taking their consent and they should be taken back with the appellant company. The Conciliation Proceedings having failed, two references u/s. 10(1) of the Industrial Dispute Act, 1947 were made for adjudication to the Labour Court to the effect: whether or not to take back the workmen of appellant in the service after their transfer to M/s Lafarge was justified; and if not, what relief they were entitled to. The appellant filed writ petitions before the High Court seeking to quash of the references. The stand of the appellant was that the manner in which the references were worded did not depict the true nature of the dispute between the parties, as the workmen were no longer in their employment and, therefore, could not have raised the grievance or any dispute against the appellant company. The Single Judge dismissed the writ petitions with the observation that the Labour Court could adjudicate and answer the reference after considering all the points raised by the parties. The Intra court appeals preferred by the appellant were dismissed by the Division Bench of the High Court.

Allowing the appeals, the Court

HELD: 1.1. The High Court is right in holding that the Industrial Dispute has arisen between the parties. In the instant cases, the appellant is denying the respondents to be its workmen. On the other hand, respondents are asserting that they continue to be the employees of the appellant company. This, as per s. 2(k) of the Industrial Disputes Act, 1947, itself would be a "dispute" which has to be determined by means of adjudication. Once these respective contentions were raised before the Labour Department, it was not within the powers of the Labour Department/ appropriate Government to decide this dispute and assume the adjudicatory role. Therefore, this facet of dispute also needs to be adjudicated upon by the

Labour Court. It cannot, therefore, be said that no dispute exists between the parties. Of course, in a dispute like this, M/s. Lafarge also becomes a necessary party. [Paras 10 and 11] [444-D; 445-A-D]

1.2. Industrial Tribunal/ Labour Court constituted under the Industrial Disputes Act is a creature of that statute. It acquires jurisdiction on the basis of reference made to it. The Tribunal has to confine itself within the scope of the subject matter of reference and cannot travel beyond the same. Therefore, it becomes the bounden duty of the appropriate Government to make the reference appropriately which is reflective of the real/ exact nature of "dispute" between the parties. Though the jurisdiction of the Tribunal is confined to the terms of reference, but at the same time it is empowered to go into the incidental issues. [para 13, 18 and 19] [446-C; 449-F, G-H]

National Engineering Industries Limited v. State of Rajasthan & Ors. **1999 (5) Suppl. SCR 87 = 2000 (1) SCC 371; and** *Moolchand Kharati Ram Hospital vs. Labour Commissioner and Ors.* **2000 (2) Suppl. JT 204 = 2002 (10) SCC 708 – relied on**

Indian Tourism Development Corporation (ITDC) v. Delhi Administration and Ors. **1982 (LAB) IC 1309;** *Moolchand Kharati Ram Hospital* vs. *Labour Commissioner and Ors.* **1998 (III) LLJ 1139 Del – referred to**

1.3. In the instant case, the issue is as to whether the respondent workmen were simply transferred by the appellant to M/s. Lafarge or their services were taken over by it and they became its employees. Second incidental question which would follow would be as to whether the respondent-workmen have right to join back the services with the appellant in case their service conditions including salary etc. which they were enjoying with the appellant are not protected by M/s. Lafarge. If it is proved

that their service conditions are violated, another question would be as to whether they can claim the service benefits/ protection from M/s. Lafarge or they have the right to go back to the appellant. [Paras 19] [449-H; 450-A-C]

1.3. This Court is of the opinion that the reference is clearly defective as it does not state the correct and precise nature of the dispute between the parties. On the contrary, the manner in which the reference is worded shows that it has already been decided that the respondent workmen continue to be the employees of the appellant and further that their services were simply transferred to M/s. Lafarge. This shall preclude the appellant to put forth and prove its case as it would deter the Labour Court to go into those issues. It also implies that by presuming so, the appropriate Government has itself decided those contentious issues and assumed the role of an adjudicator which is, otherwise, reserved for the Labour Court/ Industrial Tribunal. [Para 20] [450-C-E]

1.4. The impugned judgment of the High Court is set aside. The reference is quashed. The appropriate Government is directed to make reference afresh, incorporating real essence of the dispute as discussed in the judgment. [Para 21] [450-F-G]

Case Law Reference:

2000 (2) Suppl. JT 204	**relied on**	**Para 17**
1982 (LAB) IC 1309	**referred to**	**Para 14**
1998 (III) LLJ 1139 Del	**referred to**	**Para 16**
1999 (5) Suppl. SCR 87	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8246 of 2013.

From the Judgment & Order dated 22.06.2011 of the High Court of Jharkhand at Ranchi in LPA No. 511 of 2006.

WITH

C.A. No. 8247 of 2013.

Raju Ramachandran for the Appellant.

K. Radhakrishnan, S.K. Verma, M.A. Chinnasamy, Venkateswara Rao Anumolu, Tapesh Kumar Singh for the Respodents.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted.

2. We heard the Counsel for the parties at length. Having regard to the nature of issue involved that needs to be answered by us, it would be enough to to take note of some admitted facts, eschewing detailed factual discussion which may unnecessarily burden this judgment.

3. The appellant before us is M/s. Tata Iron & Steel Company Limited (rechristened as Tata Steel Ltd.). Apart from manufacturing steel, its core business, the appellant company was having cement division as well. In the era of globalization, liberalization and also because of economic compulsions, the appellant decided to follow the policy of disinvestment. Persuaded by these considerations it sold its cement division to Lafarge India Pvt. Ltd (hereinafter to be referred as 'M/s. Lafarge') vide Business Transfer Agreement (BTA) dated 9.3.1999 which was to be effected from 1.11.1999. This agreement, *inter alia* provided that M/s. Lafarge would take over the company personnel, including, in terms of Section 25 FF of the Industrial Disputes Act, 1947. It was on the condition that:

(a) The services of the company personnel shall not be or deemed to be interrupted by such transfer.

(b) The terms and conditions of service applicable to the company personnel after such transfer are not in any way less favourable to the company personnel than those applicable to them immediately before the transfer.

(c) The purchaser is, under the terms of transfer herein, legally liable to pay to the company personnel in the event of their retrenchment, compensation on the basis that services have been continued and have not been interrupted by the transfer of business.

4. This decision to hive off and transfer the cement division by the appellant to M/s Lafarge was communicated to the employees of the cement division as well. According to the appellant, consequent upon this agreement, with the transfer of business, the employees working in the cement division were also taken over by M/s Lafarge & M/s Lafarge issued them fresh letters of appointments. These included Respondent Nos. 8-82 herein who started working with M/s Lafarge.

5. It appears that these workers were not satisfied with the working conditions in M/s. Lafarge. They submitted a statement of demand to the appellant on 15.9.2003, stating *inter alia* that they were directed to work with M/s. Lafarge without taking their consent. As per these respondents/ employees, impression given to them was that they would work in different departments in M/s. Lafarge for some days for smooth functioning of that establishment, which was a part of the appellant organization and thereafter they would be posted back to the parent department. They had obeyed these orders faithfully believing in the said representation. However, the concerned employees were not given all the benefits by M/s Lafarge which they were enjoying in their parent department. Thus, the demand was made to take them back with the appellant company. The company did not pay any heed to this demand. These employees approached the Deputy Labour Commissioner, Jamshedpur, raising their grievances and requesting to resolve the dispute.

6. Notices were issued to the appellant to participate in the Conciliation Proceedings. The appellant appeared and took the plea that on and from 1.11.1999, the cement division was sold to M/s. Lafarge and these workmen had become the employees of M/s. Lafarge. It was also stated that fresh appointment letters issued by M/s. Lafarge and they ceased to be the employees of the appellant. Since no amicable settlement could take place and conciliation proceedings resulted in failure. The failure report was sent by the Labour Department to the Government of Jharkhand which resulted in two reference orders, thereby referring the disputes between the parties to the Labour Court, Jamshedpur, for adjudication. The dispute was referred under Section 10(1) of the Industrial Dispute Act, 1947 with following terms and reference.

> "Whether not to take back Shri K. Chandrashekhar Rao and 73 other workmen (list enclosed) of M/s TISCO Limited, Jamshedpur in service by their own TISCO Management after their transfer to M/s. Lafarge India Limited, is justified? If not what relief they are entitled to?"
>
> Other reference was also worded identically.

7. According to the appellant, the manner in which the references are worded, do not depict the true nature of the dispute between the parties. It was their submission that the concerned workmen were no longer in their employment and, therefore, could not have raised the grievance or any dispute against the appellant company and thus, no industrial dispute at all existed between the appellant and the respondent workmen. They took a specific plea that if M/s. Lafarge did not provide assured service terms, these respondents could raise the dispute only against M/s. Lafarge which was their real employer and M/s. Lafarge was not even made partial in the present proceedings. As per the appellant, the Conciliation Officer had not considered material on record and without applying its mind submitted the failure report leading to the reference in question. On that basis, Writ Petitions were filed by the appellant before the High Court of Jharkhand at Ranchi

seeking quashing of the said reference.

8. These Writ Petitions came up before the learned Single Judge who dismissed these Writ Petitions with the observation that the Labour Court, which was already in seisin of the matter, can very well adjudicate and answer the reference after considering all the points raised by the parties and on the basis of evidence led by the parties in the reference proceeding before the Labour Court. Intra Court Appeals preferred by the appellant have been dismissed by the Division Bench of the said Court observing that as there is a dispute between parties and, therefore, the learned Single Judge rightly dismissed the Writ Petitions.

9. It is how the parties are before us in the present proceedings.

10. At the outset, we would like to observe that the High Court is right in holding that the Industrial Dispute has arisen between the parties in as much as the contention of the workers is that they are entitled to serve the appellant as they continued to be the workers of the appellant and were wrongly "transferred" to M/s. Lafarge. On the other hand, the appellant contends that with the hiving off the cement division and transferring the same to M/s. Lafarge along with the workers who gave their consent to become the employees of the transferee company, the relationship of employers and employees ceased to exist and, therefore, the workmen have no right to come back to the appellant. This obviously is the "dispute" within the meaning of Section 2(k) of the Industrial Disputes Act. Section 2 (k) of the Industrial Disputes Act which defines Industrial Dispute reads as under:

> "2(k) *"industrial dispute*" means any dispute or difference between employers and employers, between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any

person."

11. No doubt, as per the aforesaid provision, industrial dispute has to be between the employer and its workmen. Here, the appellant is denying the respondents to be its workmen. On the other hand, respondents are asserting that they continue to be the employees of the appellant company. This itself would be a "dispute" which has to be determined by means of adjudication. Once these respective contentions were raised before the Labour Department, it was not within the powers of the Labour Department/ appropriate Government decide this dispute and assume the adjudicatory role as its role is confined to discharge administrative function of referring the matter to the Labour Court/ Industrial Tribunal. Therefore, this facet of dispute also needs to be adjudicated upon by the Labour Court. It cannot, therefore, be said that no dispute exists between the parties. Of course, in a dispute like this, M/s. Lafarge also becomes a necessary party.

12. Having said so, we are of the opinion that the terms of reference are not appropriately worded in as much as these terms of reference do not reflect the real dispute between the parties. The reference pre-supposes that the respondents workmen are the employees of the appellant. The reference also proceeds on the foundation that their services have been "transferred" to M/s. Lafarge. On these suppositions the limited scope of adjudication is confined to decide as to whether appellant is under an obligation to take back these workmen in service. Obviously, it is not the reflective of the real dispute between the parties. It not only depicts the version of the respondents workmen, but in fact accepts the same viz. they are the employees of the appellant and mandates the Labour Court/ Industrial Tribunal to only decide as to whether the appellant is required to take them back in its fold. On the contrary, as pointed out above, the case set up by the appellant is that it was not the case of transfer of the workmen to M/s Lafarge but their services were taken over by M/s. Lafarge which is a different company/ entity altogether. As per the

appellant they were issued fresh appointment letters by the new employer and the relationship of employer-employee between the appellant and the workmen stood snapped. This version of the appellant goes to the root of the matter. Not only it is not included in the reference, the appellant's right to put it as its defence, as a demurrer, is altogether shut and taken away, in the manner the references are worded.

13. We would hasten to add that, though the jurisdiction of the Tribunal is confined to the terms of reference, but at the same time it is empowered to go into the incidental issues. Had the reference been appropriately worded, as discussed later in this judgment, probably it was still open to the appellant to contend and prove that the Respondent workmen ceased to be their employees. However, the reference in the present form does not leave that scope for the appellant at all.

14. A full Bench of High Court of Delhi in the case of *Indian Tourism Development Corporation (ITDC) v. Delhi Administration and Ors.* 1982 (LAB) IC 1309 had an occasion to deal with issue of this nature i.e. pertaining to the "Terms of Reference". Various writ petitions were heard together and disposed of by the common judgment. One of the writ petitions, in which this issue arose, was C.W.P No. 1472/1981. One worker working at the sweets counter of the Sona Rupa Restaurant of the management was caught red handed while misappropriating the sale proceeds of sweets sold to the customers. Though initially he admitted the theft but later he instigated other employees to resort to militant and violent acts in which various workers indulged in and abstained from work. In view of the violent and subversive activities of the workers, the management decided to close down the restaurant and informed the workmen accordingly. Notice of closure was issued wherein workmen were informed that there accounts would be settled in full and final. The workmen approached the Labour Department and raised the dispute alleging that there was a "lock-out" declared by the management. The management appeared in the conciliation proceedings and

stated that it was a case of "closure" of the restaurant and not of lock-out. Since conciliation proceedings failed, the matter was referred by the appropriate Government to the Industrial Tribunal, Delhi, for adjudication with following terms of reference:

> "Whether the workmen as shown in Annexure 'A' are entitled to wages for a period of lock-out w.e.f. 1.1.81 and if so, what directs are necessary in this respect."

15. The Management filed the Writ Petition under Article 226 challenging the notification of reference on the plea that the real dispute about the existence or otherwise of the lockout had not been referred to. Instead lock- out was presumed in the reference itself on imaginating and fictitious basis with the result, it was not open to the management to urge before the Tribunal whether there was at all a lock out, and instead it was a case of closure, prompted by workers' violent attitude. The High Court accepted these contentions on the analogy that the jurisdiction of the Court/ Industrial Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and the matters incidental thereto and it is not permissible for it to go beyond the terms of reference. The High Court further pointed out that though the existence of lock-out itself was the real dispute between the management and its workmen, the terms of reference proceeded on the assumption that there was a lock-out declared by the management. This way the management was precluded from proving before the Industrial Tribunal that there was no lock out and, in fact it was a case of closure. Thus, the real dispute between the parties as to whether there was at all a lock-out or whether there was violence by the workmen which compelled the management to close the restaurant, was not referred.

16. Later this judgment was followed by a Single Bench of Delhi High Court in the case of *Moolchand Kharati Ram Hospital vs. Labour Commissioner and Ors.* 1998 (III) LLJ 1139 Del, where also dispute was as to whether the workmen had resorted to strike, as contended by the management or it is the management which had declared a lock-out, which was

the stand of the workmen. However, the terms of reference stipulated were: whether the workmen were entitled to wages for the lock-out period? The Court concluded that since there was a dispute about the existence of lock-out itself, this kind of reference would not permit the management to prove that it was in fact a case of "strike" resorted to by the workmen. Reference was accordingly quashed. The court relied upon the full Bench judgment in *ITDC(supra).* Some judgments of this Court were also referred to for the proposition that the jurisdiction of the Tribunal is limited to the extent of what is referred to it. We would like to reproduce that portion of the judgment where decisions of this Court are discussed:-

> "25. Their Lordship of the Supreme Court in the matter of *Management of Express Newspapers (Private) Ltd., Madras v. The Workers and Ors.,*MANU/SC/ 0267/1962: (1962)IILLJ227SC, held that "since the jurisdiction of the Industrial Tribunal in dealing with industrial disputes referred to it under Section 10 is limited by Section 10(4) to the point specifically mentioned in the reference and matters incidental thereto, the appropriate Government should frame the relevant orders of reference carefully and the questions which are intended to be tried by the Industrial Tribunal should be so worded as to leave no scope for ambiguity or controversy. An order of reference hastily drawn or drawn in casual manner often gives rise to unnecessary disputes and thereby prolongs the life of industrial adjudication which must always be avoided.
>
> 26. In *Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal of Gujarat and Ors.* MANU/SC/ 0233/1967 : (1968)ILLJ834SC , their Lordships of the Supreme Court have emphasised the importance of drafting of reference under Section 10 of the Industrial Disputes Act. This has been observed in this case as under at p. 839 :

"If no dispute at all is raised by the employees with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between employers and workmen. The Government has to come to an opinion that an industrial dispute does exist and that opinion can only be formed on the basis that there was a dispute between the employee and the employer.

Where the retrenched employee and the Union had confined their demand to the management to retrenchment compensation only and did not make any demand for reinstatement the reference made by the Government under Section 10 in respect of reinstatement is not competent."

17. Appeals against the aforesaid decision was dismissed by this Court in *Moolchand Kharati Ram Hospital vs. Labour Commissioner and Ors*. 2002 (10) SCC 708. This shows that view of the Delhi High Court in the aforesaid cases has been given imprimatur by this Court.

18. The Industrial Tribunal/ Labour Court constituted under the Industrial Disputes Act is a creature of that statute. It acquires jurisdiction on the basis of reference made to it. The Tribunal has to confine itself within the scope of the subject matter of reference and cannot travel beyond the same. This is the view taken by this Court in number of cases including in the case of *National Engineering Industries Limited v. State of Rajasthan & Ors.* 2000 (1) SCC 371.

19. It is for this reason that it becomes the bounden duty of the appropriate Government to make the reference appropriately which is reflective of the real/ exact nature of "dispute" between the parties. In the instant case, the bone of contention is as to whether the respondent workmen were simply transferred by the appellant to M/s. Lafarge or their

services were taken over by M/s. Lafarge and they became the employees of the M/s. Lafarge. Second incidental question which would follow therefrom would be as to whether they have right to join back the services with the appellant in case their service conditions including salary etc. which they were enjoying with the appellant are not given or protected by M/s. Lafarge? If it is proved that their service conditions are violated, another question would be as to whether they can claim the service benefits/ protection from M/s. Lafarge or they have the right to go back to the appellant?

20. It follows from the above that the reference in the present form is clearly defective as it does not take care of the correct and precise nature of the dispute between the parties. On the contrary, the manner in which the reference is worded shows that it has already been decided that the respondent workmen continue to be the employees of the appellant and further that their services were simply transferred to M/s. Lafarge. This shall preclude the appellant to put forth and prove its case as it would deter the labour court to go into those issues. It also implies that by presuming so, the appropriate Government has itself decided those contentious issues and assumed the role of an adjudicator which is, otherwise, reserved for the Labour Court/ Industrial Tribunal.

21. As a consequence, this appeal is allowed and the impugned judgment of the High Court is set aside. Sequitur to that would be to quash the references made in the present form. However, at the same time, direction is given to the appropriate Government to make fresh reference, incorporating real essence of the dispute as discussed in this judgment, within a period of two months from the date of receipt of the copy of this judgment.

22. The appeals are allowed and disposed of in the aforesaid terms with no order as to costs.

R.P. Appeals allowed.

R. VENKATA RAMANA & ANR.
v.
THE UNITED INDIA INSURANCE CO. LTD. & ORS.
(Civil Appeal No. 8283 of 2013)

SEPTEMBER 17, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Motor Vehicles Act, 1988:

Motor accident – Victim, a 17 year old student became disabled – Tribunal awarded compensation of Rs. 18,75,800/- with 7.5% interest – High Court reduced it to Rs. 12,45,800/- Held: Keeping in view the amount spent by parents on treatment of victim and the fact that he has practically become bedridden and would require care by a person throughout his life, compensation by Tribunal was just and proper – Judgment of High Court set aside and that of Tribunal restored.

Motor accident claims – Award of just compensation – Discussed.

The son of the appellants, a 17 year old student, met with a motor accident and because of the injuries, became disabled. The Tribunal awarded compensation of Rs. 18,75,800/- with 7.5% interest from the date of filing of the petition till payment. However, the High Court, relying upon *Sarla Verma's* case*, reduced the compensation to Rs.12,45,800/-. Agrrieved, the parents filed the appeal.

Allowing the appeal, the Court.

HELD: 1.1. The evidence establishes that the condition of the victim after the accident has become very pathetic. He shall not be in a position to speak for his life and shall not be in a position to do anything except

breathing for his life. He would require care of a person every day like a child. Further, the appellants had in fact proved that they had spent a huge sum towards nursing and medical expenses for treating their son as also for purchasing certain instruments to facilitate his living. In the circumstances, the Tribunal was not at all lenient in the matter of awarding the compensation, which was just and proper. [para 9, 10 and 12] [454-G; 455-A-B; 456-A]

1.2 At times it is not possible to award compensation strictly in accordance with the law laid down, as in a particular case it may not be just also. Though, the High Court has rightly followed the principle laid down in the case of *Sarla Verma*, the amount of compensation awarded by the Tribunal is more just. The judgment of the High Court is set aside and the order of the Tribunal restored. [para 12-14] [456-C, E-G]

***Sarla Verma v. Delhi Road Transport Corporation* 2009 (5) SCR 1098 = 2009(6) SCC 121- referred to.**

Case Law Reference:

2009 (5) SCR 1098 referred to para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8283 of 2013.

From the Judgment & Order dated 27.12.2010 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Civil Misc. Appeal No. 1016/2007.

Venkateswara Rao Anumolu for the Appellant.

A.K. De, Debasis Misra for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted.

2. Being aggrieved by the Judgment delivered by the Andhra Pradesh High Court in Civil Misc. Appeal No.1016 of 2007 on 27th December, 2010, this appeal has been preferred

on behalf of the claimants in a Motor Accident Claim Petition.

3. The facts giving rise to the present appeal, in a nut shell, are as under:

On account of an accident, which had taken place on 31st July, 2000, around 6 p.m., son of the appellants had suffered severe injuries. He had to be hospitalized and operations had to be performed. The injured was left with 80% disability due to the accident. Looking at the nature of injuries suffered by the injured, a claim for Rs.25,07,564/- was made by the appellants and the injured, who was also a claimant before the Tribunal but at present, possibly because of his inability, the appeal has been filed by the parents.

4. After considering the evidence and looking at the injuries suffered and physical condition of the injured, namely, Rajanala Ravi Krishna, who was hardly 17 years old at the time of the accident, by way of compensation, the Tribunal awarded a sum of Rs.18,75,800/- with interest @ 7.5 % from the date of presentation of the petition till realization of the said amount.

5. Being aggrieved by the order passed by the Tribunal, respondent No.1 – United India Insurance Company Ltd., filed Civil Misc. Appeal No.1016 of 2007 praying that the amount of compensation be reduced as it was much on higher side. After hearing the concerned counsel and looking at the evidence, the High Court allowed the civil misc. appeal by reducing the amount of compensation to a sum of Rs.12,45,800/- with interest thereon to the claimants.

6. Being aggrieved by the reduction in the amount of compensation, the parents of the 17 years old injured student have approached this Court by way of this appeal.

7. The learned counsel appearing for the appellants had submitted that the Tribunal had awarded just and proper compensation which ought not to have been reduced by the High Court. The learned counsel had taken us through the order passed by the Tribunal and the relevant evidence. Upon perusal

of the evidence, we find that the son of the appellants, as a result of the accident, is suffering from 80% permanent disability. The Neurologist who had been examined by the Tribunal had stated that there was no chance of any improvement in the health of the injured. Upon perusal of the evidence, we find that Rajanala Ravi Krishna, as a result of the accident, tracheotomy and other surgeries performed on him, he has practically become bedridden, except for the fact that he can be moved in a wheel chair. He requires continuous nursing because he is unable to perform his day to day activities. In the circumstances, the learned counsel had submitted that the amount of compensation awarded by the Tribunal was just and proper.

8. On the other hand, the learned counsel appearing for the respondent – Insurance Company had submitted that the Tribunal had awarded huge amount of compensation to a person who was not having any income and was only a student, whose future was not known to any one. In the said circumstances, according to the learned counsel, the High Court had rightly considered the judgment delivered by this Court in the case of *Sarla Verma v. Delhi Road Transport Corporation* 2009(6) SCC 121 while awarding just amount of compensation. He had supported the judgment delivered by the High Court and had submitted that the present appeal be dismissed.

9. Upon hearing the learned counsel and looking at the impugned judgment and the order of the Tribunal as well as the evidence adduced on behalf of the claimants, we are of the view that the Tribunal was not at all lenient in the matter of awarding the compensation and the compensation awarded by the Tribunal was just and proper.

10. We have considered the facts and the injuries suffered by Rajanala Ravi Krishna, who was hardly 17 years old student at the time of the accident. We need not go into the negligence part of the driver because even in the criminal proceedings it had been held that the driver of the vehicle was guilty of rash

and negligent driving. Upon perusal of the evidence, we find that the condition of Rajanala Ravi Krishna, after the accident has become very pathetic. Evidence adduced by the Neurologist and other evidence also reveal that Rajanala Ravi Krishna shall not be in a position to speak for his life and shall not be in a position to do anything except breathing for his life, unless a miracle happens. He would require care of a person every day so as to see that he is given food, bath etc. and so as to enable him even in the matter of answering natural call. It would be worth producing the reaction of the Tribunal after appreciating evidence of the doctor and the said portion of the Tribunal's order has been even reproduced by the High Court in its judgment:

> "It is not in dispute that because of this accident the injured petitioner who appears to be an active and bright student from Exs.A.481 to A.487, he lost all the function of his all four limbs on account of the severe injuries sustained by him. I have myself questioned PW.2 to find out the graveness of the injuries that are sustained by the injured third petitioner. It has been the evidence of PW.2 that there is no possibility of the injured petitioner regaining normal power of all the four limbs inspite of any amount of treatment. The patient require physio therapy throughout his life and assistance of some person for all his activities. PW.2 has also stated that it is difficult to say even by the time he was giving evidence whether the patient could regain his voice, PW.2 further stated that the patient requires regular medication of at least Rs.500/- per day for his subsistence. PW.2 also stated the patient requires some bodies assistance even for taking food and finally PW.2 stated that the patient is medically described as in a "vegitiative state" and patient is called as "spastic quadric paresys".

11. Looking at the aforestated facts which even the High Court had noticed, we feel that the Tribunal can not be said to have awarded more amount by way of compensation.

12. From the order of the tribunal, we find that the appellants had in fact proved that they had spent Rs.3,49,128/- towards medical expenses for treating their son. They had to purchase certain instruments worth Rs.58,642/- for making life of their son comfortable and Rs.31,000/- had been spent towards nursing and Rs.1,37,000/- had to be spent for Physiotherapist. Looking at the fact that Rajanala Ravi Krishna will have to remain dependant for his whole life on someone and looking at the observations made by the Tribunal, which have been reproduced hereinabove, in our opinion, his life is very miserable and there would be substantial financial burden on the appellants for the entire life of their injured son. At times it is not possible to award compensation strictly in accordance with the law laid down as in a particular case it may not be just also. We are hesitant to say that it is a reality of life that at times life of an injured or sick person becomes more miserable for the person and for the family members than the death. Here is one such case where the appellants, even during their retired life will have to take care of their son like a child especially when they would have expected the son to take their care.

13. Though, the High Court has rightly followed the principle laid down in the case of *Sarla Verma* (supra), in our opinion, the amount of compensation awarded by the Tribunal is more just. The Tribunal awarded a lump sum of Rs.10 lacs and the amount of expenditure incurred by the appellants for treating their son. The total amount awarded by the Tribunal was Rs.18,75,800/- which, in our opinion, is not too much and in our opinion, the said amount should be awarded to the appellants.

14. In the circumstances, we quash and set aside the judgment delivered by the High Court and restore the order of the Tribunal. The amount of compensation determined by the Tribunal along with interest @ 7.5 % from the date of presentation of the claim petition till its realization shall be paid to the appellants.

15. The appeal is allowed with no order as to costs.

R.P. Appeal allowed.

AJOY ACHARYA

v.

STATE BUREAU OF INV. AGAINST ECO. OFFENCE

(Criminal Appeal No. 1454 of 2013 etc.)

SEPTEMBER 17, 2013.

[P. SATHASIVAM, CJI AND JAGDISH SINGH KHEHAR, J.]

Code of Civil Procedure, 1973:

s. 197 read with s.239 CrPC and s.19 of P.C. Act – Previous sanction for prosecution of public servant – Appellant, an IAS, holding offices of Industries Commissioner in State Government and a nominee Director of MPSIDC – Misuse of position by appellant while discharging his responsibilities as a nominee Director of MPSIDC – Prosecution of – Held: The Governor under Clause 89 of Memorandum and Articles of Association of MPSIDC has absolute discretion to nominate anyone suitable as per his wisdom, as nominee Director of MPSIDC and is also vested with absolute discretion to remove a nominee Director — Participation of appellant in the meeting of the Board of Directors of MPSIDC was not on account of his holding the office of Industries Commissioner, Government of Madhya Pradesh, nor was it on account of his being a member of IAS cadre – Therefore, sanction if required, ought to have been obtained from the Governor of the State – However, since appellant was not holding the public office which he is alleged to have abused, when the first charge sheet was filed, there was no need to obtain any sanction before proceeding to prosecute him for the offences alleged against him.

s.197 – Previous sanction for prosecution of public servant – Held: Sanction is essential only if, at the time of

taking cognizance, accused was still holding the public office which he allegedly abused.

s.197 – Previous sanction for prosecution of public servant – Plurality of offices held by public servant – Held: If an accused holds a plurality of offices, sanction is essential only at the hands of the competent authority entitled to remove him from service of the office which he had allegedly misused.

s.197 – Previous sanction for prosecution of public servant – Public servant, a nominee Director of MPSDIC – Plea that such nominee Director was not incharge of conduct of business of MPSDIC nor was he responsible for its day to day activities – Held: Accusation implicating the appellant, is directly attributable to him as nominee Director of MPSIDC — His culpability lies in the mischief of passing the resolution in question — Implementation of said resolution is the consequential effect of the said mischief.

By a resolution dated 19.4.1995, the Board of Directors of the Madhya Pradesh State Industrial Development Corporation (MPSIDC) authorized its Managing Director, to extend short term loans including inter-corporate deposits (ICDs) out of the surplus funds with the MPSIDC, on suitable terms and conditions. It was alleged that the resolution dated 19.4.1995 was passed in disregard of an earlier decision taken in the Cabinet Review Meeting held on 28.1.1994, and the resolution dated 31.1.1994 passed by Board of Directors of MPSIDC, that the MPSIDC would not extend financial assistance to industries. The petitioner, a member of the IAS cadre, while holding the charge of the office of Industries Commissioner, Government of Madhya Pradesh, was nominated as a Director of the MPSIDC in 1993. He continued as such till 1998. In June 1998, he was transferred as Joint Secretary, Department of Heavy

Industries, Government of India, whereupon, he ceased to be on the Board of Directors of the MPSIDC. He had admittedly attended both the meetings held on 28.1.1994 and 31.1.1994. The first charge sheet dated 22.9.2007 was filed in Special Case no. 7 of 2007, and the Special Judge took cognizance thereof. The petitioner filed a petition u/s 239 of the CrPC as well as, s.19 of the Prevention of Corruption Act, 1988 seeking his discharge on the ground, that prosecution had been initiated against him without seeking sanction of the competent authority. The petition was dismissed by the Special Judge on 11.4.2008 and the criminal revision preferred by him was dismissed by the High Court.

In the instant appeal filed by the appellant, the issue for consideration was: whether the participation of the appellant in the meetings in question was based on his position as a nominee Director on the Board of Directors of the MPSIDC, and/or in his capacity as a member of the IAS cadre allocated to the State of Madhya Pradesh.

Dismissing the appeals, the Court

HELD: 1.1. The appellant's nomination as Director with the MPSIDC emerges from clause 89(2) of the Memorandum and Articles of Association of the MPSIDC. The Governor under clause 89 has the absolute discretion to nominate anyone suitable as per his wisdom, as nominee Director to the MPSIDC. The Governor, under sub-clause (4) of Clause 89 is also vested with the absolute discretion to remove a nominee Director. It was only on account of the nomination of the appellant as director of the MPSIDC that he assumed the responsibility and the power to deal with the affairs of the MPSIDC and to participate in the controversial meeting where the MPSIDC passed its resolution dated 19.4.1995. It is significant to note that clause 89 does not

contemplate that the Industries Commissioner, Government of Madhya Pradesh would necessarily, or automatically, or as a matter of course, must be nominated as Director of the MPSIDC. Likewise, clause 89 does not require a nominee director to be drawn out of members of the IAS cadre. In this view of the matter, it cannot be said that the appellant's nomination as Director of the MPSIDC, was the outcome of his holding the office of Industries Commissioner, Government of Madhya Pradesh, or his nomination as a Director in six other companies, or on account of his being a member of the IAS cadre. [para 12] [471-D-E; 473-A-D]

1.2. If an accused holds a plurality of offices, each one of which makes him a public servant, sanction is essential only at the hands of the competent authority entitled to remove him from service of the office which he had allegedly misused. This leads to the clear inference, that other public offices held by the accused are irrelevant for purposes of obtaining sanction. Further, sanction is essential only if, at the time of taking cognizance, the accused was still holding the public office which he allegedly abused. [para 14] [486-D-F]

R.S. Naik vs. A.R. Antulay, **1984 (2) SCR 495 = (1984) 2 SCC 183; and** *Prakash Singh Badal vs. State of Punjab*, **2006 (10) Suppl. SCR 197 = (2007) 1 SCC 1, relied on.**

1.3. In the facts and circumstances of the instant case, sanction if required, ought to have been obtained from the Governor of the State of Madhya Pradesh, as the appellant is stated to have misused his position while discharging his responsibilities as a nominee Director of the MPSIDC. It is clear that the appellant's participation in the Cabinet Review Meeting dated 28.1.1994, and in the relevant meetings of the Board of Directors (of the MPSIDC) had no nexus to the post of Industries Commissioner, Government of Madhya Pradesh, or the

subsequent office held by him as Joint Secretary, Department of Heavy Industries, Government of India. Accordingly, sanction of the authorities with reference to the post of Industries Commissioner, Government of Madhya Pradesh and Joint Secretary, Department of Heavy Industries, Government of India held by the appellant, was certainly not required. [para 14] [486-F-H; 487-A-B]

1.4. Besides, the appellant remained a nominee Director of the MPSIDC from 1993 to 1998. The first charge sheet in the matter was filed on 24.9.2007, i.e., after the appellant had relinquished charge of the office which he is alleged to have abused/misused (i.e. the office of nominee Director of the MPSIDC). In this view of the matter, since the appellant was not holding the public office which he is alleged to have abused, when the first charge sheet was filed, there was no need to obtain any sanction before proceeding to prosecute the appellant, for the offences alleged against him. [para 15] [487-G-H; 488-A-B]

State of Madhya Pradesh vs. Sheetla Sahai & Ors., **2009 (12) SCR 1048 = (2009) 8 SCC 617 – distinguished**

2.1. As regards the plea that sanction to prosecute another similarly situated co-accused had been obtained, suffice it to say that parity in law can be claimed only in respect of action rightfully executed. And not otherwise. Since sanction was not required in the case of the appellant, it cannot be said that merely because sanction was obtained in respect of another co-accused, it needed to have been obtained in the appellant's case as well. [para 17] [489-D, E-G]

Soma Chakravarty vs. State through CBI, **2007 (6) SCR 324 = (2007) 5 SCC 403- held inapplicable.**

2.2. So far as the plea that the appellant was not

incharge of the conduct of business of the MPSIDC is concerned, it is significant to note that the appellant is not being blamed for the implementation of the resolution of the Board of Directors of the MPSIDC dated 19.4.1995. The charge against the appellant is based on the fact that he allowed the Board of Directors of the MPSIDC to pass the resolution dated 19.4.1995, inspite of the earlier decisions of the Cabinet Review Committee (in meeting dated 18.1.1994) and the consequential resolution of the Board of Directors (dated 31.1.1994). In the facts of the case, the accusation implicating the appellant, is directly attributable to him as nominee Director of the MPSIDC. His culpability lies in the mischief of passing the resolution dated 19.4.1995. The implementation of the said resolution is the consequential effect of the said mischief. [para 19] [493-A, C-D; 494-A-C]

National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal & Anr. **2010 (2) SCR 805 = (2010) 3 SCC 330 – held inapplicable.**

3. The trial court is directed to expedite the trial, on a weekly basis, keeping in mind, that the charge sheet in the matter was filed as far back as in 2007. [para 22] [496-D]

C.K. Jaffer Sharief vs. State (through CBI), **(2013) 1 SCC 205- cited.**

Case Law Reference:

1984 (2) SCR 495	relied on	para 13
2006 (10) Suppl. SCR 197	relied on	para 13
2009 (12) SCR 1048	distinguished	para 16
2007 (6) SCR 324	held inapplicable	Para 17
2010 (2) SCR 805	held inapplicable	para 18
(2013) 1 SCC 205	cited	Para 20

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1454 of 2013.

From the Judgment & Order dated 29.08.2011 of the High Court of Madhya Pradesh at Jabalpur in Criminal Revision No. 1422 of 2008.

WITH

C.A. No. 1455 of 2013

L.N. Rao, Indu Malhotra, Amit Prasad, Kush Chatur Vedi, Vivek Jain, Malvika Kapila, J.P. Malviya, Ruchika Pathak, Vikas Mehta for the Appellant.

C.D. Singh, Sunny Choudhary for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Investigation into the affairs of the Madhya Pradesh Industrial Development Corporation (renamed as Madhya Pradesh State Industrial Development Corporation, hereinafter referred to as the 'MPSIDC') was ordered with effect from 3.1.1996, by the State Government. Thereupon, a first information report bearing no. 25 of 2004 was registered under Sections 409, 406, 467, 468 and 120B of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'PC Act'). The allegations levelled in the first information report generally were, that the functionaries of the MPSIDC had permitted investment by way of inter corporate deposits (hereinafter referred to as the 'ICD's') through a resolution of the Board of Directors (of the MPSIDC) dated 19.4.1995. By the instant resolution, the Board (of the MPSIDC) authorized its Managing Director, to extend short term loans (including ICD's) out of the surplus funds with the MPSIDC, on suitable terms and conditions. The gravamen of the accusation was, that the Board of Directors' resolution dated 19.4.1995

was passed in disregard of an earlier decision taken in the Cabinet Review Meeting held on 28.1.1994, wherein a decision was taken that the MPSIDC would not extend financial assistance to industries. The petitioner herein had admittedly attended the said meeting held on 28.1.1994. The accusation also included the insinuation, that after the decision of the Cabinet Review Committee dated 28.1.1994, the Board of Directors (of the MPSIDC) had passed an endorsing resolution dated 31.1.1994, wherein it was resolved by the MPSIDC to stop financing industries, from out of its surplus funds. The petitioner herein had even participated in the instant proceedings held on 31.1.1994. Based on the aforesaid factual position, it was sought to be suggested, that undeterred by the decision during the Cabinet Review Meeting dated 28.1.1994, and the resolution of the Board dated 31.1.1994 (which had prohibited extension of financial assistance to industries), the Board of Directors' resolution dated 19.4.1995, authorized its Managing Director to extend short term loans (including ICD's) to industries, out of surplus funds with the MPSIDC, on suitable terms and conditions. It was also alleged, that the above controversial Board resolution dated 19.4.1995 was passed in complete disregard to the mandate contained in Section 292 of the Companies Act, 1965. After the aforesaid Board resolution dated 19.4.1995, it was alleged, that the MPSIDC had extended ICD's to a large number of companies, out of which 42 companies had committed default in repayments. In the abovementioned first information report, it was also alleged, that the abovementioned transactions executed by the MPSIDC were illegal and in violation of law.

2. The ICD's referred to in the foregoing paragraph were executed during the period between 1995 and 2004. It was alleged, that four senior functionaries of the MPSIDC who were then members of the Board of Directors of the MPSIDC had deliberately supported the resolution of the Board of Directors dated 19.4.1995, despite the fact that they were aware of the Cabinet Review Meeting decision dated 28.1.1994, as well as,

the earlier resolution of the Board of Directors of the MPSIDC dated 31.1.1994. Without their participation and support, it was alleged, that the controversial Board resolution dated 19.4.1995 could not have been passed.

3. It would also be relevant to mention, that allegations were also levelled against 42 defaulting companies in the first information report dated 24.7.2004. The said 42 companies had defaulted by not making repayments of the ICD's released to them, in terms of their contractual obligations. The said first information report, however, did not make any reference to a large number of other companies in whose favour the MPSIDC had likewise extended ICD's, simply because the companies had returned the loaned amount to the MPSIDC, in consonance with their contractual obligations.

4 A brief description of the four senior functionaries of the MPSIDC, against whom allegations were levelled, is being delineated below:

(i) Rajender Kumar Singh : He was the then State Minister in the Commerce and Industries Department. He was also the then Chairman of the MPSIDC, having been appointed as such on 7.4.1994.

(ii) Ajoy Acharya : He was a member of the IAS cadre, belonging to the 1976 batch. While holding the charge of the office of Industries Commissioner, Government of Madhya Pradesh, he was nominated as a Director of the MPSIDC in 1993. He continued as such till

1998. In June 1998, he was transferred as Joint Secretary, Department of Heavy Industries, Government of India, whereupon, he ceased to be on the Board of Directors of the MPSIDC.

(iii) J.M. Ramamurthy : He was also a member of the IAS cadre. He was appointed as Special Director, on the Board of the MPSIDC in 1993. He retired from the IAS on 30.6.1998. Thereupon, he ceased to be on the Board of Directors of the MPSIDC.

(iv) Munadutt Pillai Rajan : He was also a member of the IAS cadre. He was appointed as the Managing Director of the MPSIDC. He retired from the IAS on 7.5.2000. Thereupon, he ceased to be the Managing Director of the MPSIDC.

5. The first charge sheet was filed on 24.9.2007. The allegations against the petitioner herein, Ajoy Acharya, were as follows:

"(a) The petitioner was present at the Cabinet Review Meeting dated 28.01.1994 and Board Meeting dated 31.01.1994, where the decision relating to discontinuance of project financing/providing

financial assistance was taken, and thus, the instant factual position was within petitioner's personal knowledge."

(b) The petitioner was present in the Board Meeting dated 19.04.1995 in which the Board Resolution was passed to engage itself in Investments by way of ICD, and also in other Board Meeting after 28.01.1994 where decision relating to equity participation was taken. The petitioner did not object to the passing of these resolutions despite of his having been aware of the contrary decision taken at the Cabinet Review Meeting which was endorsed at the Board Meeting dated 31.1.1994.

(c) The petitioner did not act bonafidely as the Cabinet Review Meeting had specifically stopped giving of any financial assistance to industries out of the surplus funds available with the MPSIDC.

(d) The Board Resolution dated 19.04.1995 empowering the Managing Director to invest in ICD was in violation of Section 292 of the Companies Act, and also, in violation of Memorandum of Association and Articles of Association.

(e) The petitioner facilitated the passing of the aforesaid allegedly illegal Board Resolution, which became the foundation for all illegal ICD's.

(f) The petitioner facilitated the passing of the resolutions referred to above, by attending the said Board Meetings, wherein he did not object to the proposed resolutions in the Board Meetings."

6. The first charge sheet dated 22.9.2007 was filed in Special Case no. 7 of 2007, and the Special Judge, Bhopal, took cognizance thereof. It is the contention of the petitioner Ajoy

Acharya, that upon his having perused the charge sheet dated 22.9.2007 (and the documents enclosed therewith), he learnt that no sanction was applied for or obtained, before initiation of the above prosecution against him. Under the belief, that prior sanction was a pre-requisite under Section 19 of the PC Act, as well as, under Section 197 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'CrPC'), the petitioner filed a petition under Section 239 of the CrPC (as well as, Section 19 of the PC Act) seeking discharge on the ground, that prosecution had been initiated against him without seeking sanction of the competent authority. The petition filed under Section 239 of the CrPC was dismissed by the Special Judge, Bhopal, on 11.4.2008.

7. Dissatisfied with the aforesaid order dated 11.4.2008, the petitioner preferred Criminal Revision Petition no. 1422 of 2008, in the High Court of Madhya Pradesh (before its principal seat at Jabalpur, hereinafter referred to as the 'High Court'). The aforesaid Criminal Revision Petition was dismissed by a Division Bench of the High Court on 29.8.2011. Aggrieved by the order passed by the Special Judge, Bhopal (dated 11.4.2008), and the order passed by the High Court (dated 29.8.2011), the petitioner preferred Petition for Special Leave to Appeal (Criminal) no. 61 of 2012. This Court issued notice in the above matter (as also in a connected matter i.e., Special Leave to Appeal (Criminal) no. 400 of 2012) on 6.1.2012. While issuing notice, an interim order came to be passed on 6.1.2012, staying proceedings before the Special Judge, Bhopal (in Special Case no. 7 of 2007).

8. We have concluded hearing in the matter. Leave is granted.

9. We shall endeavour to first adjudicate the principal contention advanced at the hands of the appellant, namely, that the initiation of prosecution against the appellant was not sustainable in law, since sanction of the competent authority was not obtained before cognizance in the matter was taken.

The particulars of the allegations levelled against the appellant in the charge sheet filed against him (and others) are irrelevant for the determination of the present controversy. We have already recorded hereinabove briefly, an outline of the controversy which resulted in the filing of the charge sheet (dated 22.9.2007) involving the appellant. Despite our above determination, it is imperative at the cost of repetition to notice, that the pointed allegation in respect of the appellant's culpability is drawn from the resolution of the Board of Directors of the MPSIDC dated 19.4.1995. For all intents and purposes, therefore, our determination on the merits of the controversy, will be based on the culpability of the appellant on account of his participation in the meeting of the Board of Directors, wherein the resolution dated 19.4.1995 was passed, without his having objected to the same.

10. Having recorded the cause for his being arrayed as an accused, the next step in the process of the present adjudication is to determine whether the participation of the appellant in the meetings in question was based on his position as a nominee Director on the Board of Directors of the MPSIDC, and/or in his capacity as a member of the IAS cadre allocated to the State of Madhya Pradesh. The above determination, would make all the difference to the outcome on the principal issue canvassed on behalf of the appellant. If the appellant's position as nominee director of the MPSIDC was abused, then the holding of the said position itself would be relevant for deciding the present controversy. If however, the office of Industries Commissioner, Government of Madhya Pradesh was abused, the consideration would be different. In the latter situation, the appellant being a member of the IAS cadre, his said position would necessarily have a relevant nexus to the issue in hand. It is essential to notice, that besides being a nominee Director of the Board of Directors of the MPSIDC, the appellant was simultaneously nominated as a Director of six other companies. The nomination of the appellant as Director in the other companies (besides the

MPSIDC), has no nexus to the allegations levelled against him in the charge sheet dated 22.9.2007. However, there is some doubt about the fact, whether the appellant participated in the controversial meeting of the Board of Directors (of the MPSIDC) only because of his holding the office of Industries Commissioner of the Government of Madhya Pradesh, which position he occupied as a member of the IAS cadre of the State of Madhya Pradesh.

11. The case set up by the appellant was, that it was mandatory for the prosecution to obtain sanction before initiating prosecution against him, as he held a government post, namely, the post of Industries Commissioner, Government of Madhya Pradesh. It was also submitted on the appellant's behalf, that he was a public servant, and the President of India was his appointing authority, as also his dismissing authority. Even while he was discharging his duties as Industries Commissioner, Government of Madhya Pradesh, and thereafter, when he had proceeded on appointment by way of deputation to the Central Government, his appointing and dismissing authorities remained the same. Insofar as his being nominated as a Director on the Board of the MPSIDC is concerned, the case set up by the appellant was, that his nomination co-existed with his appointment as Industries Commissioner, Government of Madhya Pradesh. In this behalf it was asserted, that his being nominated as a Director (with the MPSIDC) was the outcome/consequence/result of his holding the office of Industries Commissioner, Government of Madhya Pradesh. It was submitted, that had he not held the office of Industries Commissioner, he would not have been nominated as a Director (with the MPSIDC). It was further asserted, that consequent upon his appointment by way of deputation to the Central Government, his successor on the post of Industries Commissioner, came to be nominated as a Director on the Board of the MPSIDC. It was therefore, sought to be canvassed, that the appellant's nomination as Director of the Board of the MPSIDC, was a fallout/sequel of his

appointment as Industries Commissioner, Government of Madhya Pradesh. It was accordingly his contention, that he continued to occupy the same position as he had occupied while holding the office of Industries Commissioner, Government of Madhya Pradesh, even after cognizance was taken by the Special Judge, Bhopal. The submission projected was premised on the foundation, that the offices held by the appellant were the outcome of his appointment to the IAS cadre. As such, according to the appellant, his participation in the proceedings of the Board of Directors culminating in its resolution dated 19.4.1995, must be deemed to have been taken in his capacity as a member of the IAS cadre.

12. On the pleas canvassed at the hands of the learned counsel for the appellant, as have been noticed in the foregoing paragraph, there can be no doubt that merely the position held by the appellant as Commissioner Industries, Government of Madhya Pradesh, would not have vested in him the right to participate in the affairs of the MPSIDC. It was only on account of the nomination of the appellant as director of the MPSIDC, that vested in him the authority to participate in the controversial meeting where the MPSIDC passed its resolution dated 19.4.1995. Likewise, his nomination as a Director in six other companies did not vest in him any right whatsoever, to deal with the affairs of the MPSIDC. It is only on account of his being a nominee Director of the MPSIDC, that he assumed the responsibility and the power, to deal with the affairs of the MPSIDC. His participation in the proceedings of the Board of Directors which passed its resolution dated 19.4.1995 was therefore exclusively on account of his having been nominated as a Director on the Board of the MPSIDC. We must therefore, first endeavour, to deal with the credibility of the submission canvassed on behalf of the appellant, that the appellant's nomination as Director (with the MPSIDC) was the outcome of his holding the office of Industries Commissioner, Government of Madhya Pradesh. It was not disputed during the course of hearing, that the appellant's nomination as Director (with the

MPSIDC) emerges from clause 89(2) of the Memorandum and Articles of Association of the MPSIDC. Clause 89 aforementioned is being extracted hereunder:

"89 (1) The number of Directors shall not be less than three and more than twelve but the number can be increased or decreased by the Governor subject to the provisions of the Act.

(2) Unless otherwise determined by the Governor from time to time not more than five Directors shall be nominated by the Governor so long as the Government's share does not exceed Rs.26 lakhs. In the event of Government's share exceeding this amount, the number of Directors to be nominated by the Governor will increase. The number of Directors so increased will be in proportion to the Government's share in excess of Rs.26 lakhs and the shares held by persons other than Government. The Directors other than those nominated by the Governor shall be appointed by the Company in the general meeting.

(3) The tenure of all Directors including Chairman and excluding Managing Director shall be for the period as fixed or determined by the State Government from time to time. The Managing Director shall retire on his ceasing to hold the office of the Managing Director. A retiring Director shall be eligible for reappointment.

(4) The Governor shall have the power to remove any Director appointed and nominated by him including the Chairman and the Managing Director from Office at any time in his absolute discretion.

(5) The Governor shall have the right to fill any vacancy in the Office of a Director caused by

retirement, removal, resignation, death or otherwise of the Directors nominated/appointed by him.

A perusal of sub-clause (2) of clause 89 reveals, that nominee Directors to the MPSIDC are appointed by the Governor. The Governor (under sub-clause (4) extracted above) is also vested with the absolute discretion to remove a nominee Director. But what needs emphasis is, that clause 89 of the Memorandum and Articles of Association of the MPSIDC, does not contemplate that the Industries Commissioner, Government of Madhya Pradesh would necessarily, or automatically, or as a matter of course, must be nominated as Director of the MPSIDC. Likewise, clause 89 aforementioned, does not require a nominee director to be drawn out of members of the IAS cadre. In fact, in our view, the Governor under clause 89 has the absolute discretion to nominate anyone suitable as per his wisdom, as nominee Director to the MPSIDC. In the above view of the matter, it is not possible to accept, that the appellant's nomination as Director of the MPSIDC, was the outcome of his holding the office of Industries Commissioner, Government of Madhya Pradesh, or on account of his being a member of the IAS cadre. In the above view of the matter it is natural to conclude, that the participation of the appellant in the meeting of the Board of Directors of the MPSIDC on 19.4.1995 was not on account of his holding the office of Industries Commissioner, Government of Madhya Pradesh, or on account of his being a member of the IAS cadre. Having so concluded, we shall now endeavour to determine, on the basis of the law declared by this Court, the veracity of the assertion made by the appellant, that prior sanction was mandatory, and in its absence, the prosecution initiated against the appellant should be considered to be without jurisdiction.

13. We shall first endeavour to deal with the law declared by this Court on the proposition being canvassed before us. In this behalf, reference may first of all be made to R.S. Naik vs. A.R. Antulay, (1984) 2 SCC 183. Observations made by this

Court, as are relevant to the proposition canvassed on behalf of the appellant, are being extracted hereunder :

"21. Re: (b) and (c): It was strenuously contended that if the accused has held or holds a plurality of offices occupying each one of which makes him a public servant, sanction of each one of the competent authorities entitled to remove him from each one of the offices held by him, would be necessary and if anyone of the competent authorities fails or declines to grant sanction, the court is precluded or prohibited from taking cognizance of the offence with which the public servant is charged. This submission was sought to be repelled urging that it is implicit in Section 6 that sanction of that authority alone is necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motives. Section 6(1)(c) is the only provision relied upon on behalf of the accused to contend that as M.L.A. he was a public servant on the date of taking cognizance of the offences, and therefore, sanction of that authority competent to remove him from that office is a sine qua non for taking cognizance of offences. Section 6 (1)(c) bars taking cognizance of an offence alleged to have been committed by public servant except with the previous sanction of the authority competent to remove him from his office.

xxx xxx xxx xxx

23. Offences prescribed in Sections 161, 164 and 165 IPC and Section 5 of the 1947 Act have an intimate and inseparable relation with the office of a public servant. A public servant occupies office which renders him a public servant and occupying the office carries with it the powers conferred on the office. Power generally is not conferred on an individual person. In a society governed by rule of law power is conferred on office or acquired by statutory status and the individual occupying the office or on whom

status is conferred enjoys the power of office or power flowing from the status. The holder of the office alone would have opportunity to abuse or misuse the office. These sections codify a well-recognised truism that power has the tendency to corrupt. It is the holding of the office which gives an opportunity to use it for corrupt motives. Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. This interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of sub-section (1) of Section 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section 6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other than legal remuneration for doing or forbearing to do an official act (Section 161 IPC) or as a public servant abets offences punishable under Sections 161 and 163 (Section 164 IPC) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (Section 165 IPC) or commits criminal misconduct as defined in Section 5 of the 1947 Act, it is implicit in the various offences that the public servant has misused or abused the power of office held by him as public servant. The expression 'office' in the three sub-clauses of Section 6(1) would clearly denote that office which the public servant misused or abused for

corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This interrelation between the office and its abuse if severed would render Section 6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in Section 6 providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of government servants against frivolous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants. (See Mohd. Iqbal Ahmad v. State of Andhra Pradesh, [1979] 2 S.C.R. 1007). The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him, to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That

authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office.

24. Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the learned counsel that a Minister who is

indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rougue's charter. (See *Davis & Sons Ltd. v. Atkins*)

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26. Therefore, upon a true construction of Section 6, it is implicit therein that sanction of that competent authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motive and for which a prosecution is intended to be launched against him.

27. In the complaint filed against the accused it has been repeatedly alleged that the accused as Chief Minister of Maharashtra State accepted gratification other than legal remuneration from various sources and thus committed various offences set out in the complaint. Nowhere, not even by a whisper, it is alleged that the accused has misused or abused for corrupt motives his office as M.L.A. Therefore, it is crystal clear that the complaint filed against the accused charged him with criminal abuse or misuse of only his office as Chief Minister. By the time, the court was called upon to take cognizance of the offences, so alleged in the complaint, the accused had ceased to hold the office of the Chief Minister. On this short ground, it can be held that no sanction to prosecute him was necessary as former Chief Minister of Maharashtra State. The appeal can succeed on this short ground. However, as the real bone of contention between the parties was whether as M.L.A. the accused was a public servant and the contention was canvassed at some length, we propose to deal with the same.

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68. Re. (f) & (g): The learned Judge after recording a finding that M.L.A. is a public servant within the comprehension of clause (12)(a) and further recording the finding that as on the date on which the Court was invited to take cognizance, the accused was thus a public servant proceeded to examine whether sanction under Section 6

of the 1947 Act is a pre-requisite to taking cognizance of offences enumerated in Section 6 alleged to have been committed by him. He reached the conclusion that a sanction is necessary before cognizance can be taken. As a corollary he proceeded to investigate and identify, which is the sanctioning authority who would be able to give a valid sanction as required by Section 6 for the prosecution of the accused in his capacity as M.L.A.? We have expressed our conclusion that where offences as set out in Section 6 are alleged to have been committed by a public servant, sanction of only that authority would be necessary who would be entitled to remove him from that office which is alleged to have been misused or abused for corrupt motives. If the accused has ceased to hold that office by the date, the court is called upon to take cognizance of the offences alleged to have been committed by such public servant, no sanction under Section 6 would be necessary despite the fact that he may be holding any other office on the relevant date which may make him a public servant as understood in Sec 21, if there is no allegation that office has been abused or misused for corrupt motives. The allegations in the complaint are all to the effect that the accused misused or abused his office as Chief Minister for corrupt motives. By the time the Court was called upon to take cognizance of those offences, the accused had ceased to hold the office of Chief Minister. The sanction to prosecute him was granted by the Governor of Maharashtra but this aspect we consider irrelevant for concluding that no sanction was necessary to prosecute him under Section 6 on the date on which the court took cognizance of the offences alleged to have been committed by the accused. Assuming that as MLA the accused would be a public servant under Section 21, in the absence of any allegation that he misused or abused his office as MLA that aspect becomes immaterial. Further Section 6 postulates existence of a valid sanction for prosecution of a public

servant for offences punishable under Sections 161, 164, 165 IPC and Section 5 of the 1947 Act, if they are alleged to have been committed by a public servant. In view of our further finding that M.L.A. is not a public servant within the meaning of the expression in Section 21 IPC no sanction is necessary to prosecute him for the offences alleged to have been committed by him."

(emphasis is ours)

The conclusions drawn by this Court in *R.S. Naik's* case (supra) were affirmed by this Court in *Prakash Singh Badal vs. State of Punjab,* (2007) 1 SCC 1, wherein this Court held as under:

"23. Offences prescribed in Sections 161, 164 and 165 IPC and Section 5 of the 1947 Act have an intimate and inseparable relation with the office of a public servant. A public servant occupies office which renders him a public servant and occupying the office carries with it the powers conferred on the office. Power generally is not conferred on an individual person. In a society governed by the rule of law power is conferred on office or acquired by statutory status and the individual occupying the office or on whom status is conferred enjoys the power of office or power flowing from the status. The holder of the office alone would have opportunity to abuse or misuse the office. These sections codify a well-recognised truism that power has the tendency to corrupt. It is the holding of the office which gives an opportunity to use it for corrupt motives. Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. This interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of Sub-section (1) of Section 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section 6 requires a sanction

before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other than legal remuneration for doing or forbearing to do an official act (Section 161 IPC) or as a public servant abets offences punishable under Sections 161 and 163 (Section 164 IPC) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (Section 165 IPC) or commits criminal misconduct as defined in Section 5 of the 1947 Act, it is implicit in the various offences that the public servant has misused or abused the power of office held by him as public servant. The expression 'office' in the three Sub-clauses of Section 6(1) would clearly denote that office which the public servant misused or abused for corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This interrelation between the office and its abuse if severed would render Section 6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in Section 6 providing for sanction by a competent authority who would he able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can he given by an authority competent to remove the public servant from the office

which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants. (See *Mohd. Iqbal Ahmad v. State of A.P.,* (1979) 4 SCC 172). The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him, to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could he abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the Legislature clearly provided that that authority alone would be

competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office.

24. Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used (sic) nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used (sic) or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the Learned Counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him

as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rougue's charter. (See *W. Davis & Sons Ltd. v. Atkins,* (1977) 3 All ER 40.

50. The offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120B can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of the offence."

(emphasis is ours)

14. The judgments referred to in paragraph 13 above, were relied upon by the Courts below to reject the contention advanced at the hands of the appellant, that sanction was essential before the appellant could be prosecuted. It would be pertinent to mention, that extracts from the judgments referred to in paragraph 13 reproduced above, deal with two pointed situations. Firstly, whether sanction before prosecution is required from each of the competent authorities entitled to remove an accused from the offices held by him, in situations wherein the accused holds a plurality of offices. The second determination was in respect of the requirement of sanction, in situations where the accused no longer holds the office, which he is alleged to have abused/misused, for committing the offence (s) for which he is being blamed. In answer to the first query, it has unambiguously been concluded, that if an accused holds a plurality of offices, each one of which makes him a public servant, sanction is essential only at the hands of the competent authority (entitled to remove him from service) of the office which he had allegedly misused. This leads to the clear inference, that other public offices held by the accused wherein an accused holds a plurality of offices, are irrelevant for purposes of obtaining sanction prior to prosecution. On the second issue it was concluded, that sanction was essential only if, at the time of taking cognizance, the accused was still holding the public office which he had allegedly abused. If the legal position determined in the above judgments is taken into consideration, there is certainly no doubt, that in the facts and circumstances of this case, sanction if required, ought to have been obtained from the Governor of the State of Madhya Pradesh. The instant determination is premised on the fact, that the appellant is stated to have misused his position while discharging his responsibilities as a nominee Director of the MPSIDC. It is clear to us, specially from the deliberation recorded hereinabove, that the appellant's participation in the Cabinet Review Meeting dated 28.1.1994, and in the relevant

meetings of the Board of Directors (of the MPSIDC) had no nexus to the post of Industries Commissioner, Government of Madhya Pradesh, or the subsequent office held by him as Joint Secretary, Department of Heavy Industries, Government of India. Accordingly, in our considered view, sanction of the authorities with reference to the post of Industries Commissioner, Government of Madhya Pradesh and Joint Secretary, Department of Heavy Industries, Government of India held by the appellant, was certainly not required. We therefore, hereby reject the submission advanced at the hands of the learned counsel for the appellant, that since the appellant continued to hold the above-mentioned public office(s) in his capacity as a member of the IAS cadre, at the time the first charge sheet was filed on 24.9.2007, prosecution could be proceeded with, and cognizance taken, only upon sanction by the competent authority(ies) of the said two offices (Industries Commissioner, Government of Madhya Pradesh and Joint Secretary, Department of Heavy Industries, Government of India), as wholly misconceived.

15. The abuse/misuse of authority, alleged against the appellant pertains to the discharge of his responsibilities as a nominee Director (on the Board of the MPSIDC). Therefore, the further question which arises for our consideration is, whether sanction at the hands of the Governor of the State of Madhya Pradesh, (who had the power to remove any Director appointed or nominated by him under clause 89 of the Memorandum and Articles of Association of the MPSIDC), was a prerequisite before taking cognizance in the matter. In the facts and circumstances of this case, we are of the view, that answer to the instant question has also to be in the negative. Our aforesaid determination is based on the fact that the appellant remained a nominee Director of the MPSIDC from 1993 to 1998. The first charge sheet in the matter was filed on 24.9.2007. Well before the filing of the first charge sheet, the appellant had relinquished charge of the office which he is

alleged to have abused/misused (i.e. the office of nominee Director of the MPSIDC). In the above view of the matter, since the appellant was not holding the public office which he is alleged to have abused, when the first charge sheet was filed, in terms of the law declared by this Court (referred to in the judgments extracted in paragraph 13 above), there was no need to obtain any sanction before proceeding to prosecute the appellant, for the offences alleged against him.

16. It would be relevant to mention, that during the course of hearing learned counsel for the appellant placed emphatic reliance on the judgment rendered by this Court in *State of Madhya Pradesh vs. Sheetla Sahai & Ors.,* (2009) 8 SCC 617. It is not necessary for us to refer either to the factual position in the judgment relied upon, or even the conclusions recorded thereon. We say so because, the issues canvassed and determined in the aforesaid judgments were not the ones on the basis whereof we have recorded our conclusions, in the foregoing paragraphs. It is sufficient for us to note, that the judgment rendered by this Court in *State of Madhya Pradesh vs. Sheetla Sahai & Ors.* (supra), does not carve out any exception, to the two propositions relied upon for the conclusions drawn by us, from the judgments referred to in paragraph 13 above.

17. The second contention advanced at the hands of the learned counsel for the appellant, was based on the determination rendered by this Court in *Soma Chakravarty vs. State through CBI,* (2007) 5 SCC 403. Pointed reliance was placed by the learned counsel for the appellant on paragraph 23 which is being extracted hereunder:-

> "23. In a case of this nature, the learned Special Judge also should have considered the question having regard to the 'doctrine of parity' in mind. An accused similarly situated has not been proceeded against only because, the departmental proceedings ended in his favour.

Whether an accused before him although stands on a similar footing despite he having not been departmentally proceeded against or had not been completed exonerated also required to be considered. If exoneration in a departmental proceeding is the basis for not framing a charge against an accused person who is said to be similarly situated, the question which requires a further consideration was as to whether the applicant before it was similarly situated or not and/or whether the exonerated officer in the departmental proceeding also faced same charges including the charge of being a party to the larger conspiracy."

(emphasis is ours)

It was the vehement contention of the learned counsel for the appellant, that sanction to prosecute another co-accused similarly situated as the appellant, having been obtained, it was not permissible to treat the appellant differently. We find no substance in the second contention advanced at the hands of the learned counsel for the appellant. Having concluded on the basis of the law declared by this Court, that prior sanction for prosecuting the appellant was unessential, it is futile to suggest that sanction ought to have been obtained all the same. The instant submission needs no further consideration in view of the deliberations recorded by us hereinabove. Parity in law can be claimed only in respect of action rightfully executed. And not otherwise. Having concluded that sanction was not required in the case of the appellant, it is not possible for us to accept on the analogy of the submission advanced at the hands of the learned counsel for the appellant, that merely because sanction was obtained in respect of another co-accused, it needed to have been obtained in the appellant's case as well.

18. The next contention advanced at the hands of the learned counsel for the appellant was based on Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred

to as the 'NI Act'). Section 141 aforementioned is being extracted hereunder:-

"**141. Offences by companies.-** (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished

accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

Relying on sub-Section (1) of Section 141 extracted above, it was the vehement contention of the learned counsel for the appellant, that the appellant was not in charge of the conduct of the business of the MPSIDC. It was also his submission, that the appellant was not responsible to the MPSIDC for the conduct of its day to day activities. In this behalf it was sought to be asserted, that the appellant was not aware of the fact, that the functionaries of the MPSIDC were extending short term loans (including ICD's) out of the surplus funds of the MPSIDC to industrial establishments. It was also pointed out, that the appellant had neither examined nor approved any financial assistance extended to industries, out of the surplus funds of the MPSIDC, on the basis of the resolution of the Board of Directors dated 19.4.1995. As such it was asserted, that the accusations levelled against the appellant were misconceived. Insofar as the instant aspect of the matter is concerned, learned counsel for the appellant relied on the decision rendered by this Court in *National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal & Anr.,* (2010) 3 SCC 330. Learned counsel invited our pointed attention to the following observations recorded therein:-

"6. In the connected appeal, the appellant - DCM Financial Services Ltd., entered into a hire purchase agreement on 25.2.1996 with M/s International Agro Allied Products Ltd. At the time of entering into contract, the Company handed over post-dated cheques to the appellant towards

payment of monthly hire/rental charges. Respondent No. 1, Dev Sarin was one of the Directors of the said Company. The cheque issued by International Agro and Allied Products Ltd. in favour of the appellant was duly presented for payment on 28.10.1998 and the same was returned unpaid for the reason that the Company had issued instructions to the bankers stopping payment of the cheque.

12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact that if a Director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company."

(emphasis is ours)

19. We have given our thoughtful consideration to the contention advanced at the hands of the learned counsel for the appellant, as has been noticed in the foregoing paragraph. We

are of the view, that the appellant's reliance on Section 141 of the NI Act, as also, the judgment rendered by this Court in *National Small Industries Corporation Ltd.* (supra), is misconceived. The appellant is not being blamed for the implementation of the resolution of the Board of Directors of the MPSIDC dated 19.4.1995. The appellant is being blamed for having allowed the aforesaid resolution dated 19.4.1995 to be passed despite the earlier decision taken in the Cabinet Review Meeting held on 28.1.1994, as also, the earlier resolution of the Board of Directors of the MPSIDC dated 31.1.1994. It is not a matter of dispute before us, that the appellant had participated in the decision making process in the meeting of the Cabinet Review Committee dated 28.1.1994, as also, the resolution of the Board of Directors of the MPSIDC dated 31.1.1994. The charge against the appellant is based on the fact, that the appellant allowed the Board of Directors of the MPSIDC to pass the resolution dated 19.4.1995, inspite of the earlier decisions at the hands of the Cabinet Review Committee (in meeting dated 18.1.1994) and the consequential resolution of the Board of Directors (dated 31.1.1994). We, therefore, reject the submission advanced at the hands of the learned counsel for the appellant based on Section 141 of the NI Act. All the same, it would be relevant to notice, that the second proviso under Section 141(1) of the N.I. Act is inapplicable to the facts of this case, because the appellant was not nominated as a Director of the MPSIDC on account of holding the office of Industries Commissioner, Government of Madhya Pradesh. The appellant's appointment as nominee Director of the MPSIDC was based on the determination of the Governor of Madhya Pradesh under clause 89 of the Memorandum and Articles of Association of the MPSIDC. If the factual position alleged against the appellant is correct, the culpability of the appellant would emerge from sub-Section (2) of Section 141 of the N.I. Act. The instant inference is inevitable, because it is not disputed on behalf of the appellant, that he had actually participated in the Cabinet Review Meeting dated 28.1.1984, as well as, in the meetings of the Board of Directors

leading to the passing of the resolutions dated 31.1.1994 and 19.4.1995. In the facts of the present case, the accusation implicating the appellant, is directly attributable to the appellant, as nominee Director of the MPSIDC. The aforesaid inference has been drawn by us, to negate the submission of the learned counsel for the appellant based on Section 141 of the N.I. Act. In our view, the instant issue does not arise for adjudication in the present controversy in view of the conclusions already drawn hereinabove, that the culpability of the appellant, lies in the mischief of passing the resolution dated 19.4.1995. The implementation of the said resolution is the consequential effect of the said mischief.

20. For the last contention advanced on behalf of the appellant, learned counsel placed reliance on a decision rendered by this Court in C.K. Jaffer Sharief vs. State (through CBI), (2013) 1 SCC 205. Our pointed attention was drawn to the following observations recorded therein:-

> "17. It has already been noticed that the appellant besides working as the Minister of Railways was the Head of the two public sector undertakings in question at the relevant time. It also appears from the materials on record that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister. It is difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary advantage either for himself or for any of the aforesaid four persons. If the statements of the witnesses examined under Section 161 Cr.P.C. show that the aforesaid four persons had performed certain tasks to assist the Minister in the discharge

of his public duties, however insignificant such tasks may have been, no question of obtaining any pecuniary advantage by any corrupt or illegal means or by abuse of the position of the appellant as a public servant can arise. As a Minister it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was anticipated that he would be required to perform his official duties while in London. If in the process, the rules or norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under Section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in *M. Narayanan Nambiar v. State of Kerala,* AIR 1963 SC 1116 while considering the provisions of Section 5 of Act of 1947."

(emphasis is ours)

Based on the aforesaid determination, it was the contention of the learned counsel for the appellant, that the allegations levelled against the appellant do not lead to the inference, that the appellant had adopted corrupt or illegal means, or had abused his position as a public servant to obtain any valuable thing or pecuniary advantage, either for himself or for the industries to whom the MPSIDC extended short term loans (including ICD's). We are of the view, that the last contention advanced at the hands of the learned counsel for the appellant is a mixed

question of fact and law. Determination of the instant issue would be possible only after the rival parties have adduced evidence to establish their respective claims. At the said juncture, it would be possible to record factual conclusions. It would then be possible for the concerned Court(s) to draw inferences on the basis of the established factual position, whether the accused is guilty of the accusation levelled against him. Therefore, it is neither proper nor possible for us to deal with the last contention advanced at the hands of the learned counsel for the appellant, at the present juncture.

21. No further contention was advanced at the hands of the learned counsel for the appellant.

22. For the reasons recorded hereinabove, we find no merit in the instant appeals. The same are accordingly hereby dismissed. While disposing of the instant appeals, we consider it just and appropriate to direct the trial Court to expedite the trial, keeping in mind, that the charge sheet in the matter was filed as far back as in 2007. On account of the proceedings initiated at the hands of the appellant, no further proceedings were taken by the Special Judge, Bhopal. In the above view of the matter, we consider it appropriate to direct the trial Court to hold proceedings for the disposal of Special Case No. 7 of 2007 on a weekly basis.

R.P. Appeals dismissed.

RANJEET GOSWAMI
v.
STATE OF JHARKHAND & ANR.
(Criminal Appeal No. 1465 of 2013)

SEPTEMBER 18, 2013

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

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000:

s. 2(2) – Juvenile in conflict with law – Proof of juvenility – The school leaving certificate having been proved, the accused could not be subjected to medical examination – Going by the school leaving certificate, since appellant was a juvenile on the date of occurrence, he can be tried only by JJ Board.

The appellant, who was accused of having committed offences punishable u/ss. 376, 302 and 201, IPC, in order to prove that on the date of occurrence, he was a juvenile, got the Head Mistress of the School examined to prove the School Leaving Certificate. The respondent filed an application that the school leaving certificate was false and fabricated. The Juvenile Justice Board then sought for and accepted the opinion of the Medical Borad, which opined that the appellant was about 20 years of age on the date of occurrence. The Sessions Judge held that the JJ Board did not give any cogent reason for not accepting the school leaving certificate. However, the High Court set aside the order of the Sessions Judge and restored that of the JJ Board.

Allowing the appeal, the Court.

HELD: No cogent reasons have been stated by the

High Court to discard the school leaving certificate which was issued on 10.04.2004 by the then Principal of the school. The certificate reveals the date of birth of the accused as 10.05.1991. The school leaving certificate was proved by examining the Head-mistress of the school. She has recognized the signatures of the Principal who issued the school leaving certificate. The evidence adduced by her was not challenged. Therefore, there is no reason to reject the school leaving certificate. In the circumstances, as per the ratio laid down in *Ashwani Kumar Saxena,* there is no question of subjecting the accused to a medical examination by a medical board. Going by the school leaving certificate, since the appellant was a juvenile on the date of occurrence, he can be tried only by the JJ Board. Consequently, the order passed by the High Court is set aside and that of the Sessions Judge restored. [Para 9-10] [501-F-H; 502-C-D]

Ashwani Kumar Saxena v. State of M.P. **2012 (10) SCR 540 = 2012 (9) SCC 750 – relied on.**

Case Law Reference:

2012 (10) SCR 540	**relied on**	**para 2**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1465 of 2013.

From the Judgment & Order dated 29.10.2010 of the High Court of Jharkhand at Ranchi in Crl. Revision No. 504 of 2009.

Shankar Narayanan (for Gaurav Agrawal) for the Appellant.

Jayesh Gaurav (for Gopal Prasad), Barun Kr. Sinha, Pratibha Sinha, Aayush Raj (for Rameshwar Prasad Goyal) for the Respondents.

The Judgment of the Court was delivered by

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

2. We notice with concern the commission of large number of crimes by the juveniles at a time when there is a hue and cry to lower the age limit of juvenile in conflict with law within the meaning of clause (l) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000. Claiming juvenility large number of applications are also being filed before the criminal courts and age determination enquiry orders passed by the Board themselves result in several litigations right up to this Court. This case is also one among them in spite of the various directions given by this Court as to how to determine the age of a juvenile in conflict with law in *Ashwani Kumar Saxena v. State of M.P.* (2012) 9 SCC 750.

3. The appellant herein was charge-sheeted for the offences under Sections 376, 302 and 201 of the Indian Penal Code, along with three others. The appellant, after submission of the charge-sheet, surrendered before the court on 13.06.2008 and filed an application before the Chief Judicial Magistrate, Dumka on 17.06.2008 stating that on the date of occurrence i.e. 12/13.04.2008 he was a juvenile since his date of birth was 10.05.1991, as per the records kept in the Primary School, Benagadia.

4. The CJM, Dumka forwarded the said application to the Principal Magistrate, Juvenile Justice Board, Dumka (for short "the JJ Board") to conduct an appropriate enquiry and to submit a report. The application was registered as GR Case No.577 of 2008. The appellant preferred a petition on 18.06.2008 before the Board to examine the Principal of Primary School, Benagadiya along with the admission register and also to examine the person in-charge of the Head Master, as well as the head mistress of Akmit School, Benagadia to prove his date of birth. Application was allowed on 23.06.2008, but on the same date, a fresh petition was filed on behalf of the respondent duly endorsed by the APP stating that the appellant had produced a forged copy of the admission register. Appellant

examined Neela Hembrahm, who was the Head Mistress of the School since 17.8.2006, to prove the School Leaving Certificate issued on 10.4.2004, by the then Principal of the School, whose signature was identified and recognized. Applications dated 26.6.2008 and 31.7.2008 were also filed by the appellant for medical examination.

5. The JJ Board then sought the opinion of the Medical Board and the Board opined that the appellant was about 20 years of age on the date of the incident. There was some confusion whether the appellant and one Rajiv Ranjan Goswami was the same person, but it was found otherwise, and the School Leaving Certificate produced was not accepted. The JJ Board, however, accepted the report of the Medical Board and passed an order on 27.3.2009, rejecting the application holding that the appellant was not a juvenile on the date of occurrence. JJ Board then forwarded the report to the CJM. Learned CJM, on accepting the report, committed the case to the Sessions Court and it was registered as Case No.132 of 2009. Accused then preferred Criminal Miscellaneous Appeal No.71 of 2009 before the Sessions Judge, Dumka. Learned Sessions Judge took the view that the JJ Board had not assigned any cogent reasons for discarding the School Admission Register and then to accept the medical report. Learned Judge also took the view that there was conflicting evidence as to the age of the accused, hence the benefit of doubt should go to the accused. The appeal was accordingly allowed and the order passed by the court below was set aside and a direction was given to recall the case from the Sessions Court to be tried by the JJ Board.

6. The respondent aggrieved by the order, approached the Division Bench of the High Court by way of Criminal Revision No.504 of 2009. The Criminal Revision was allowed and the order passed by the JJ Board was restored, setting aside the order dated 30.05.2009, passed by the Sessions Judge, Dumka.

7. Shri Shankar Narayanan, learned counsel appearing for the appellant submitted that the High Court has committed an error in reversing the judgment of the Sessions Judge without examining the correctness or otherwise on the school admission register, which will indicate that his date of birth is 10.05.1991 and hence a juvenile on the date of occurrence i.e. 12/13-04-2008. Learned counsel also submitted that the admission register was properly proved through the head mistress of the school and there is no reason to discard the same. Learned counsel submitted that the question of accepting the report of the medical board arises only if the school leaving certificate is discarded by stating cogent reasons.

8. Shri Barun Kumar Sinha, learned counsel appearing for the respondent, on the other hand, submitted that the High Court has rightly accepted the report of the medical board which indicated that the accused was not a juvenile on the date of occurrence. Learned counsel pointed out that the medical board has assessed the age of the accused as 20 years on the date of occurrence i.e. 12/13-04-2008. Learned counsel also submitted that there was some confusion with regard to the documents produced, one document showed that the date of birth of one Rajiv Ranjan Goswami as 10.04.1990 though the appellant's date of birth was shown as 10.05.1991. It is due to that confusion the matter was referred to the medical board and medical board, in turn, opined that the age of the accused was 20 years on the date of occurrence.

9. We are of the view that no cogent reasons have been stated by the High court to discard the school leaving certificate which was issued on 10.04.2004 by the then Principal of the school. The certificate reveals the date of birth of the accused as 10.05.1991. The school leaving certificate was proved by examining the head mistress of the school. She has recognized the signatures of the principal who issued the school leaving certificate. The evidence adduced by the head mistress was not challenged. Consequently, there is no reason to discard that

document. Further, we notice that there was some confusion as to whether the appellant, whose name is Ranjeet Goswami is the same person Rajiv Ranjan Goswami. The investigating officer's report indicates that they are different persons. Consequently we have to take it that the school leaving certificate produced was in respect of the appellant which has been proved.

10. We, therefore, find no reason to reject the school leaving certificate. If that be so, as per the ratio laid down in *Ashwani Kumar Saxena* (supra) there is no question of subjecting the accused to a medical examination by a medical board. Going by the school leaving certificate since the appellant was a juvenile on the date of occurrence, he can be tried only by the JJ Board. Consequently, the order passed by the High Court is set aside and that of the Sessions Judge, Dumka is restored. The appeal is allowed, as stated above.

R.P. Appeal allowed.

DR. B. R. AMBEDKAR MEDICAL COLLEGE & OTHERS
v.
UNION OF INDIA & ANOTHER
(Writ Petition (Civil) No. 580 of 2013 etc.)

SEPTEMBER 18, 2013

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

Enhancement of Annual Intake Capacity in Undergraduate Courses in Medical College for the Academic Session 2013-14 only Regulations 2013:

Medical admissions – Enhancement of annual intake capacity in undergraduate medical courses – Corrigendum Notification issued by Central Government confining benefits of Regulations, 2013 to Government Colleges only – Held: The Corrigendum is not violative of Art. 14 — In a given case, Central Government, in exercise of power conferred on it by virtue of Establishment of Medical College Regulations (Amendment), 2012, for reasons to be recorded in writing, can modify the time schedule in respect of any of five classes or categories of applicants mentioned in Regulation 1999 — Central Government has power to modify the time schedule to Government Medical Colleges alone, out of the five categories —The corrigendum extending the last date was made applicable only to Government medical colleges recording the reason that the time would be very short so as to process the applications by MCI received from non-government medical colleges — Therefore, it cannot be said that the decision taken by Central Government is perverse, arbitrary or unreasonable, so as to strike down the corrigendum, under the extra-ordinary jurisdiction of the Court under Art. 32 of the Constitution — Establishment of Medical College Regulations, 1999 — Establishment of Medical College Regulations (Amendment), 2012 — Constitution of India, 1950 — Art.14 read with Art. 32

The petitioners-Private unaided Medical Colleges challenged the corrigendum Notification No. 37(1) 2013/ One Time Permission/Med./1935, in so far as it confined the benefits of the "Enhancement of Annual Intake Capacity in Undergraduate Courses in Medical College for the Academic Session 2013-14 only Regulations 2013" ("Regulations 2013"), to the Government Medical Colleges only, as *ultra vires* Art. 14 of the Constitution of India, 1950.

Dismissing the writ petition, the Court

HELD: 1.1 There is imperative need to follow the time limit fixed by this Court in the matter of admission to MBBS/BDS courses in *Mridul Dhar** **which was done in the interest of student-community, for admission to the Post Graduate and Super Speciality courses. Timely admission of students to these courses is of utmost importance so that the students would get quality and timely education. In** *Mridul Dhar***, this Court clearly indicated that the time schedule for establishment of new college or to increase intake in existing college shall be adhered to strictly by all concerned, failing which defaulting party would be liable to be personally proceeded with. In *Priya Gupta*, this Court while reiterating the necessity to follow the time limit fixed by this Court, went even to the extent that failure to conform with the time limit fixed by this Court shall be liable for action under the provisions of the Contempt of Courts Act, 1971 read with Art. 129 of the Constitution of India. [para 7-8] [510-C-G]**

Mridul Dhar (Minor) and Another v. Union of India and Others* **2005 (1) SCR 380 = (2005) 2 SCC 65; *Priya Gupta v. State of Chhattisgarh and Others* **2012 (5) SCR 768 = (2012) 7 SCC 433 – relied on.**

1.2. The object of the Regulations 2013 was to enhance the intake capacity in the existing medical

colleges so as to augment human resources in medicine for attaining optimum Doctor-Population ratio in the Nation, without compromising the prescribed minimum standards of medical education. Regulation 3 deals with the eligibility to make an application. Regulation 4 deals with the procedure to make application. The time-schedule for receipt of application for enhancement of annual intake capacity in under-graduate courses, is provided in Schedule II appended to the Regulations. [para 9-10] [511-B-C; 512-C]

2.1. MCI, in the counter affidavit, stated that the notification dated 8.7.2013 containing the Regulations, 2013 was received by the Council Office only on 16.7.2013. By that time, the last date fixed for receipt of application by the Board of Governors was over, which was on 15.7.2013. MCI, therefore, requested the Government of India to modify the time schedule and extend the last date of receipt of application to 24.7.2013, since they could not receive the applications from medical colleges prior to 15.7.2013. The Central Government considered the request and pointed out that it would not be possible for the Board of Governors of MCI to process all the applications preferred by Non-government medical colleges within the time fixed; therefore, it decided to issue a corrigendum with the modification that the date of 24.7.2013 would apply only to Government medical colleges. [para 12-14] [514-E-F; 516-C-F]

2.2. There is no serious error in the view taken by the Central Government confining Regulations 2013 to Government medical colleges alone in view of strict time limit fixed in the Schedule for receipt of applications i.e. 15.7.2013 and the preremptory directions given by this Court in its judgments. It is made clear that the time limit fixed for starting a medical college as well as for additional intake are of extreme importance, or else it may collide with the time limit fixed for starting the

academic session. [para 15] [516-F-G]

2.3. Establishment of Medical College Regulations, 1999, which was issued in exercise of powers conferred u/s 10A read with s.3 of the Indian Medial Council Act, has recognised five categories of organisations which are eligible to apply for starting a Medical College as well as eligible to apply for further intake of seats. Amongst these, State Government/Union Territory can also set up a Medical College and take additional intake of seats, apart from the other categories. In a given case, the Central Government, in exercise of power conferred on it by virtue of Establishment of Medical College Regulations (Amendment), 2012 for reasons to be recorded in writing, can modify the time schedule in respect of any of five classes or categories of applicants mentioned in Regulation 1999. Resultantly, the Central Government has the power to modify the date from 15.7.2013 to 24.7.2013 in respect of any class or category of applications. So far as the instant case is concerned, it is in exercise of that statutory power, the Corrigendum has been issued by the Central Government modifying the time schedule to the Government Medical College alone out of the five categories. Therefore, the step taken by the MCI cannot be said as violative of Art. 14 of the Constitution. [para 16,17 and 19] [517-C-D, H; 518-A-B; 519-A-D]

2.4. Central Government is also empowered u/s 3(c) of Indian Medical Council Act, as amended in 2010, to issue various directions to the Board of Governors of the MCI, which is, therefore, bound by the Corrigendum issued by the Central Government. [para 20] [519-D-E; 520-A]

2.5. The corrigendum extending the last date was made applicable only to the Government medical colleges recording the reason that the time would be very short so as to process the applications by the MCI received from the non-government medical colleges. Therefore, it

cannot be said that the decision taken by the Central Government is perverse, arbitrary or unreasonable, so as to strike down the corrigendum issued under the extra-ordinary jurisdiction of this Court under Art. 32 of the Constitution. [para 21] [520-B-C]

Suraj Mall Mohta and Co. Vs. A.V. Vishvanath Sastri **(1955) 1 SCR 448;** *State of West Bengal vs. Anwar Ali Sarkar* **1952 SCR 284 – cited.**

Case Law Reference:

(1955) 1 SCR 448	**cited**	**para 4**
1952 SCR 284	**cited**	**para 4**
2005 (1) SCR 380	**relied on**	**para 5**
2012 (5) SCR 768	**relied on**	**para 5**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 580 of 2013.

Under Article 32 of the Constitution of India.

WITH

SLP (C) No. 24693 of 2013

P. Vishwanatha Shetty, Indu Malhotra, Harish N. Salve, Amrendra Sharan, Madhu Naik, Shashi Kiran Shetty, Rohit Bhat, Kush Chaturvedi, Vijaykumar Paradesi, Vivek Jain, Bina Madhavan, Praseena E. Joseph, Shivendra Singh, for the Petitioners.

Sidharth Luthra, ASG, R.P. Bhatt, Dr. A.M. Singhvi, Amarendra Sharan, Amit Kumar, Ankit Rajgarhia, Avijit Mani Tripathi, Atul Kumar, Gaurav Sharma, Amarjeet Singh, Supriya Juneja, G. Umapathy, Rakesh K. Sharma, R. Nekuala, Sushma Suri, Amit Anand Tiwari, Ashutosh Jha for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Petitioners have approached this Court invoking the extraordinary jurisdiction of

this Court under Article 32 of the Constitution of India seeking a *Writ of Certiorari* to quash the Corrigendum Notification No. 37(1)2013/One Time Permission/Med./19355, in so far as it confines the benefits of - the "Enhancement of Annual Intake Capacity in Undergraduate Courses in Medical College for the Academic Session 2013-14 only Regulations 2013" (in short "Regulations 2013"), issued vide notification dated 8.7.2013, to the Government Medical Colleges only, as unconstitutional, being ultra vires of Article 14 of the Constitution of India.

2. Petitioners in all these petitions submit that they are all well established private unaided medical institutions in the country running for more than 10 years with an annual intake of 100 MBBS students, over and above, they are conducting PG Degree and Diploma courses as well. Regulations 2013 was issued on 8.7.2013 by the Medical Council of India (for short "MCI") with the intention of granting one-time permission to all Government and Non-Government Medical Colleges with the objective of enhancing the intake capacity of all the medical colleges in the country, which was framed with the intention to augment the human resources in medicine for attaining optimum Doctor-Population ratio in the nation, without compromising on the prescribed minimum standards of medical education.

3. Petitioners have satisfied all the eligibility criteria laid down in the above mentioned Regulations 2013, and after having satisfied the eligibility criteria laid down, few of them submitted an application to the MCI for enhancement of annual intake of students, reference was made to one of such applications dated 15.7.2013. While so, they came across a Corrigendum issued by the Board of Governors of the MCI, on the direction given by the Central Government, stating that Regulations 2013 would be confined only to Government medical colleges for the academic year 2013-14.

4. Learned senior counsel appearing for the writ petitioners submitted that such corrigendum cannot override the statutory Regulations 2013. Learned senior counsel submitted that the

object of the Regulations would be achieved only if the same is made applicable uniformly to the Government as well as Non-Government medical colleges in the country and that confining the Regulations only to the Government medical colleges is discriminatory and violative of Article 14 of the Constitution of India. In support of this contention, reference was made to the judgments of this Court in *Suraj Mall Mohta and Co. v. A. V. -Vishvanath Sastri* (1955) 1 SCR 448 and *State of West Bengal v. Anwar Ali Sarkar* 1952 SCR 284.

5. Shri Amit Kumar, learned counsel appearing for MCI defended the issue of corrigendum stating that the same was issued in public interest and also in the peculiar facts and circumstances of the present case since the time limit fixed in the Schedule to 2013 Regulations got expired. Learned counsel also submitted that corrigendum was issued by the MCI on the direction given by the Central Government under Section 3(c) of the Indian Medical Council (Amendment) Act, 2010, which enables the Central Government to give proper directions to the MCI and the MCI is bound to give effect to those directions. Learned counsel also explained the circumstances which led the Central Government in issuing the letter dated 18.7.2013 to the MCI. Learned counsel also submitted that, due to the extreme necessity of completing the admission process, the Board of Governors of the MCI could not have received applications from the private medical colleges for enhancing the intake capacity during the academic year 2013-14. It is under such circumstances, the Central Government had directed the MCI to apply the modified time schedule for the receipt of application and grant permission only to the Government medical colleges for the academic year 2013-14. Learned counsel also pointed out that MCI and the Central Government have to comply with the time schedule fixed by this Court in various judgments for admission of students as well. Reference was made to the judgments of this Court in *Mridul Dhar (Minor) and Another v. Union of India and Others* (2005) 2 SCC 65 and *Priya Gupta v. State of Chhattisgarh and Others* (2012) 7 SCC 433.

6. Shri Sidharth Luthra, Additional Solicitor General appearing on behalf of the Union of India, made available the original files leading to the issue of the letter dated 18.7.2013 by the Central Government to the MCI and explaining the circumstances under which it was decided to confine the Regulations 2013 only to the Government medical colleges, that too, taking into consideration the larger public interest. Shri Luthra also submitted that the direction given by the Central Government vide letter dated 18.7.2013 is in consonance with the Regulations and issued in exercise of the powers conferred on it under Section 3(c) of the Indian Medical Council Act, 1956.

7. We have heard learned senior counsel on either side at length. We need not reiterate the imperative need to follow the time limit fixed by this Court in the matter of admission to MBBS/BDS courses in *Mridul Dhar* case (supra) which was done in the interest of students' community, for admission to the Post Graduate and Super Speciality courses. Timely admission of the students to these courses is of utmost importance so that the students would get quality and timely education. In *Mridul Dhar* case (supra), this Court clearly indicated that the time schedule for establishment of new college or to increase intake in existing college shall be adhered to strictly by all concerned, failing which defaulting party would be liable to be personally proceeded with.

8. In *Priya Gupta v. State of Chhattisgarh and Others* (2012) 7 SCC 433, this Court has reiterated the necessity to follow the time limit fixed by this Court. This Court went even to the extent of indicating that failure to conform with the time limit fixed by this Court shall be liable for action under the provisions of the Contempt of Courts Act, 1971 read with Article 129 of the Constitution of India.

9. In the light of the above mentioned judgments and the various directions issued by this Court, we have to judge whether the decision taken by the Central Government as well as the MCI confining the Regulations 2013 only to the

Government medical colleges is arbitrary, illegal or discriminatory in the peculiar circumstances of this case. Regulations 2013 was issued by the MCI in exercise of its powers conferred under Section 33(fa) of the Indian Medical Council Act, 1956 with the previous sanction of the Central Government. The object of the notification was to enhance the intake capacity in the existing medical colleges so as to augment human resources in medicine for attaining optimum Doctor-Population ratio in the Nation, without compromising the prescribed minimum standards of medical education. Regulation 3 deals with the eligibility to make an application, which reads as under:

> **"3. Eligibility to make application**.- (1) The application for enhancement of annual intake capacity in the existing Medical Colleges may be made by the organizations that have established the Medical College to the Board of Governors in Supersession of the Medical Council of India. The format of application for Government and non-governmental owned Medical College is prescribed in Schedule I appended to these Regulations.
>
> (2) Only such existing Medical Colleges shall be eligible to apply under these Regulations that enjoy minimum ten years of standing from the date of grant of initial letter of permission by the Central Government and the MBBS qualification awarded by them stands included in the First Schedule of the Indian Medical Council Act, 1956 [Act No. 102 of 1956].
>
> (3) The Medical Colleges with an annual intake of 50 or more but below 100 MBBS seats shall be eligible to apply for enhancement for annual intake capacity to 100, as one-time measure.
>
> (4) The Medical Colleges with an annual intake of 100 or more but below 150 MBBS seats shall be eligible to apply for enhancement for annual intake capacity to 150, as one-time measure.

> (5) Such Medical Colleges that have not been granted letter of permission by the Board of Governors in Super-session of the Medical Council of India in accordance with clause 8(1)(3)(d) of the Establishment of Medical College Regulations, 1999 [notified in the Official Gazette on 16.04.2010] and/or the person who has established the Medical College has been convicted by a Court of Competent jurisdiction in a criminal investigation initiated by the Central Bureau of Investigation or Police."

10. Regulation 4 deals with the procedure to make application. The time-schedule for receipt of application for enhancement of annual intake capacity in under-graduate courses, is provided in Schedule II appended to the Regulations, which reads as follows:

"SCHEDULE II
TIME-SCHEDULE FOR RECEIPT OF APPLICATION FOR ENHANCEMENT OF ANNUAL INTAKE CAPACITY IN UNDERGRADUATE COURSES

S.No.	Stage of Processing	Last date
1.	Receipt of applications by the Board of Governors in Super-session of the Medical Council of India	15.07.2013
2.	Return of Incomplete application	20.07.2013
3.	Grant of Letter of Permission by the Board of Governors in Supersession of the Medical Council of India	31.07.2013

11. Schedule I of Regulations 2013 deals with the format of application for Government and Non-government medical colleges for making an application for enhancement of annual intake capacity. Para 4 of the Form (Schedule I) as well as the

note attached to the said format also has relevance and the same is as follows:

"SCHEDULE I
FORM
(Suggested format for Applicants)

PROPOSED FORMAT OF UNDERTAKING TO BE OBTAINED FROM THE APPLICANT FOR ENHANCEMENT OF MBBS SEATS FROM _____ (Please specify existing intake capacity} to _____ (Please specify enhanced intake capacity)

xxx xxx xxx

xxx xxx xxx

4. The applicant assures that the compliance with the relevant Minimum Standard Requirement Regulations is mandatory for continuation of the batch of students and is in the interest of students. In case of any failure to meet the requirements of the Regulations the Central Government / Board of Governors in super-session of the Medical Council of India would be entitled in law to withdraw/revoke/cancel such permission.

Yours faithfully,
[Applicant]

Note :

(i) Kindly enclose :

(a) duly attested copy of initial Letter of Permission and of subsequent renewals granted by the Central Government u/s 10A of the Indian Medical Council Act, 1956; and

(b) duly attested copy of the Gazette notification/ Order of the Central Government including the

MBBS qualification awarded by the applicant's Medical College in the First Schedule of the Indian Medical Council Act, 1956.

(ii) The Undertaking in case of Government of State/Union Territory should be signed by the Chief Secretary.

(iii) The Undertaking in case of non-Governmental application should be on non-judicial stamp paper of Rs. 100 and should be made by President / Chairman /Vice Chancellor/ Managing Trustee of the Society/Trust and Managing Director of the Company. The Undertaking should inter alia state that:

(a) the College has not been subject to clause 8 (3) (1) (d) of the Establishment of Medical College Regulations, 1999; and

(b) the person establishing the Medical College has not been convicted by a Court of competent jurisdiction in a criminal investigation initiated by the Central Bureau of Investigation or Police. The Undertaking should be duly attested by a First Class Magistrate."

12. MCI, in their counter affidavit, stated that the above mentioned notification dated 8.7.2013 was received by the Council Office only on 16.7.2013. By that time, the last date fixed for receipt of application by the Board of Governors was over, which was on 15.7.2013. Under such circumstances, the MCI wrote a letter dated 17.7.2013 to the Government of India, stating as follows:

" xxx xxx xxx

In light of Gazette notification received on 16.07.2013 the time of receipt of application has already lapsed. Therefore, as per provisions as under [in the Establishment of Medical College Regulations, 1999]:

"The time schedule indicated above may be modified by the Central Government, for reasons to be recorded in writing, in respect of any class or category of applications.

Keeping in light the above statutory provisions, whereby the Central Government is empowered to modify the time schedule, it is proposed in order to achieve the objective of enhancing the intake capacity in existing Medical Colleges, so as to augment the human resources in medicine for attaining optimum Doctor-population ratio in the nation, the above schedule may be modified to the following:

S. No.	Stage of Processing	Last Date	Modified Dates
1.	Receipt of applications by the Board of Governors in Super-session of the Medical Council of India	15.07.2013	24.07.2013
2.	Return of Incomplete application	20.07.2013	31.07.2013
3.	Grant of Letter of Permission by the Board of Governors in Supersession of the Medical Council of India	31.07.2013	31.07.2013

It is requested that permission of Central Government to modify the Schedule as proposed above be granted, so as to enable the Council to further expedite the process. This modification, with the approval of Central Government can be carried out by public notice and need not be notified in the Official Gazette.

It is also brought to your kind attention that as the time-schedule for grant of letter of permission for establishment of new Medical Colleges and renewal of permission for increase of seats in existing Medical Colleges was extended to 15 July 2013, by the Hon'ble Supreme Court for he academic year 2013-14 pursuant to an application moved by the Council in Priya Gupta's case, an appropriate application is also required to be filed by the Council seeking permission of the Hon'ble Supreme Court. Necessary steps are being taken by the Council in this regard.

Kindly grant permission at the earliest which will enable the Council to do the needful at the earliest."

13. The MCI, therefore, requested the Government of India to modify the time schedule and extend the last date of receipt of application to 24.7.2013, since they could not receive the applications by the various medical colleges prior to 15.7.2013, as the very Regulations 2013 dated 8.7.2013 was received by the MCI only on 16.7.2013.

14. The Central Government considered the request and pointed out that it would not be possible for the Board of Governors of MCI to process all the applications preferred by the Non-government medical colleges within the time fixed, therefore, it decided to issued a corrigendum which modified that the date of 24.7.2013 would apply only to Government medical colleges.

15. We find no serious error in the view taken by the Central Government confining Regulations 2013 to Government medical colleges alone in view of strict time limit fixed in the Schedule for receipt of applications i.e. 15.7.2013 and the preremptory directions given by this Court in judgments referred to above. We may make it clear that the time limit fixed for starting a medical college as well as for additional intake are of extreme importance, or else it may collide with the time limit fixed for starting the academic session. If the time limit fixed in the notification dated 8.7.2013 was to be adhered to strictly,

the majority of the Non-government medical colleges could not have applied, since the Regulations 2013 was received by the MCI only on 16.7.2013 beyond the last date fixed for the receipt of application by the Board of Governors of MCI.

16. We indicate that the main argument raised by the learned senior counsel appearing for the Petitioners was that 2013 Regulations should have been made applicable equally to the Government Medical Colleges as well as non-Government Medical Colleges and there cannot be any discrimination between them, otherwise the object sought to be achieved by the Regulations would have been defeated. In our view, in a given case power is vested with the Central Government to modify the time schedule, in respect of at least one class or category of applicants. We may in this connection refer to Establishment of Medical College Regulations, 1999, which was issued in exercise of powers conferred under Section 10A read with Section 3 of the Indian Medial Council Act, which has recognised five categories of organisations which are eligible to apply for starting a Medical College as well as eligible to apply for further intake of seats. Following are the categories :-

1. A State Government/Union Territory;
2. A University;
3. An autonomous body promoted by Central and State Government by or under a Statute for the purpose of medical education;
4. A society registered under the Societies Registration Act, 1860 (21 of 1860) or corresponding Acts in States; or
5. A public religious or charitable trust registered under the Trust Act, 1882 (2 of 1882) or the Wakfs Act, 1954 (29 of 1954).

17. State Government/Union Territory can also set up a Medical College and take additional intake of seats, apart from

the other categories mentioned above. In a given case, the Central Government, for reasons to be recorded in writing, can modify the time schedule in respect of any class or category of applicants mentioned hereinbefore. Such a power has been conferred on Central Government by virtue of Establishment of Medical College Regulations (Amendment), 2012.

18. The Establishment of Medical College Regulations, 1999, as amended by Establishment of Medical College Regulations (Amendment), 2012, provides for time schedule for grant of letter of permission by the Medical Council of India for establishment of a Medical College as well as increase in admission capacity in MBBS course. Schedule to the above mentioned Regulations reads as follows :-

SCHEDULE

SCHEDULE FOR RECEIPT OF APPLICATIONS FOR ESTABLISHMENT OF NEW MEDICAL COLLEGES AND PROCESSING OF THE APPLICATIONS BY THE MEDICAL COUNCIL OF INDIA.

S. No.	Stage of processing	Last Date
1.	Receipt of applications by the Council	From 1st August to 30th September (both days inclusive) of the year.
2.	Issue of Letter of Intent by the Council	Upto 30th April
3.	Receipt of reply from the applicant by the Council for consideration for issue of Letter of Permission	Upto 31st May
4.	Issue of Letter of Permission by the Council	15th June

Note : The time schedule indicated above may be modified by the Central Government, for reasons to be recorded in writing, in respect of any class or category of applications.

19. The note specifically indicates that the time schedule could be modified by Central Government for reasons to be recorded in writing in respect of any category, class of applicants which, in our view, could also be invoked in the case of increase of annual intake as well. Resultantly, the Central Government has the power to modify the date from 15.7.2013 to 24.7.2013 in respect of any class or category of applications. So far as the present case is concerned, it is in exercise of that statutory power, the Corrigendum has been issued by the Central Government modifying the time schedule to the Government Medical College alone out of the five categories mentioned hereinbefore. We are not prepared to say favouring the Government Medical College alone in such circumstances is violative of Article 14 of the Constitution.

20. Central Government is also empowered under Section 3(c) of Indian Medical Council Act, as amended in 2010, to issue various directions to the Board of Governor of the the MCI, which reads as follows :-

"3C. (1) Without prejudice to the provisions of this Act, the Board of Governors or the Council after its reconstitution shall, in exercise of its powers and in the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time;

Provided that the Board of Governors or the Council after its reconstitution shall, as far as practicable, be given an opportunity to express its views before any direction is given under this subsection.

(2) The decision of the Central Government whether a question is a matter of policy or not shall be final."

Board of Governors of the MCI is, therefore, bound by the Corrigendum issued by the Central Government.

21. We notice that the above corrigendum extending the last date was made applicable only to the Government medical colleges recording the reason that the time would be very short so as to process the applications by the MCI received from the non-government medical colleges. We cannot say that the decision taken by the Central Government is perverse, arbitrary or unreasonable, so as to strike down the corrigendum issued under the extra-ordinary jurisdiction of this Court under Article 32 of the Constitution of India.

22. The petitions, therefore, lack in merits and are accordingly dismissed.

R.P. Writ Petition dismissed.

UNIVERSITY GRANTS COMMISSION & ANR.
v.
NEHA ANIL BOBDE (GADEKAR)
(Civil Appeal No. 8355 of 2013 etc.)

SEPTEMBER 19, 2013.

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

University Grants Commission Act, 1956:

ss.12 and 26 – National Eligibility Test 2012 conducted by UGC – Challenges on the ground that changes of qualifying criteria reflected in final declaration of final results was arbitrary, illegal, without authority and violative of Art. 14 of the Constitution – Held: All the steps taken by UGC were strictly in accordance with clause 7 of the Notification for NET Examination, 2012 – Prescribing the qualifying criteria as per clause 7 does not amount to a change in the rule as it was already pre-meditated in the notification – It cannot be said that the UGC has acted arbitrarily or whimsically against the candidates — To clear the NET Examination, means clearing the final results, not merely passing in individual papers, which is only the initial step — Candidate should satisfy the final qualifying criteria laid down by UGC before declaration of results — It is open to UGC to lay down any "qualifying criteria", which has a rational nexus to the object to be achieved, i.e. for maintenance of standards of teaching, examination and research – UGC has only implemented the opinion of Experts by laying down the qualifying criteria, which cannot be considered as arbitrary, illegal or discriminatory or violative of Art. 14 of the Constitution of India – University Grants Commission Regulations, 2010.

Universities:

Academic matters – Held: In academic matters, unless

there is a clear violation of statutory provisions, Regulations or Notification issued, courts shall keep their hands off since those issues fall within domain of the experts.

Pursuant to the Notification issued by the University Grants Commission (UGC) on 06.02.2012 for determination of the eligibility for the award of JRF and the eligibility for lectureship in Universities and Colleges, National Eligibility Test (NET) was conducted on 24.6.2012. On 17.9.2012, the Moderation Committee constituted by the UGC recommended that qualifying criteria for eligibility for lecturership for General, OBC (Non-Creamy Layer) and SC/ST/PWD candidates would be an aggregate percentage of 65%, 60% and 55% respectively in addition to the paper-wise minimum percentage presented in clause 7 of the UGC NET Notification for June 2012. Accordingly, the result was declared on 18.9. 2012. Subsequently, on some representations and in view of the decision of the Expert Committee, UGC prepared and declared supplementary result on 12.11.2012 qualifying 15,178 additional candidates. The candidates who had obtained the minimum marks in Paper I, Paper II and Paper III, approached the High Court seeking a declaration that the change of qualifying criteria reflected in the final declaration of results was arbitrary, illegal and violative of Art. 14 of the Constitution of India. The High Court allowed the writ petition and directed the UGC to declare the results with reference to the minimum marks prescribed.

In the instant appeals filed by UGC and others, the question for consideration before the Court was: whether the University Grants Commission had the power to fix the final qualifying criteria, for those who have obtained the minimum marks for all the papers, before the final declaration of the results of the National Eligibility Test for the year 2012.

Allowing the appeals, the Court

HELD: 1.1 Section 12 of the UGC Act, 1956 states that it shall be the general duty of the UGC to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and co-ordination of University education.The UGC as an expert body has been entrusted by UGC Act the general duty to take such steps as it may think fit for the determination and maintenance of standards of teaching, examination and research in Universities. It is also duty bound to perform such functions as may be prescribed or as may be deemed necessary by it for advancing the cause of higher education in India. The UGC has also got the power to define the qualification that should ordinarily be required for any person to be appointed to the teaching staff of the University and to regulate the maintenance of standards and coordination of work and faculties in the Universities. The UGC, in exercise of its powers conferred on it under the various provisions is duty bound to conduct the NET for conferring eligibility for lectureship and for awarding Junior Research Fellowship every year. [para 5,9 and 20] [528-G-H; 531-F-G; 540-B-D]

University of Delhi v. Raj Singh **1994 (3) Suppl. SCR 217 = 1994 Supp. (3) SCC 516;** *University Grants Commission v. Sadhana Chaudhary and Others* **1996 (6) Suppl. SCR 392 = (1996) 10 SCC 536,** *Annamalai University represented by Registrar v. Secretary to Government, Information and Tourism Department and Others* **2009 (3) SCR 355 = (2009) 4 SCC 590 – relied on**

1.2. The UGC, in exercise of its powers conferred under clauses (e) and (g) of s.26(1) of the UGC Act, issued the UGC (Minimum Qualification of Teachers and other Academic Staff in Universities and Colleges and other measures for Maintenance of Standards of Higher

Education) Regulations, 2010. Clause 3.3.1 of the Regulation specifically states the NET shall remain the minimum eligibility condition for recruitment and for appointment of Assistant Professors in the Universities/ Colleges/Institutions. Clause 4.4.1 stipulates that before fulfilling the other prescribed qualifications, the candidates must have cleared the NET conducted by the UGC. Therefore, the power of the UGC to prescribe, as it thinks fit, the qualifying criteria for maintenance of standards of teaching, examination etc., cannot be disputed. Para 7 of the Notification for holding the NET on 24.6.2012 deals with the Scheme of the Act which clearly indicates that the candidates are required to obtain minimum marks separately in Paper I, Paper II and Paper III. It also clearly indicates that only such candidates who obtain minimum required marks in each paper will be considered for final preparation of results. The final qualifying criteria for JRF and eligibility for lectureship shall be decided by UGC before declaration of results. [para 23] [542-D-H; 543-A]

1.3. Thus, the requirements to be followed before the final declaration of the results are: (i) Candidates to obtain minimum marks separately in Paper I, Paper II and Paper III; (ii) Candidates who have satisfied the said criteria only would be subjected to a qualifying criteria before the final preparation of result; (Consideration Zone); and (iii) UGC has to fix the final qualifying criteria before the declaration of results. The candidates are seeking final declaration of results the moment they have obtained the minimum marks separately in Paper I, Paper II and Paper III, ignoring the other two steps and also forgetting the fact that only those who obtain the minimum required marks alone will fall in the consideration zone. All these steps have been clearly stipulated in the notification for NET Examination, 2012. [para 23-24] [543-A-E]

1.4. It is to be noted that 2,04,150 candidates have obtained the minimum marks separately in Paper I, Paper II and Paper III. All those candidates were subjected to a final qualifying criteria fixed by the Committee constituted by the UGC, since they fell within the Consideration Zone. Applying the final qualifying criteria, the Committee recommended: (i) that a total of 43,974 candidates may be declared qualified for lectureship eligibility as per the qualifying criteria;(ii) that the NET Bureau may finalize the JRF awardees as per the criteria mentioned at (i) out of those candidates who had opted for JRF and have qualified for lectureship eligibility. Based on the recommendations of the Expert Committee, the final results were announced and 43,974 candidates were declared qualified for lectureship eligibility as per the qualifying criteria. Some more relaxation was also granted in favour of those who got the minimum qualifying marks since those candidates figured amongst the top 7% of all the candidates who appeared in NET, which was in addition to the candidates declared as qualified in the original result declared on 18.9.2012. 15,178 candidates were benefitted by that relaxation. Consequently, a total of 57,550 candidates were declared passed in the NET Exam. 2012. [para 25-26] [543-D-E; 544-F-H; 545-A]

1.5. All the steps taken by the UGC were strictly in accordance with clause 7 of the Notification for the NET Examination, 2012. Prescribing the qualifying criteria as per clause 7 does not amount to a change in the rule as it was already pre-meditated in the notification. It cannot be said that the UGC has acted arbitrarily or whimsically against the candidates. The UGC in exercise of its statutory powers and the laid down criteria in the notification for NET June, 2012, constituted a Moderation Committee consisting of experts for finalising the qualifying criteria for lectureship eligibility and JRF. UGC acted on the basis of the recommendations made by the Expert Committee. [para 27] [545-B-D]

1.6. The candidates were not misled in any manner. To clear the NET Examination, means clearing the final results, not merely passing in Paper I, Paper II and Paper III, which is only the initial step, not final; the candidate should satisfy the final qualifying criteria laid down by the UGC before declaration of the results. [para 28] [545-E-F]

1.7. In academic matters, unless there is a clear violation of statutory provisions, the Regulations or the Notification issued, the courts shall keep their hands off since those issues fall within the domain of the experts. [para 29] [545-F-G]

University of Mysore vs. C.D. Govinda Rao, **1964 SCR 575 = AIR 1965 SC 491,** *Tariq Islam vs. Aligarh Muslim University* **2001 (3) Suppl. SCR 689 = (2001) 8 SCC 546 and** *Rajbir Singh Dalal vs. Chaudhary Devi Lal University* **2008 (11) SCR 992 = (2008) 9 SCC 284 – relied on**

1.8 UGC as an expert body has been entrusted with the duty to take steps as it may think fit for the determination and maintenance of standards of teaching, examination and research in Universities. For attaining the said standards, it is open to the UGC to lay down any "qualifying criteria", which has a rational nexus to the object to be achieved, that is, for maintenance of standards of teaching, examination and research. Candidates declared eligible for lectureship may be considered for appointment as Assistant Professors in Universities and colleges and the standard of such a teaching faculty has a direct nexus with the maintenance of standards of education to be imparted to the students of the universities and colleges. UGC has only implemented the opinion of the Experts by laying down the qualifying criteria, which cannot be considered as arbitrary, illegal or discriminatory or violative of Art. 14 of

the Constitution of India. [para 29] [546-B-E]

Case Law Reference:

1994 (3) Suppl. SCR 217	**relied on**	**para 21**
1996 (6) Suppl. SCR 392	**relied on**	**para 22**
2009 (3) SCR 355	**relied on**	**para 22**
1964 SCR 575	**relied on**	**para 29**
2001 (3) Suppl. SCR 689	**relied on**	**para 29**
2008 (11) SCR 992	**relied on**	**para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8355 of 2013.

From the Judgment & Order dated 29.04.2013 of the High Court of Bombay at Nagpur in WP No. 4996 of 2012.

WITH

Civil Appeal No. 8356 of 2013

Civil Appeal No. 8357 of 2013.

Mohan Parasaran, S.G., Raju Ramachandran, Nagendra Rai, V. Giri, Amitesh Kumar, Chandra Shekhar, Navin Prakash, Gopal Sankaranarayanan, Ashwati Balraj, Vikramaditya, Nirnimesh Dube, Varun Punia, Siddhart Mittal, S.K. Sabharwal, K.P. Rajagopal, A. Venayagam Balan, Arjun Garg, Nachiketa Joshi, Chaitanya Joshi, Hanmat Patil, Shantanu Sagar, Chandra Prakash, Deepak Prakash, Bineesh Karat, Vivek Kumar Varma, Haritha V.A., Dr. Vinod Kr. Tewari, Anupam Dwivedi, Pradeep Kr. Dwivedi, D.N. Dubey, R.K. Pandey, Atul Sharma, Aakarshan Sahay, Akhil Sachar, Shridhar V. Purohit, Siddesh Kotwal, Usha Nandini, V, for the appearing parties.

The Judgment of the Court was delivered by

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

2. We are, in these appeals, called upon to examine whether the University Grants Commission (for short "the UGC") has got the power to fix the final qualifying criteria, for those who have obtained the minimum marks for all the papers, before the final declaration of the results of the National Eligibility Test (for short "NET") for the year 2012.

3. We have, before us, a judgment of the Division Bench of the Bombay High Court, Bench at Nagpur, which ruled that the UGC lacked the competence to fix the aggregate marks as the final qualifying criteria, after the candidates obtained the minimum marks, prescribed in the notification dated 6.12.2012 before the declaration of results of NET Examination, agreeing with a similar view expressed by a learned single Judge of the Kerala High Court.

4. Let us, at the outset, examine the scope of the University Grants Commission Act, 1956 (for short "the UGC Act"), the University Grants Commission Regulations, 2010 etc., which is necessary for a proper appreciation of the various contentions raised by the learned counsel on either side.

5. The UGC Act, 1956 was enacted by the Parliament under the provisions of Entry 66 List I of the Seventh Schedule of the Constitution, which entitles it to legislate in respect of "co-ordination and determination of standards in Institutions for higher education or research and scientific and technical education". For the said purpose, the Act authorized the Central Government to establish a commission, by name, the University Grants Commission. Chapter III of the Act deals with the powers and functions of the Commission. Section 12 states that it shall be the general duty of the Commission to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and co-ordination of University education and for the determination and maintenance of standards of teaching, examination and research in

Universities, and for the purpose of performing its functions under the Act, the Commission has been bestowed with certain powers under the Act. Clause (j) of Section 12 reads as under:

> "12(j) perform such other functions as may be prescribed or as may be deemed necessary by the Commission for advancing the cause of higher education in India or as may be incidental or conducive to the discharge of the above functions."

6. Section 26(1) of the UGC Act confers powers on it to make regulations consistent with the Act and the Rules. Clauses (e), (f) and (g) of Section 26 are of some relevance and are given below:

> "26.(1) The Commission may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder-
>
> xxx xxx xxx
>
> (e) defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University, having regard to the branch of education in which he is expected to give instruction;
>
> (f) defining the minimum standards of instruction for the grant of any degree by any University;
>
> (g) regulating the maintenance of standards and the co-ordination of work or facilities in Universities.
>
> xxx xxx xxx"

7. UGC, in exercise of its powers conferred under Clauses (e) and (g) of Section 26(1) of the UGC Act and in supersession of the University Grants Commission (Minimum Qualifications required for the Appointment and Career Advancement of

Teachers in Universities and Institutions affiliated to it) Regulations, 2000, issued the University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education)Regulations, 2010. Regulation 2 states that the minimum qualifications for appointment and other service conditions of University and College teachers, Librarians and Directors of Physical Education and Sports as a measure for the maintenance of standards in higher education, shall be as provided in the Annexure to the above Regulations. Clause 3.3.1 of the Annexure reads as follows:

> "3.3.1. NET/SLET/SET shall remain the minimum eligibility condition for recruitment and appointment of Assistant Professors in Universities /Colleges/ Institutions.
>
> Provided however, that candidates, who are or have been awarded a Ph.D Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph.D Degree) Regulations, 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Profession or equivalent positions in Universities/ Colleges/Institutions."

8. Clause 4.0.0 deals with Direct Recruitment. Clause 4.4.0 deals with Assistant Professor and Clause 4.4.1 deals with various disciplines, like Art, Humanities etc and qualifications prescribed for them read as follows:

> "**4.4.1 Arts, Humanities, Sciences, Social Sciences, Commerce, Education, Languages, Law, Journalism and Mass Communication**
>
> **i.** Good academic record as defined by the

concerned university with at least 55% marks (or an equivalent grade in a point scale wherever grading system is follows) at the Master's Degree level in a relevant subject from an Indian University, or an equivalent degree from an accredited foreign university.

ii. Besides fulfilling the above qualifications, the candidate must have cleared the National Eligibility Test (NET) conducted by the UGC, CSIR or similar test accredited by the UGC like SLET/SET.

iii. Notwithstanding anything contained in sub- clauses (i) and (ii) to this Clause 4.4.1, candidates, who are, or have been awarded a Ph.D Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph.D. Degree) Regulations, 2009 shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professor or equivalent positions in Universities/ Colleges/ Institutions

iv. NET/SLET/SET shall also not be required for such Masters Programmes in disciplines for which NET/ SLET/SET is not conducted."

9. UGC, in exercise of its powers conferred on it under the various provisions mentioned hereinabove, is duty bound to conduct the NET for conferring eligibility for lectureship and for awarding Junior Research Fellowship (for short "JRF"). UGC conducts such a test every year.

10. UGC, in its 482nd meeting held on 22.12.2011, decided as under:

"During the course of discussion, the Commission

also deliberated in detail the issues pertaining to objectivity in marking of Paper-III, transparency, reducing the inter and intra-examiner variability in marking of Paper-III, delays in declaration of NET results, recommendations of the NET Moderation Committees to switch over Paper-III from descriptive to objective type on the pattern of CSIR- NET Examination wherein all the three papers are of objective type.

Having regard to the above, the Commission decided that Paper-III be converted into objective type from the ensuing examination scheduled in June 2012. Further, the Commission also recommended that the action may also be initiated for the development of question banks."

11. Notification for the NET examination was accordingly published on 06.02.2012 for determination of the eligibility of Indian Nationals for the award of JRF and the eligibility for lectureship in Indian Universities and Colleges.

12. UGC, under that Notification, announced that NET would be held on 24th June, 2012 and the candidates were directed to read the notification carefully before submission of the application form. Clause 3 refers to the condition of eligibility and Para 7 of the Notification deals with the Scheme and date of test. Operative portion of Para 7 is given below for easy reference :-

"7. SCHEME AND DATE OF TEST:

(i) The UGC-NET will be conducted in objective mode from June 2012 onwards. The Test will consist of three papers. All the three papers will consist of only objective type questions and will be held on 24th June, 2012 (SUNDAY) in two separate sessions as under:

Session	Paper	Marks	Number of Question	Duration
First	I	100	60 out of which 50 questions to be attempted	1 ¼ Hours (09.30 A.M. to 10.45 A.M.)
First	II	100	50 questions are compulsory	1 ¼ Hours (10.45 to 12.00 Noon)
Second	III	150	75 questions all are compulsory	2 ½ Hours (01.30 P.M. to 04.00 P.M.)

Paper- I shall be of general nature, intended to assess the teaching/research aptitude of the candidate. It will primarily be designed to test reasoning ability, comprehension, divergent thinking and general awareness of the candidate. Sixty (60) multiple choice questions of two marks each will be given, out of which the candidate would be required to answer any fifty (50). In the event of the candidate attempting more than fifty questions, the first fifty questions attempted by the candidate would be evaluated.

Paper-II shall consist of 50 objective type compulsory questions based on the subject selected by the candidate. Each question will carry 2 marks.

Paper-III shall consist of 75 objective type compulsory questions from the subject selected by the candidate. Each question will carry 2 marks.

The candidate will have to mark the responses for questions of Paper-I, Paper-II and Paper-III on the Optical Mark Reader (OMR) sheet provided along with the Test Booklet. The detailed instructions for filling up the OMR Sheet will be sent to the candidate along with the Admit Card.

The candidates are required to obtain minimum marks separately in Paper-I, Paper-II and Paper-III as given below:

CATEGORY	Minimum Marks (%) to be obtained		
	PAPER-I	PAPER-II	PAPER-III
GENERAL	40 (40%)	40 (40%)	75 (50%)
OBC (Non-creamy layer	35 (35%)	35 (35%)	67.5 (45%) rounded off to 68
PH/VH/SC/ST	35 (35%)	35 (35%)	60 (40%)

Only such candidates who obtain the minimum required marks in each Paper, separately, as mentioned above, will be considered for final preparation of result. However, the final qualifying criteria for Junior Research Fellowship (JRF) and Eligibility for Lectureship shall be decided by UGC before declaration of result."

13. UGC, accordingly, conducted the examination on 24th June, 2012. On 17th September, 2012, the Moderation Committee constituted by the UGC consisting of the Chairman and Secretary, UGC, former Director, NCERT, former Member of the UGC, Vice-Chancellor, Central University of Gujarat, Vice-Chancellor, Tripura University, Vice-Chancellor, Delhi University, Head, Dept. of Bio-Technology, University of Madras, Vice-Chancellor, Doon University and few other experts, met for finalising the "Qualifying Criteria" for Lectureship eligibility and took the following decision :-

"**II. <u>CONSIDERATION ZONE FOR UGC-NET</u>**

The candidates are required to obtain minimum marks separately in Paper-I, Paper-II and Paper-III as given below:

Table (i)

Category	Minimum marks (%) to be obtained		
	Paper-I	Paper-II	Paper-III
General	40(40%)	40(40%)	75 (50%)
OBC	35(35%)	35(35%)	67.5(45%) rounded off to 68)
SC/ST/PWD	35(35%)	35(35%)	60(40%)

Only such candidates who obtain the minimum required marks in each Paper, separately, as mentioned above, were to be considered for final preparation of result. As many as 2.04,150 candidates fell in the above-mentioned consideration zone.

III. QUALIFYING CRETERIA FOR LECTURESHIP ELIGIBILITY

Taking cognizance of the consideration zone described above, the final qualifying criteria for Junior Research Fellowship (JRF) and Eligibility for Lectureship are to be determined by the Moderation Committee for declaration of result.

In addition to the consideration zone described above, the Committee decided to establish another category-wise benchmark for Lectureship Eligibility, i.e. aggregate percentage of all the three papers. Thus, the proposed qualifying criteria for Lectureship Eligibility are as follows:

Table (ii)

Category	Minimum Qualifying Percentage			
	Paper-I	Paper-II	Paper-III	Aggregate
General	40 %	40 %	50 %	65 %
OBC	35 %	35 %	45 %	60 %
SC/ST/PWD	35 %	35 %	40 %	55 %

As per the above criteria, it was found by the Committee that a total of 43974 candidates qualify for lectureship eligibility."

14. The Committee recommended that the General, OBC (Non-Creamy Layer) and SC/ST/PWD candidates would be

required to obtain an aggregate percentage of 65%, 60% and 55% respectively in addition to the paper-wise minimum percentage presented in clause 7 of the UGC NET Notification for June 2012, as qualifying criteria. Based on the recommendations of the Moderation Committee, result was declared on 18th September, 2012 and the category-wise qualifying criteria to the UGC-NET examination held on 24th June, 2012 was as under :

"Category-Wise Qualifying Criteria for Lectureship Eligibility in UGC-NET held on 24th June, 2012:

Category	Minimum Qualifying Percentage			
	Paper-I	Paper-II	Paper-III	Aggregate
General	40 %	40 %	50 %	65 %
OBC (Non Creamy Layer)	35 %	35 %	45 %	60 %
SC/ST/PWD	35 %	35 %	40 %	55 %

15. UGC later received some representations regarding the criteria adopted for the NET-JUNE 2012 and keeping in view the same, the Commission met on 20.10.2012 and set up a five member Expert Committee from amongst the Commission Members for examining the representations/ grievances related to NET-JUNE 2012 and re-visit the results, if found necessary. The Committee, after examining the representations, recommended as under:-

"**(i) Grievances related to insufficient information in the advertisement:** The Committee noted that the advertisement clearly stated that securing minimum marks required in each paper do not amount to eligibility for the purpose of NET. In the past, scores in all the three papers

were taken into account while preparing the list of selected candidates for the purposes of JRF. At the same time, the Committee felt that in future the announcement should make it very clear that the scores in all the three papers shall be taken into account for NET as well as JRF and that Eligibility for NET shall be determined separately for each subject by taking into account the performance of all the candidates.

(ii) Grievances related to the uniform and high cut-off for UGC-NET across various disciplines: The Committee examined the pattern of marks secured in different subjects and the proportion of candidates who were eligible for UGC-NET based on the uniform cut-off approved by the Moderation Committee. It noted that the proportion of students who made it varied hugely across the subjects, from above 30% to as low as less than 1% in many subjects. The Committee felt that this method puts candidates from several subjects to disadvantage. A fair method must also take into account the performance relative to other candidates. Accordingly, the Committee recommended a correction in the list of candidates eligible for UGC-NET held in June 2012. For this correction, additional criteria (b below) shall be used and any candidate who meets either of the following two criteria shall be eligible for UGC-NET:

(a) Those candidates who had made it to the consideration zone, i.e. those who received a minimum of 40%, 40% & 50% marks in Paper-I, Paper-II and Paper-III respectively for General Category; 35%, 35% & 45% marks in Paper-I, Paper-II and Paper-III respectively for OBC (Non-Creamy Layer) Category and 35%, 35% & 40% marks in Paper-I, Paper-II and Paper-III respectively for SC/ST/PWD Category and those who secured aggregate percentage (obtained by combining marks of Paper-I, II & III) of 65% for General

Category, 60% for OBC (Non-Creamy Layer) and 55% for SC/ST/PWD category candidates (This is the same criterion as described by the earlier Moderation Committee).

OR

(b) Those candidates who figure among top 7% of all the candidates who appeared in NET; this shall be calculated separately for each discipline and for each category (SC/ST/OBC (Non-Creamy Layer)/ PWD. Accordingly a cut-off will be determined for each subject and each category for this purpose. In case of tie (when several students have same identical aggregate marks) all the candidates appearing at the qualifying marks shall be included. Candidates who do not secure minimum required score in each paper and are therefore not in the consideration zone, will not be included in this list even if they fall among the top 7% within their subject and category.

xxx xxx xxx

xxx xxx xxx"

16. The Committee revisited the results and decided to qualify a few additional candidates for JRF and eligibility for lectureship both and eligibility for lectureship only. Accordingly, UGC prepared supplementary result qualifying 15,178 additional candidates which was declared on 12.11.2012. This was in addition to the candidates declared as qualified in the original result of June 2012 UGC-NET declared on 18.9.2012.

17. Altogether 5,71,630 candidates appeared in the UGC-NET Examination, 2012, out of which 2,04,150 candidates got the minimum marks prescribed separately in Paper I, Paper II and Paper III and fell in the consideration zone. From that,

57,550 candidates were declared passed in the NET Examination for the year 2012, applying the qualifying criteria laid down by the Expert Committee of the UGC.

18. We notice, the candidates who have obtained the minimum marks in Paper I, Paper II and Paper III approached the High Court of Bombay at Nagpur Bench seeking a declaration that the change of qualifying criteria reflected in the final declaration of results is arbitrary, illegal and without authority of law and is violative of Article 14 of the Constitution of India. Further, it was also stated that the declaration of NET alone being the minimum eligibility standard, UGC has attempted to fix the Aggregate Criteria as an additional qualifying criteria, which action of the UGC goes beyond the scope of the notification. Further, it was also pointed out that if at all the UGC has got the power to fix any additional qualifying criteria prior to the declaration of results, the same should have been notified at the time of taking the NET examination. Further, it was also the case of the writ petitioners that the object of prescribing NET is only to have uniform standards of lecturers to be appointed across the country and to remove the disparity in evaluation by awarding the degrees by various Universities and that the UGC is not a recruiting authority. UGC, according to the candidates, is only expected to prescribe uniform standards and not to superimpose any further qualifying criteria before the declaration of the results. The High Court found favour with the contentions raised by the writ petitioners and allowed the writ petition and directed the UGC to declare the results with reference to the minimum marks prescribed for passing those papers. Aggrieved by the same, these appeals have been preferred by the UGC.

19. We have heard counsel on the either side at length. Let us, at the outset, point out that the power of the UGC to set the standard of qualifying criteria, as such, is not disputed but, it was pointed out, such qualifying criteria ought to have been notified and made known to the candidates before taking the

examination on 24th June, 2012. After prescribing that the candidates were required to obtain minimum marks separately in Paper I, Paper II and Paper III, there is no justification in superimposing an additional qualifying criteria before the declaration of the results.

20. We have elaborately referred to various statutory provisions which would clearly indicate that the UGC as an expert body has been entrusted by UGC Act the general duty to take such steps as it may think fit for the determination and maintenance of standards of teaching, examination and research in Universities. It is also duty bound to perform such functions as may be prescribed or as may be deemed necessary by the Commission for advancing the cause of higher education in India. The UGC has also got the power to define the qualification that should ordinarily be required for any person to be appointed to the teaching staff of the University and to regulate the maintenance of standards and coordination of work and faculties in the Universities.

21. This Court in *University of Delhi v. Raj Singh* 1994 Supp. (3) SCC 516 dealt with the powers of UGC elaborately and held as follows:

> "**20.** The ambit of Entry 66 has already been the subject of the decisions of this Court in the cases of the *Gujarat University v. Krishna Ranganath Mudholkar* 1963 Supp 1 SCR 112 and the *Osmania University Teachers' Association v. State of Andhra Pradesh* (1987) 4 SCC 671. The UGC Act is enacted under the provisions of Entry 66 to carry out the objective thereof. Its short title, in fact, reproduces the words of Entry 66. The principal function of the UGC is set out in the opening words of Section 12, thus:
>
> > "It shall be the general duty of the Commission to take … all such steps as it may think fit for the promotion and coordination of University education

and for the determination and maintenance of standards of teaching, examination and research in Universities ...."

It is very important to note that a duty is cast upon the Commission to take "all such steps as it may think fit ... for the determination and maintenance of standards of teaching". These are very wide-ranging powers. Such powers, in our view, would comprehend the power to require those who possess the educational qualifications required for holding the post of lecturer in Universities and colleges to appear for a written test, the passing of which would establish that they possess the minimal proficiency for holding such post. The need for such test is demonstrated by the reports of the commissions and committees of educationists referred to above which take note of the disparities in the standards of education in the various Universities in the country. It is patent that the holder of a postgraduate degree from one University is not necessarily of the same standard as the holder of the same postgraduate degree from another University. That is the rationale of the test prescribed by the said Regulations. It falls squarely within the scope of Entry 66 and the UGC Act inasmuch as it is intended to co-ordinate standards and the UGC is armed with the power to take all such steps as it may think fit in this behalf. For performing its general duty and its other functions under the UGC Act, the UGC is invested with the powers specified in the various clauses of Section 12. These include the power to recommend to a University the measures necessary for the improvement of University education and to advise in respect of the action to be taken for the purpose of implementing such recommendation [clause (*d*)]. The UGC is also invested with the power to perform such other functions as may be prescribed or as may be deemed necessary by it for advancing the cause of higher

education in India or as may be incidental or conducive to the discharge of such functions [clause (*j*)]....."

22. The judgment referred to above was later followed in *University Grants Commission v. Sadhana Chaudhary and Others* (1996) 10 SCC 536, wherein this Court dealt with the recommendation of the Malhotra Committee and the powers of UGC. Reference may also be made to another judgment of this Court in *Annamalai University represented by Registrar v. Secretary to Government, Information and Tourism Department and Others* (2009) 4 SCC 590, wherein this Court reiterated that the UCG Act was enacted for effectuating co-ordination and determination of standards in universities and colleges.

23. UGC, in exercise of its powers conferred under clauses (e) and (g) of Section 26(1) of the UGC Act, issued the UGC (Minimum Qualification of Teachers and other Academic Staff in Universities and Colleges and other measures for Maintenance of Standards of Higher Education) Regulations, 2010. Clause 3.3.1 of the Regulation specifically states the NET shall remain the **minimum eligibility condition** for recruitment and for appointment of Assistant Professors in the Universities/ Colleges/Institutions. Clause 4.4.1 stipulates that before fulfilling the other prescribed qualifications, the candidates must have cleared the National Eligibility Test conducted by the UGC. Therefore, the power of the UGC to prescribe, **as it thinks fit**, the qualifying criteria for maintenance of standards of teaching, examination etc. cannot be disputed. It is in exercise of the above statutory powers, the UGC has issued the notification for holding the NET on 24th June, 2012. Para 7 of the Notification deals with the Scheme of the Act which clearly indicates that the candidates are required to obtain minimum marks separately in Paper I, Paper II and Paper III. It also clearly indicates that **only such candidates** who **obtain minimum required marks** in each paper **will be considered** for **final preparation of results**. The final **qualifying criteria** for JRF

and eligibility for lectureship **shall be decided by UGC** before declaration of result. Above clause deals with the following requirements to be followed before the final declaration of the results:-

(i) Candidates to obtain minimum marks separately in Paper I, Paper II and Paper III;

(ii) Candidates who have satisfied the above criteria only would be subjected to a qualifying criteria before the final preparation of result; (Consideration Zone)

(iii) UGC has to fix the final qualifying criteria before the declaration of results.

24. Candidates are seeking final declaration of results the moment they have obtained the minimum marks separately in Paper I, Paper II and Paper III, ignoring the other two steps, referred to hereinbefore, and also forgetting the fact that only those who obtain the minimum required marks alone will fall in the **consideration zone**. All these steps, as we have referred to above, have been clearly stipulated in the notification for NET Examination, 2012.

25. We find, 2,04,150 candidates have obtained the minimum marks separately in Paper I, Paper II and Paper III. All those candidates were subjected to a final qualifying criteria fixed by the Committee constituted by the UGC, since they fell within the Consideration Zone. Applying the final qualifying criteria, the Committee made the following recommendations:-

(i) The Committee recommended that a total of 43,974 candidates may be declared qualified for lectureship eligibility as per the qualifying criteria given below :-

Category	Minimum Qualifying Percentage			
	Paper-I	Paper-II	Paper-III	Aggregate
General	40 %	40 %	50 %	65 %
OBC (Non Creamy Layer)	35 %	35 %	45 %	60 %
SC/ST/PWD	35 %	35 %	40 %	55 %

(ii) The Committee recommended that the NET Bureau may finalize the JRF awardees as per the criteria mentioned above out of those candidates who had opted for JRF and have qualified for lectureship eligibility.

(iii) The Committee authorized the Chairman, University Grants Commission to declare the result for eligibility for lectureship and Junior Research Fellowship as recommended by the Moderation Committee.

While concluding the deliberations, the Committee expressed the appreciation for the painstaking effort of the NET Bureau in analyzing the results and presenting its findings.

26. We notice, based on the recommendations of the Expert Committee, the final results were declared and 43,974 candidates were declared qualified for lectureship eligibility as per the qualifying criteria. As already indicated, some more relaxation was also granted in favour of those persons who got the minimum qualifying marks since those candidates figured amongst the top 7% of all the candidates who appeared in NET, which was in addition to the candidates declared as qualified in the original result declared on 18.9.2012. 15,178 candidates were benefitted by that relaxation. Consequently, as already

stated, a total of 57,550 candidates were declared passed in the NET Exam. 2012.

27. We are of the considered opinion that all the steps taken by the UGC were strictly in accordance with clause 7 of the Notification for the NET Examination, 2012. Prescribing the qualifying criteria as per clause 7, in our view, does not amount to a change in the rule of the game as it was already pre-meditated in the notification. We are not inclined to say that the UGC has acted arbitrarily or whimsically against the candidates. The UGC in exercise of its statutory powers and the laid down criteria in the notification for NET June, 2012, has constituted a Moderation Committee consisting of experts for finalising the qualifying criteria for lectureship eligibility and JRF. UGC acted on the basis of the recommendations made by the Expert Committee. The recommendations made by them have already been explained in the earlier part of the judgment. Reason for making such recommendations has also been highlighted in the Report.

28. We are of the considered view that the candidates were not misled in any manner. Much emphasis has been made on the words "clearing the National Eligibility Test". "Clearing" means clearing the final results, not merely passing in Paper I, Paper II and Paper III, which is only the initial step, not final. To clear the NET Examination, as already indicated, the candidate should satisfy the final qualifying criteria laid down by the UGC before declaration of the results.

29. We are of the view that, in academic matters, unless there is a clear violation of statutory provisions, the Regulations or the Notification issued, the Courts shall keep their hands off since those issues fall within the domain of the experts. This Court in ***University of Mysore vs. C.D. Govinda Rao*****,** AIR 1965 SC 491, ***Tariq Islam vs. Aligarh Muslim University*** (2001) 8 SCC 546 and ***Rajbir Singh Dalal vs. Chaudhary Devi Lal University*** (2008) 9 SCC 284, has taken the view that the Court shall not generally sit in appeal over the opinion

expressed by expert academic bodies and normally it is wise and safe for the Courts to leave the decision of academic experts who are more familiar with the problem they face, than the Courts generally are. UGC as an expert body has been entrusted with the duty to take steps **as it may think fit** for the determination and maintenance of standards of teaching, examination and research in the University. For attaining the said standards, it is open to the UGC to lay down any "qualifying criteria", which has a rational nexus to the object to be achieved, that is for maintenance of standards of teaching, examination and research. Candidates declared eligible for lectureship may be considered for appointment as Assistant Professors in Universities and colleges and the standard of such a teaching faculty has a direct nexus with the maintenance of standards of education to be imparted to the students of the universities and colleges. UGC has only implemented the opinion of the Experts by laying down the qualifying criteria, which cannot be considered as arbitrary, illegal or discriminatory or violative of Article 14 of the Constitution of India.

30. The Appeals are accordingly allowed and the judgment of the High Court is set aside. The Applications for Impleadment and Intervention are dismissed. There shall be no order as to costs.

R.P. Appeals allowed.

BALDEV SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No.1303 of 2005 etc.)

SEPTEMBER 20, 2013

[A.K. PATNAIK AND GYAN SUDHA MISRA, JJ.]

PENAL CODE, 1860:

ss. 302 read with s.120-B – Police party picking up 7 members of complainant's family – Victims did not return – Conviction by courts below u/ss 364, 452, 120-B and 302 – Held: Evidence adduced is that the seven persons abducted by appellants were seen in different police stations and also in residential quarters near the police station — On this evidence, court cannot hold that the two appellants have killed the seven abducted persons only because they have not been traced or are found missing — No material has been placed before the court to establish that the last police station in which the seven persons or any of them were kept was under the control of the appellants — In absence of such evidence, the finding of guilt recorded by courts below u/s. 302 against appellants, was not correct either on facts or on law — Therefore, conviction of appellants u/s. 302 read with s. 120-B is set aside.

ss. 364 and 452 – Seven members of a family picked up by police party – Victims did not return – Held: It has been established that appellants had gone to the house of complainant in the early morning and picked up 7 members of his family – Therefore, conviction of appellants u/ss 364 and 452 was rightly maintained by High Court – The sentence of three years with fine u/s 452 is maintained – However, in the facts of the case, keeping in view Illustration (h) to s.220(1)CrPC, as seven persons had been abducted by

appellants, they were guilty of seven offences and should be punished for each of these offences u/s. 364 — Therefore, it is directed that the fine of Rs.4000/- as imposed by trial court and the period of rigorous imprisonment of five years will be for each of the seven offences of abduction and the five years rigorous imprisonment for each of the seven offences of abduction will run consecutively and not concurrently – Code of Criminal Procedure, 1973 – s.220(1), Ill.(h).

Delay/Laches:

Delay in lodging of FIR - Held: Delay in lodging of FIR often results in embellishment as well as the introduction of a distorted version of what may have actually happened, but the facts of each case have to be examined to find out whether the delay in lodging the FIR is fatal to prosecution case — In the instant case, there is enough evidence of the fact that complainant was afraid of lodging the complaint to local police station which was under the control of one of the accused-appellants – Delay of 2 months and 21 days in lodging the FIR has been explained by the facts and the evidence adduced – FIR.

Delay in recording statements u/s 161 CrPC – Held: Complainant in the very first complaint had named the appellants as the persons who raided their house and picked up seven members of his family, and therefore, the fact that there was considerable delay of two years from the date of lodging the FIR in recording of statements of witnesses does not make their evidence in this regard doubtful.

Evidence:

Witness at enmity with accused – Evidence of — Held: Testimony of such a witness has to be carefully scrutinized by the court before it is accepted, but only on account of enmity, court cannot discard evidence of the witness altogether.

Code of Criminal Procedure, 1973:

ss.161 and 162, Explanation – Improvements in deposition of witness over his statement u/s 161 – Held: In view of Explanation to s. 162, unless the omission in the statement recorded u/s. 161 of a witness is significant having regard to the context in which the omission occurs, it will not amount to a contradiction to the evidence of the witness recorded in court – In the instant case, courts below rightly considered the omissions as not material omissions amounting to contradictions covered by the Explanation to s.162.

The appellants (a DSP and a constable of police) and 9 others were prosecuted for commiting offences punishable u/ss. 120-B, 148, 452, 364, 365, 302 read with s. 120-B and s. 201, IPC. The prosecution case was that on 29-10-1991 at about 5:00 am, the appellants and other policemen raided the house of the complainant (PW 13) and picked up seven members of his family, who thereafter never returned. The trial court convicted the appellants u/ss. 452, 364 and 302 read with s. 120-B IPC and sentenced them to various terms including imprisonment for life u/s. 302 IPC. The High Court dismissed the appeal.

Allowing the appeals in part, the Court

HELD: 1.1. There cannot be any doubt that delay in the lodging of the FIR often results in embellishment as well as the introduction of a distorted version of what may have actually happened, but the facts of each case have to be examined to find out whether the delay in lodging the FIR is fatal to the prosecution case. In the instant case, from the evidence of PW-3 it is evident that the terrorists were active in the State of Punjab and the police was taking action against the terrorists and in such a state of affairs, PW-3 was apprehensive of the

consequences of lodging an FIR against appellants, one of whom was a Deputy Superintendent of Police in control of several police stations and the other was a police constable. Therefore, after seven members of his family were picked up on 29.10.1991, PW-3 waited with the hope that they would be released by the police and only after all his efforts to get them released failed, he lodged the complaint on 19.01.1992. The fact that the complainant addressed the complaint not to the police station but to the Director General of Police is enough evidence that PW-3 was afraid of lodging the complaint to the local police station which was under the control of appellant no. 1. Considering the fact situation, the delay of 2 months and 21 days on the part of PW-3 to lodge the complaint to the Director General of Police, Punjab, had been explained by PW-3 and this is not a case where the prosecution case could be disbelieved on the ground of delay in lodging the FIR. [Para 16-17] [562-F-H; 563-A-B, G-H]

Gauri Shanker Sharma vs. State of U.P. **1990 SCR 29 = 1990 (Supp) SCC 656 – relied on.**

1.2. As regards the delay in recording s. 161 statements of witnesses, it is evident from the evidence of PW-3 and PW-4 that on the stated date and time, the appellants came in 3-4 vehicles and took the seven members of their family in the Gypsy. Further, in the very first complaint lodged by PW-3 on 19.01.1992, he has named the appellants as the persons who raided their house and picked up seven members of his family. Therefore, the delay of two years from the date of lodging the FIR in recording of statements of PW-3 and PW-4 and other witnesses does not make their evidence that the appellants picked up seven members of their family on the stated date and time, doubtful. [Para 18] [564-A-B, E-G]

Jagjit Singh alias Jagga vs. State of Punjab **2005 (1) SCR 559 =2005 (3) SCC 689;** *State of Andhra Pradesh vs. S. Swarnalatha & Ors.* **2009 (12) SCR 289 = 2009 (8) SCC 383 - held inapplicable.**

1.3. Where there is previous enmity between the witness and the accused, the evidence of the witness has to be carefully scrutinized by the court before it is accepted, but only on account of such enmity the court cannot discard the evidence of the witness altogether. Moreover, witnesses who are not related to a victim of an offence are in some situations difficult to find. The appellants had gone to the house of the complainant (PW-3) early in the morning at 5.00 am on 29.10.1991 and picked up seven members of his family and it is difficult to find persons witnessing the incident at the stated time. Moreover, one of the appellants was a Deputy Superintendent of Police and, therefore, no one would prefer to narrate the incident either before the Investigating Officer or before the court. In such a situation, the court has to consider carefully and cautiously the evidence of witnesses who may have had enmity with the accused. On such careful and cautious consideration, it is difficult to discard the evidence of PW-3 when it is corroborated by the evidence of PW-4 as well as the complaint dated 19.01.1992 (Ext. PB) of PW-3 which had been registered as the FIR. Therefore, the evidence of PW-3 and PW-4 cannot be rejected on the ground of enmity. [Para 20] [566-B-G]

State of U.P. vs. Kishanpal and Others **2008 (11) SCR 1048 = 2008 (16) SCC 73 – relied on.**

1.4. With regard to the plea of improvements in the deposition of PW-3 over his statements recorded u/s. 161 Cr.P.C, in view of Explanation to s. 162 Cr.P.C, unless the omission in the statement recorded u/s. 161, Cr.P.C. of a witness is significant and relevant having regard to the

context in which the omission occurs, it will not amount to a contradiction to the evidence of the witness recorded in court. There is no omission in the evidence of PW-3 with regard to the facts about the picking up of seven members of his family from his house on the stated date and time and the names of the victims in his statement u/s. 161 Cr.P.C. The trial court and the High Court had rightly considered the omissions with regard to the nature, number and colour of the vehicles and the number of men who had come as well as what happened after the incident as not material omissions amounting to contradictions covered by the Explanation to 162, Cr.P.C. Therefore, the High Court rightly maintained the conviction of the appellants u/ss. 364 and 452 IPC. [Para 21] [566-H; 567-A, B-C, E-H]

2.1. From the evidence of PW-3 to PW-6, it is evident that the victims abducted by the appellants were subsequently seen in different police stations and also in residential quarters near the police station. No material has been placed before the court to establish that the last police station in which the seven persons or any of them was kept was under the control of the appellants. In absence of such evidence, the finding of guilt recorded by courts below u/s. 302 IPC against the appellants, was not correct either on facts or on law. [Para 27] [571-D, E-F; 572-B-C]

2.2. Therefore, the conviction of the two appellants u/s. 302 read with s. 120-B, IPC is set aside, but their conviction u/ss. 364 and 452, IPC is maintained. The sentence of three years rigorous imprisonment and a fine of Rs.3000/- for the offence punishable u/s. 452, IPC is maintained. But so far as the sentence and fine u/s. 364, IPC is concerned, in view of Illustration (h) to s. 220(1) of the Cr.P.C., as seven persons had been abducted by the appellants, they were guilty of seven offences u/s. 364, IPC, and they should be punished for each of these

offences. Therefore, it is directed that the fine of Rs.4000/- as imposed by the trial court and the period of rigorous imprisonment of five years, will be for each of the seven offences of abduction; and the five years rigorous imprisonment for each of the seven offences of abduction will run consecutively and not concurrently. [Para 28] [572-C-G]

Meharaj Singh (L/Nk.) vs. State of U.P. **1994 (5) SCC 188;** *Vishnu Davare vs. State of Maharashtra* **2004 (9) SCC 431;** *Radha Kumar vs. State of Bihar (Jharkhand)* **2005 (10) SCC 216;** *Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. Vs. State of Maharashtra* **2010 (15) SCR 452 = 2010 (13) SCC 657;** *Sahadevan and Another vs. State of Tamil Nadu* **2012 (4) SCR 366 = 2012 (6) SCC 403;** *LIC of India vs. Anuradha* **2004 (3) SCR 629 = 2004 (10) SCC 131;** *Prithipal Singh & Ors. vs. State of Punjab & Anr.* **2012(14) SCR 862 = 2012 (1) SCC 10;** *Gulam Chaudhary & Ors. Vs. State of Bihar* **2001 (3) Suppl. SCR 279 = 2001 (8) SCC 311;** *Badshah and Ors. Vs. State of Uttar Pradesh* **2008 (2) SCR 766 = 2008 (3) SCC 681 – cited.**

Case Law Reference:

1990 SCR 29	**relied on**	**para**
2005 (1) SCR 559	**held inapplicable**	**para 7**
2009 (12) SCR 289	**held inapplicable**	**para 7**
2008 (11) SCR 1048	**relied on**	**para 7**
1994 (5) SCC 188	**cited**	**para 7**
2004 (9) SCC 431	**cited**	**para 7**
2005 (10) SCC 216	**cited**	**para 7**
2010 (15) SCR 452	**cited**	**para 7**
2012 (4) SCR 366	**cited**	**para 10**
2004 (3) SCR 629	**cited**	**para 11**

2012(14) SCR 862	**cited**	**para 12**
2001 (3) Suppl. SCR 279	**cited**	**para 15**
2008 (2) SCR 766	**cited**	**para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No 1303 of 2005.

From the Judgment & Order dated 06.04.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 221-DB of 1998.

WITH

Crl. A. No. 1380 of 2005

Amarender Saran, Kawaljit Kochar, Kusum Chaudhary for the Appellant.

V. Madhukar, AAG, Paritosh Anil, Anivta Cowshish, Srajita Mathur, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These are appeals by way of special leave under Article 136 of the Constitution against the common judgment dated 06.04.2005 of the High Court of Punjab and Haryana in Criminal Appeal No.221-DB of 1998.

Facts of the case:

2. The facts very briefly are that Inder Singh sent an application dated 19.01.1992 by registered post with A.D. to the Director General of Police, Punjab, for releasing seven members of his family. In the application, Inder Singh alleged that on 29.10.1991 at 5.00 a.m. Baldev Singh, Deputy Superintendent of Police, and Balwinder Singh, Police Constable (the appellants herein) and other police men raided their house and picked up seven members of his family. They are Sadhu Singh (his father), Hardev Singh (his son), Gurdip

Singh and Amanjit Singh (his brothers), Sharanjit Singh (son of his younger brother Sajjan Singh) and Davinder Singh and Sukhdev Singh (two sons of his younger brother Khazan Singh). Inder Singh further stated in the aforesaid application that he has seen his family members, who were picked up, in Fatehgarh Churian, Police Station Kalanaur, Dera Baba Nanak and Police Station Kathu Nangal and on 08.01.1992, his son Sarwan Singh has seen these persons in the police vehicle in Amritsar. In the application, Inder Singh stated that he had fear that the appellant-Baldev Singh may kill his family members or may implicate in some case and he requested that they be released from illegal detention of the police at the earliest. By Memo dated 21.03.1994, the Inspector General of Police, Crime Branch directed the Senior Superintendent of Police, Majitha, to get the case registered and accordingly a formal FIR was registered under Section 364 of the Indian Penal Code (for short 'IPC') on 23.03.1994 in Police Station, Kathunangal, District Majitha. After investigation, charges were framed against nine accused persons including the appellants and as per the amended charges, nine accused persons were tried for offences under Sections 120-B, 148, 452, 364, 365, 302 read with Section 120-B and 201, IPC.

3. At the trial, fourteen prosecution witnesses were examined. Inder Singh was examined as PW-3 and he stated that on 29.10.1991 the two appellants accompanied by twenty to twenty five persons came in vehicles to the house and took away the seven members of his family. PW-3 has further deposed that he and his other relatives had approached the higher authorities but all his efforts to get the seven persons released did not yield any result. The evidence of PW-3 was corroborated by his brother Sajjan Singh who was examined as PW-4 as well as Jarnail Singh, a relation of PW-3, who was examined as PW-5. Sarwan Singh, the son of PW-3, was also examined as PW-6 and he stated that on 08.01.1992 he happened to be present at the shop near the bus stand at Amritsar when he noticed a Police Gypsy going on the road

and saw that his brother Hardev Singh was sitting in the vehicle and even he gave a signal by raising his hand. He also stated that there were other persons sitting in the vehicle but he did not see them and made an attempt to chase the vehicle but he could not do so. The appellants also examined as many as eleven witnesses in their defence that they have not taken anybody in their custody as alleged by the prosecution.

4. The trial court rejected the defence of the appellants and convicted the appellants under Sections 452, 364, and 302 read with Section 120-B, IPC, by its judgment dated 30.03.1998. The trial court thereafter heard the appellants on the question of sentence and sentenced the appellants to three years rigorous imprisonment and a fine of Rs.3,000/- for the offence of house trespass for wrongful restraint under Section 452, IPC, five years rigorous imprisonment and a fine of Rs.4,000/- for the offence of abduction of Sadhu Singh, Gurdip Singh, Hardev Singh, Amanjit Singh, Sharanjit Singh, Davinder Singh and Sukhdev Singh in order to murder under Section 364, IPC and rigorous imprisonment for life and a fine of Rs.50,000/- for the offence of murder of Sadhu Singh, Gurdip Singh, Hardev Singh, Amanjit Singh, Sharanjit Singh, Davinder Singh and Sukhdev Singh under Section 302 read with Section 120-B, IPC. Aggrieved, the appellants filed Criminal Appeal No.221-DB of 1998 before the High Court and by the impugned judgment dated 06.04.2005, the High Court dismissed the appeal.

Contentions on behalf of the Appellants:

5. Mr. Amarendra Sharan, learned senior counsel appearing for the appellants, submitted that while the incident was alleged to have taken place on 29.10.1991, the FIR was registered on 19.01.1992 and there was, thus, a delay of two months and twenty one days in lodging the FIR. He submitted that this delay is sought to be explained by the prosecution by saying that the complainant approached the Senior Superintendent of Police and the Director General of Police

and thereafter the Courts and even a writ petition before this Court and only thereafter the complaint was registered as an FIR. Mr. Sharan submitted that PW-3 belonged to a family of prosperous farmers and his son PW-6 was serving in the police and his friend PW-5 was also a member of Punjab State Congress Committee and had easy access to the Chief Minister of the State and, therefore, the explanation given by the prosecution for the delay of two months and twenty one days in lodging the FIR cannot be accepted by the Court. He cited the decision in *Meharaj Singh (L/Nk.) v. State of U.P.* [(1994) 5 SCC 188] in which this Court has held that delay in lodging the FIR often results in embellishment as well as introduction of a coloured version or exaggerated story and the FIR loses its value and authenticity.

6. Mr. Sharan next submitted that there was enough evidence to show that there was enmity between the complainant and the appellants. In this regard, he referred to the evidence of PW-3, the complainant himself, that the brother of the appellant-Baldev Singh was earlier kidnapped by the terrorists on 18.10.1991 and the appellant-Baldev Singh was under the impression that Gurdip Singh (brother of PW-3) was responsible for getting Kuldip Singh kidnapped and earlier Kundan Singh, who was a co-accused with the appellants but acquitted by the trial court, had asked the family of PW-3 to accept some girl for marriage with the son of PW-3 Hardev Singh, but Hardev Singh rejected the proposal. He submitted that as there was enmity between the family of PW-3 and the appellants, PW-3 has lodged the false complaint against the appellants.

7. Mr. Sharan next submitted that the evidence of PW-3 and PW-4 on which the trial court and the High Court relied on for holding the appellants guilty, is not reliable because the statements were recorded under Section 161, Cr.P.C., for the first time in July, 1994 more than two years after the incident and this fact has been admitted by the Investigating Officer

(PW-10), who recorded the statements. He cited the decisions of this Court in *Jagjit Singh alias Jagga v. State of Punjab* [(2005) 3 SCC 689] and *State of Andhra Pradesh v. S. Swarnalatha & Ors.* [(2009) 8 SCC 383] for the proposition that the delay in examination of a witness in the course of investigation if not properly explained creates a serious doubt about the reliability of the evidence of the witness.

8. Mr. Sharan referred to several improvements in the deposition of PW-3 over his statements recorded during investigation under Section 161, Cr.P.C. He cited *Ashok Vishnu Davare v. State of Maharashtra* [(2004) 9 SCC 431], *Radha Kumar v. State of Bihar (now Jharkhand)* [(2005) 10 SCC 216] and *Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. v. State of Maharashtra* [(2010) 13 SCC 657], in which this Court has not believed the evidence of prosecution witnesses on account of improvements in the deposition of the witnesses made over their statements recorded under Section 161, Cr.P.C.

9. Mr. Sharan submitted that police personnel, namely, SSP Sita Ram and SSP Hardeep Singh Dhillon, whose names find place in the evidence of PW-3, PW-4 and PW-5, were material witnesses and yet have not been examined by the prosecution. He submitted that similarly, Sukhbans Kaur Bhinder, Member of Parliament, and Beant Singh, Chief Minister of the State, whose names also find place in the evidence of PW-3, were material witnesses, but have not been examined. He submitted that their evidence would have thrown sufficient light on the prosecution case and the Court should draw adverse inference against the prosecution for non-examination of these material witnesses.

10. Mr. Sharan submitted that there is no evidence whatsoever on record to show that the seven persons alleged to have been abducted by the police have been killed by the appellants. He cited the decision of this Court in *State of Karnataka v. M.V. Mahesh* [(2003) 3 SCC 353] in which it has

been held that in the absence of definite evidence to indicate that Beena had been done to death, the accused could not have been convicted merely on the circumstance that the accused and Beena were last seen together. He submitted that in this case, PW-3, PW-4 and PW-5 have stated that they had seen the seven persons in Fatehgarh Churian Police Station and Kalanaur Police Station and PW-6 has further stated that he saw and identified his brother Hardev in a Police Van on 08.01.1992 at Amritsar. Mr. Sharan submitted that on these facts, therefore, Section 106 of the Indian Evidence Act was not attracted and the burden was not on the appellants to prove that they had not killed the seven persons who were abducted by them. He cited *Sahadevan and Another v. State of Tamil Nadu* [(2012) 6 SCC 403] in which this Court has held that the last seen theory should be applied while taking into consideration the prosecution case in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. He submitted that if the aforesaid principle as laid down by this Court in *Sahadevan and Another v. State of Tamil Nadu* (supra) is applied then the appellants could not be held guilty of the offence of murder of the seven persons.

11. Mr. Sharan next submitted that there is no evidence whatsoever before the court that the seven persons are dead and are not alive and the trial court has erroneously drawn the presumption that the seven persons are dead by applying Section 108 of the Indian Evidence Act. He cited the judgment of this Court in *LIC of India v. Anuradha* [(2004) 10 SCC 131 in which the principle behind Section 108 of the Indian Evidence Act is explained. He submitted that in any case, if there was any evidence against the appellants for the offence of murder of the seven persons under Section 302, IPC, the same should have been put to the appellants by the Court under Section 313, Cr.P.C., but this has not been done in this case. He vehemently argued that the conviction of the appellants for the offence of murder of seven persons under Section 302, IPC is without any evidence whatsoever.

Contentions on behalf of the State:

12. Mr. V. Madhukar, learned counsel appearing for the State of Punjab, in his reply, submitted that in this case though the complaint was filed by PW-3 on 19.01.1992 nothing was done for quite sometime and, therefore, PW-3 approached this Court in a habeas corpus petition to secure the release of the seven members of his family and on 15.09.1994 this Court passed an order directing that an inquiry should be conducted by the Central Bureau of Investigation. He submitted that pursuant to the said order of this Court, the Director of the Central Bureau of Investigation submitted his report dated 15.12.1994 and thereafter the investigation was carried out by the Crime Branch of the Punjab Police and the charge-sheet was filed against the two appellants and others. He submitted that the delay in lodging the FIR in this case on the part of PW-3 must be on account of the fact that the complaint was against the police personnel themselves and PW-3 must be contemplating whether or not to lodge such a complaint. He submitted that this was, therefore, an extra-ordinary case and this Court has held in *Prithipal Singh & Ors. v. State of Punjab & Anr*. [(2012) 1 SCC 10] that in such an extra-ordinary situation, the Court has to bear in mind the peculiar facts and innovate the law accordingly. He submitted that in the extra-ordinary facts in which PW-3, had to lodge the FIR, the delay in lodging the FIR should be ignored by the Court.

13. Mr. Madhukar next submitted that the evidence of PW-3, PW-4 and PW-5 on material aspects of the case are that the appellants took into custody seven persons, who were members of the family of PW-3, on 29.10.1991 and this was the case of PW-3 in the complaint filed by him on 19.01.1992 as well as in his statement recorded under Section 161, Cr.P.C., in the course of the investigation. The omissions in the statements recorded under Section 161, Cr.P.C., which have been supplied during the evidence of the witnesses in Court, do not detract from this basic prosecution story and, therefore,

are not "contradictions" covered by the Explanation under Section 162, Cr.P.C. He further submitted that the delay in recording the statements under Section 161, Cr.P.C. in this extra-ordinary case should not be held fatal to the prosecution case as the main prosecution story that the appellants abducted seven members of the family of PW-3 has been consistently reiterated all throughout, from the date of the complaint made on 19.01.1992 to the dates of the examination of witnesses by the Court. He submitted that the motive of the appellants to abduct the seven members of the family of PW-3 obviously was revenge as will be clear from the evidence of PW-3 and thus the trial court and the High Court rightly believed the evidence of PW-3, PW-4 and PW-5.

14. Mr. Madhukar submitted that seven other police personnel who went along with the appellants to abduct the seven members of the family of PW-3 were not examined as prosecution witnesses as they were also accused persons and these seven persons, namely Kundan Singh, Sukhwinder Singh, Balwinder Singh, Gurmukh Singh, Amrik Singh, Nirmal Singh and Randhir Singh, have been acquitted by the trial court. He submitted that the only evidence which has come on record regarding Sita Ram, SSP, Batala, is that a message was received from him that seven persons will be collected from the office of Sita Ram, SSP. He submitted that if Sita Ram, SSP, would have been examined he would have only denied that he had given such message and hence non-examination of Sita Ram, SSP, as a witness in court should not be held against the prosecution.

15. Mr. Madhukar vehemently submitted that the appellant-Baldev Singh was a DSP in the Police Department and had control over all the Police Stations under him and if this fact along with the fact that the appellant-Baldev Singh abducted the seven members of the family of PW-3 are taken into consideration, then the burden of proving as to what happened to the seven persons abducted by him was on him under

Section 106 of the Indian Evidence Act. He submitted that as the appellants have not discharged this burden of proving facts especially within their knowledge, the trial court and the High Court rightly held that the seven abducted persons have been murdered by the appellants. In support of this argument, he cited the decisions of this Court in *Ram Gulam Chaudhary & Ors. v. State of Bihar* [(2001) 8 SCC 311] and *Badshah & Ors. v. State of Uttar Pradesh* [(2008) 3 SCC 681]. He submitted that in these two cases it was held that even though the dead-body of a person alleged to have been murdered was not discovered, conviction for murder under Section 302, IPC, can still be recorded if there exists strong circumstantial evidence and if the accused is unable to offer any explanation regarding facts especially within his knowledge as provided under Section 106 of the Indian Evidence Act. He submitted that this is, therefore, not a fit case where this Court should interfere with the concurrent findings of fact recorded by the trial court and the High Court against the appellants and should dismiss the appeal.

Findings of the Court:

16. The first question that we have to decide is whether the delay of 2 months and 21 days in lodging the FIR could make the prosecution case one which is not believable. There cannot be any doubt that delay in the lodging of the FIR often results in embellishment as well as the introduction of a distorted version of what may have actually happened, but the facts of each case have to be examined to find out whether the delay in lodging the FIR is fatal for the prosecution case. In the present case, we find from the evidence of PW-3 that the terrorists were active in the State of Punjab and the police was taking action against the terrorists and in such a state of affairs, PW-3 was apprehensive of the consequences of lodging an FIR against appellants, one of whom was a Deputy Superintendent of Police in control of several police stations and the other was a police constable. Hence, after seven

members of his family were picked up on 29.10.1991, PW-3 waited for 2 months and 21 days with the hope that they would be released by the police and only after all his efforts to get them released failed, he lodged the complaint on 19.01.1992 (Ex.PB). The fact that the complainant addressed the complaint (Ex. PB) not to the police station but to the Director General of Police, Punjab, is enough evidence of the fact that PW-3 was afraid of lodging the complaint to the local police station which was under the control of the appellant Baldev Singh.

17. To illustrate this point, we may refer to *Gauri Shanker Sharma vs. State of U.P.* [1990 (Supp) SCC 656]. In this case, the facts were that Ram Dhiraj died of injuries received by him after his arrest while he was in police custody. The prosecution version was that he was beaten in police custody on 19.10.1971 by accused no.1 and his two companions after he was arrested from his residence and brought to the police station. Even though the High Court came to the conclusion that the deceased was beaten after his arrest, the High Court refused to place reliance on the direct testimony of three witnesses insofar as involvement of the Station House Officer of Police Station was concerned and one of the grounds for rejecting the evidence of the three prosecution witnesses was that the telegram was sent by PW-5 who had requested the Station House Officer not to beat the deceased on 23.10.1971, where as the prosecution case was that the injuries on the person of the deceased were caused on the evening of 19.10.1971. This Court held that the High Court has failed to appreciate that everyone thinks twice before deciding to make so serious a complaint against a police officer and there was no serious delay as to throw out the evidence of the three witnesses on the ground of delay. In our view, considering the fact situation, the delay of 2 months and 21 days on the part of PW-3 to lodge the complaint to the Director General of Police, Punjab, had been explained by PW-3 and this is not a case where the prosecution case could be disbelieved on the ground of delay in lodging the FIR.

18. We may next consider the contention of Mr. Sharan that the trial court and the High Court should not have relied on the evidence of witnesses when their statements under Section 161, Cr.P.C. were recorded for the first time in July, 1994, almost more than two years after the incident and lodging of the FIR. In *Jagjit Singh alias Jagga v. State of Punjab* (supra) cited by Mr. Sharan, the relevant facts were that PW-6, who was a young girl of 7 years age and resided in a different village than that of Jagjit Singh did not say in her earlier statements that she knew him, but in her statement recorded by the Investigating Officer under Section 161, Cr.P.C. she claimed to have known him and on these facts this Court held that in her earlier statements she did not name him and the delay in examining her in course of investigation also creates a serious doubt in the absence of any explanation for her late examination after 3 days and further held that though she may have witnessed the occurrence, she did not know Jagjit Singh and she had no opportunity of knowing or seeing him earlier and she has involved him at the instance of her father when her statement was recorded by the Investigating Officer. In the facts of the present case, on the other hand, PW-3 and PW-4, who have stated in their evidence before the court that on 29.10.1991 the appellants Baldev Singh and Balvinder Singh came in 3-4 vehicles and took the seven members of their family in the Gypsy and knew the two appellants who lived in village Ram Diwali which was at a small distance from the village of PW-3 and PW-4. Further, in the very first complaint lodged by PW-3 on 19.01.1992, PW-3 has named the appellants Baldev Singh and Balvinder Singh as the persons who raided their house and picked up seven members of his family. Hence, the fact that there was considerable delay of two years from the date of lodging the FIR and recording of statements of PW-3 and PW-4 and other witnesses does not make their evidence, that the appellants picked up seven members of their family on 29.10.1991 at 5.00 a.m., doubtful.

19. In *State of Andhra Pradesh v. S. Swarnalatha & Ors*

(supra) also cited by Mr. Sharan, the prosecution relied on the evidence of PW-3, a taxi driver, who claimed to have taken the accused persons to the house where the two persons died homicidal death and he also said that the accused persons entered into the house and asked him to stay on at that place and after half an hour all of them came out of the house and asked him to drop them at Ring Road, Dilsukhnagar. This Court found that PW-3 in his statement under Section 161, Cr.P.C. had mentioned the names of only two accused persons, but in his deposition before the Court, he took the names of six accused persons and further PW-3 was not taken by the Investigating Officer to the house in question to identify the house where the incident has taken place. On these facts, this Court held that the statement of PW-3 which was recorded by the Investigating Officer only on 31.01.1999 when the murder of the deceased had taken place on 03.12.1997 was not reliable, particularly when his statement was also recorded under Section 164, Cr.P.C. before the recording of his statement under Section 161, Cr.P.C. Thus, considering the peculiar facts of this case, the delay in recording the statement of witnesses by the Investigating Officer under Section 161, Cr.P.C. was held against the prosecution by this Court. In the facts of the present case, the investigation was against the Deputy Superintendent of Police and several other police persons and the investigation was being conducted by the Investigating Officer of the Crime Branch of the State Police. There was, therefore, resistance within the police against the investigation and it was only on account of intervention of this Court in Writ Petition (Criminal) No. 221 of 1994 that there was progress in the investigation and the statements of witnesses came to be recorded by the Investigating Officer. This being explanation for the delay in examining the witnesses under Section 161 Cr.P.C., we are not inclined to accept the statement on behalf of the appellants that the prosecution witnesses should not be relied on because of delay in recording the statements under Section 161, Cr.P.C.

20. We are also unable to accept the submission of Mr. Sharan that the evidence of PW-3 and PW-4 ought not to be relied on by the trial court and the High Court when there was evidence to show that there was enmity between PW-3 and PW-4 on the one hand and the appellants on the other hand. Where there is previous enmity between the witness and the accused, the evidence of the witness has to be carefully scrutinized by the Court before it is accepted, but only on account of such enmity the Court cannot discard the evidence of the witness altogether [See *State of U.P. vs. Kishanpal and Others* (2008) 16 SCC 73]. Moreover, witnesses who are not related to a victim of an offence are in some situations difficult to find. This is one such situation where the appellants have come to the house of the complainant (PW-3) early in the morning at 5.00 am on 29.10.1991 and picked up seven members of his family and it is difficult to find persons witnessing this incident at 5.00 a.m. during the last part of October. Moreover, one of the appellants was a Deputy Superintendent of Police and therefore even if some one had witnessed the incident, he would prefer not to narrate the incident either before the Investigating Officer or before the Court. In such a situation, the Court has to consider carefully and cautiously the evidence of witnesses who may have had enmity with the accused. On such careful and cautious consideration, it is difficult to discard the evidence of PW-3 that the appellants picked up seven members of his family on 29.10.1991 at 5.00 a.m. from his house particularly when it is corroborated by the evidence of PW-4 as well as the complaint dated 19.01.1992 (Ext. PB) of PW-3 which had been registered as the FIR. In our considered opinion, therefore, the trial court and the High Court could not have rejected the evidence of PW-3 and PW-4 on the ground of enmity between PW-3 and PW-4 on the one hand and the appellants on the other hand.

21. We may now consider the submission of Mr. Sharan that there were improvements in the deposition of PW-3 over

his statements recorded during the investigation under Section 161 Cr.P.C. The Explanation under Section 162, Cr.P.C. provides that an omission to state a fact or circumstance in the statement recorded by a police officer under Section 161, Cr.P.C. may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. Thus, unless the omission in the statement recorded under Section 161, Cr.P.C. of a witness is significant and relevant having regard to the context in which the omission occurs, it will not amount to a contradiction to the evidence of the witness recorded in court. The evidence of PW-3 is that on 29.10.1991, the appellant Baldev Singh accompanied by the appellant Balwinder Singh accompanied by twenty to twenty five persons came in three to four vehicles to his house and Sadhu Singh (his father), Hardev Singh (his son), Gurdip Singh (his brother), Amanjit Singh (his son), Sharanjit Singh (son of his brother, Sajjan Singh), Davinder Singh and Sukhdev Singh (sons of his brother Khazan Singh) in all seven persons were made to sit in the Gypsy and the appellants took these seven persons with them. There is no omission with regard to these facts about the picking up of seven members of his family from his house on 29.10.1991 and the names of these seven members of his family in the statement of PW-3 recorded under Section 161 Cr.P.C. The omissions in the statement of PW-3 recorded under Section 161 Cr.P.C. are with regard to the nature, number and colour of the vehicles and the number of men who had come as well as what happened after the aforesaid incident on 29.10.1991. In our view, the trial court and the High Court had rightly considered these omissions as not material omissions amounting to contradictions covered by the Explanation under Section 162, Cr.P.C. In our view, therefore, the High Court rightly maintained the conviction of the appellants under Sections 364 and 452 IPC.

22. We may now come to the submission of Mr. Sharan that there is no evidence whatsoever on record to show that the seven persons alleged to have been abducted by the appellants have been killed by the appellants.

23. We find that PW-3 has stated in his evidence:

> "All our men who kidnapped, were found present in PS Fatehgarh Churian and they were kept there for 10 days. We kept on meeting them during this period. Their condition was very bad. We used to go to them to supply food and articles and clothing to meet their needs. Then these persons were shifted from Fatehgarh Churian to Kalanaur. I and my relatives Jarnail Singh, Kuldip Singh, Sajjan Singh used to go to meet our men in the said police station also. We found that all these persons had been given severe beatings and out of them Gurdip Singh my brother and Amanjit Singh, his son, had received more serious injuries as compared to others. The conditions of these persons were very bad. After keeping our men at PS Kalanaur for ten days, then they were kept in PS Fatehgarh Churian. Subsequently, 3 persons were taken to PS Dera Baba Nanak and 4 were taken to PS Kahnuwal. Sadhu Singh, Gurdip Singh and Amanjit Singh had been kept in PS Dera Baba Nanak, where as the other 4 were kept in PS Kahnuwal. We continued meeting them from time to time in these police stations also. On 08.12.1991 4 persons, namely, Hardev Singh, Davinder Singh, Sukhdev Singh and Sharanjit Singh were shifted to PS Sadiq Faridkot from Kahnuwal Police Station."

> "I mentioned that we kept on meeting our men during the period of 10 days when they were detained in Police Station Fatehgarh Churian and also that their condition was very bad and we used to go there to supply food and articles and clothing to meet their needs."

> "In my statement in court I had mentioned that we had been

meeting our men at various Police Stations at Kalanaur, Fatehgarh Churian etc. and we had also been supplying food articles to them."

Thus, as per the evidence of PW-3, after the seven members of his family were abducted, he had met them at different police stations and was supplying them food and articles and clothing to meet their needs.

24. We also find that PW-4 in his statement has stated:

"We again approached Baldev Singh accused and he told us that our men will be sent back after his brother was traced. Thereafter, we continued to contact SSP of Batala for getting our men released because accused Baldev Singh was working as DSP under his control. SSP Sita Ram, however, continued postponing the matter promising that he would get our men released. Our men were kept from time to time at Police Station Fatehgarh Churian, Kalanaur, again Fatehgarh Churian and then to Kahnuwal and Dera Baba Nanak. We had been meeting our men from time to time in these Police Stations and we used to provide our men with food and clothes and other eatables. Subsequently 4 persons were sent to PS Sadiq."

"Our men used to be kept in the residential quarters near the Police Station and we used to meet them there. Other men from public were not present there on these occasions. I had mentioned in my police statement that our men were taken to Police Station Fatehgarh Churian because our men had been subsequently seen by us."

Hence, the evidence of PW-4 also is that the seven persons picked up by the appellants were kept at different places including Police Stations and residential quarters near the Police Station and their family members used to provide them with food and clothes and other articles and used to meet them.

25. We further find that PW-5 has stated in his evidence:

"I then went to Gurdaspur. Then I learnt that our men were kept in Police Station Kahnuwal. I went there and I could find only 4 persons present there. The other 3 persons namely Sadhu Singh, his son Gurdip Singh and Son of Gurdip were not there."

"I had also disclosed that I, Inder Singh, Sajjan Singh and wife, brother of Sajjan Singh has gone to PS Kalanaur and had met 7 persons."

"I had mentioned in my statement before Police about our going to PS Kahnuwal and meeting 4 persons there."

"I did not meet the SHO of PS Kalanaur as the SHO could never permit us to meet our men. Voluntarily explained that I had met them in a stealthy manner, when a Head Constable who had earlier remained posted at Quadian, had helped us in seeing them. I cannot tell his name. Head Constable had taken our 7 men, out of the particular room, so that we may meet them. All this, however, happened in the premises of the Police Station. We had gone there during the day. There were other police officials and guard there. It is incorrect that I have given false evidence."

"We had gone to PS Kahnuwal. There was MHC there. I told him that I wanted to see my men who were detained there in the adjoining room in the Police Station and the said MHC told me that I could meet them hurriedly and go away as there was lot of strictness in the quarters."

Thus, the evidence of PW-5 is also that he had met the seven persons after they were abducted by the appellants in different Police Stations where there were other police officials and guards.

26. We also find that PW-6, who was the son of PW-3 and working as Police Constable at Amritsar has said in his evidence:

"On 08.01.1992 I happened to be present near the shops near Bus Stand. I noticed a police gypsy going on the road. I noticed that in the body of that vehicle my brother Hardev Singh was sitting. He also gave me a signal with his hand. There were other persons also in that vehicle, but I could see only my brother. I tried to pursue that vehicle but due to rush I could not reach the vehicle, and it slipped away. On the same day I sent a message to my father that I had seen my brother being taken away in a vehicle. Police also recorded my statement during investigation."

Hence, PW-6 also had seen his brother sitting in a police gypsy at Amritsar.

27. We, therefore find that the evidence adduced by PW-3, PW-4, PW-5 and PW-6 is that the seven persons abducted by the appellants were found in different police stations and also in residential quarters near the police station. On this evidence, the court cannot hold that the two appellants have killed the seven abducted persons only because the seven persons have not been traced or are found missing. Learned counsel for the State submitted that the appellant Baldev Singh was in control of all the police stations in his area but no material has been placed before the court to show which were the police stations which were under the control of the appellant Baldev Singh. No material has been placed before the Court to establish that the last police station in which the seven persons or any of the seven persons were kept was under the control of the appellant Baldev Singh and the other appellant Balwinder Singh. From the evidence of PW-3, we find that terrorism was prevailing in the State of Punjab at the time when the seven persons were abducted and action was being taken by the police against the terrorists. When the seven persons abducted by the appellants did not go missing immediately after their abduction and were found in different police stations in the State of Punjab and one of them was also found going in a Gypsy at Amritsar, the Court cannot hold that the seven abducted persons were last in the custody of the appellants and hence they must discharge the

burden under Section 106 of the Evidence Act and must explain what they did to the seven abducted persons. The prosecution should have examined witnesses from amongst the police personnel or the Police Station to establish that the seven abducted persons were last seen in the custody of the appellants. In absence of such evidence, the finding of guilt recorded by the trial court and the High Court under Section 302 IPC against the appellants, in our view, was not correct either on facts or on law.

28. We, therefore, set aside the conviction of the two appellants under Section 302 read with Section 120-B, IPC but maintain the conviction of the appellants under Sections 364 and 452, IPC. The trial court has imposed a punishment of three years rigorous imprisonment and a fine of Rs.3000/- for the offence under Section 452, IPC and five years rigorous imprisonment and a fine of Rs.4000/- for the offence under Section 364, IPC, and the High Court has maintained the aforesaid sentences for the two offences. We maintain the sentence and fine under Section 452, IPC. But so far as the sentence and fine under Section 364, IPC is concerned, we find from illustration (h) under Section 220 of the Cr.P.C. that where an accused commits the same offence against three persons, then he can be charged with three offences. As seven persons had been abducted by the appellants, the appellants were guilty of seven offences under Section 364, IPC, and they should be punished for each of these offences under Section 364, IPC. We, therefore, direct that the fine amount as imposed by the trial court will be Rs.4000/- for each of the seven offences of abduction and the period of rigorous imprisonment will be five years for each of the seven offences of abduction and these five years rigorous imprisonment for each of the seven offences of abduction will not run concurrently but consecutively. In case, the fine amount of Rs.4,000/- is not paid, the appellants will have to undergo one more year of rigorous imprisonment. The appeals are allowed to the extent indicated above.

R.P. Appeals partly allowed.

DELTA DISTILLERIES LIMITED
v.
UNITED SPIRITS LIMITED & ANR.
(Civil Appeal No. 8426 of 2013)

SEPTEMBER 23, 2013

[A.K. PATNAIK AND H.L. GOKHALE, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996:

s.27 r/w s.25 – Petition for seeking court assistance in taking evidence – Claim regarding set-off/refund pertaining to sales tax – Prayer by respondent seeking to produce assessment orders relating to appellant — Held: Arbitrator / Arbitral Tribunal is required to make an award on merits of the claim placed before it – For that purpose, if any evidence becomes necessary, Tribunal ought to have power to get the evidence and it is for this purpose only that the enabling provision in s.27 has been made – If a claim is to be decided on the basis of an order of assessment, claimant cannot be denied the right to seek a direction to party concerned to produce the assessment order – High Court rightly directed the appellant to produce the documents which were sought by first respondent – Arbitration Act, 1940 – s.43.

Interpretation of statutes:

Construing of a statutory provision – Held: Words used in a statute are to be read as they are used, to the extent possible, to ascertain the meaning thereof — s. 71 of Maharashtra Value Added Tax, 2002 and s. 64 of Bombay Sales Tax Act, contain a bar only against Government officers from producing the documents mentioned therein — There is no bar therein against a party to produce any such document – Maharashtra Value Added Tax, 2002 – s.71 – Bombay Sales Tax Act, 1959 – s.64.

The appellant, in terms of an agreement, manufactured and supplied to respondent no. 1 certain brands of Indian Made Foreign Liquor. The contract price at which the IMFL was to be sold by the appellant to respondent No.1, was exclusive of sales tax and other taxes, and latter was required to bear the same. The dispute, which was referred to arbitration, arose between the parties regarding set-off/refund obtained by the appellant from the Sales Tax Department on the sales tax paid on packaging material, and such set-off/refund operated to reduce the sales tax liability of the appellant, which was ultimately being borne by respondent No.1. The Arbitral Tribunal granted permission to respondent no. 1 to apply to court for production of the relevant assessment orders from the appellant and/or the Sales Tax Authorities. Accordingly, respondent No.1 filed an arbitration petition u/s. 27 of the Arbitration and Conciliation Act, 1996. The single Judge of the High Court allowed the petition and directed the appellant to produce the documents sought for.

Dismissing the appeal, the Court

HELD: 1.1. Section 27(2)(c) of the Arbitration and Conciliation Act, 1996 does provide that an application under this section seeking assistance of the court shall specify the name and address of any person to be heard as a witness or as an expert witness. As far as the appearance of a party in pursuance to a notice of the arbitrator is concerned, s. 25 (c) provides that in the event a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings, and make the arbitral award on the evidence before it. This evidence can be sought either from any third person or from a party to the proceeding itself. The substitution of the phrase "parties and witnesses" u/s. 43 of the earlier Act by the phrase 'any person' in s.27

cannot make any difference. It is an enabling provision and has to be read as such. The term 'any person' appearing in 27 (2) (c) is wide enough to cover not merely the witnesses, but also the parties to the proceeding. It is undoubtedly clear that if a party fails to appear before the Arbitral Tribunal, it can proceed ex-parte, as provided u/s. 25 (c). At the same time, it cannot be ignored that the Tribunal is required to make an award on merits of the claim placed before it. For that purpose, if any evidence becomes necessary, the Tribunal ought to have the power to get the evidence, and it is for this purpose only that enabling provision in s.27 has been provided. [Para 18-19] [586-G-H; 587-A; 588-F-H; 589-A-C]

Union of India v. Bhatia Tanning Industries **AIR 1986 Delhi 195 – referred to.**

1.2. To draw an adverse inference against the defaulting party is a power available with the Arbitral Tribunal, and if necessary the same can be used. However, as observed by the Arbitrator in the order dated 27.3.2007, the documents sought in the instant matter were required to arrive at the decision on the claim of respondent no. 1, since, the quantification in support of its claim had been done by it on a theoretical basis. A hypothetical calculation should not be resorted to when actual Sales Tax Assessments are available, which would show as to whether the quantum of set-off allowed and claimed was in fact justified. If a claim is to be decided on the basis of an order of assessment, the claimant as well cannot be denied the right to seek a direction to the party concerned to produce the assessment order. It is this very prayer which has been allowed by the earlier order dated 27.3.2007 passed by the then Arbitrator, and also by the subsequent order dated 16.9.2011 passed by the Arbitral Tribunal, and rightly so. [Para 21 and 24] [590-A-C; 592-B-C]

1.3. As regards, the plea that the assessment orders were confidential documents in view of s. 71 of the Maharashtra Value Added Tax, 2002 and s. 64 of the Bombay Sales Tax Act, suffice it to say that it is a settled principle of law that the words used in a statute are to be read as they are used, to the extent possible, to ascertain the meaning thereof. Both these provisions contained a bar only against the Government officers from producing the documents mentioned therein. There is no bar therein against a party to produce any such document. [Paras 23 and 24] [590-E; 591-F-G]

Tulsiram Sanganaria and Another v. Srimati Anni Rai and Ors. **1971 (1) SCC 284 – relied on.**

1.4. Single Judge of the High Court rightly allowed the petition as against the appellant in terms of prayer clause 'A', directing the appellant to produce the documents which were sought by respondent no. 1. [Para 25]

Case Law Reference:

AIR 1986 Delhi 195	**referred to**	**Para 11**
1971 (1) SCC 284	**relied on**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8426 of 2013.

From the Judgment & Order dated 20.07.2012 of the High Court of Bombay in Arbitration Petition No. 838 of 2011.

Ravindra Shrivastava, Aarohi Bhalla, Subodh S. Patil, Anshuman Shrivastava, Anup Jain, Abhinav Shrivastava, Suvigya Awasti, Ajay Singh, Mayank Gulati, Sujata Kurdukar for the Appellant.

C.U. Singh, Priyanka Mishra, Vanita Bhargava, Ajay Bhargava (for Khaitan & Co.) for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave Granted.

2. This appeal by Special Leave seeks to challenge the judgment and order dated 20.7.2012 rendered by a Single Judge of Bombay High Court allowing Arbitration Petition No.838 of 2011 filed by the respondent No.1 herein. The said petition sought to invoke the powers of the court under Section 27 of the Arbitration and Conciliation Act, 1996 (herein after referred to as the Act of 1996), which provides for seeking assistance of the court in taking evidence. The said petition had been moved in pursuance of the order dated 16.9.2011 passed by a three member Arbitral Tribunal permitting the respondent No.1 to file such an application. The learned Single Judge allowed the said petition, and thereby directed the appellant to produce the documents as sought by the respondent No.1 before the Arbitral Tribunal. This appeal has been filed by Special Leave to challenge the said judgment and order. The appeal raises the question with respect to the scope of Section 27, and the circumstances in which the Arbitral Tribunal or a party before the Arbitral Tribunal can apply to the court for assistance in taking evidence.

Facts leading to this appeal are this wise:-

3. The respondent No.1 herein is a company which owns certain brands of Indian Made Foreign Liquor (IMFL). The appellant is a company carrying on the business of distilling and bottling of IMFL. The predecessor of the respondent No.1 entered into an agreement with the appellant on 25.3.1997, under which the appellant agreed to manufacture and supply to the respondent No.1, IMFL of such brands and quantity, as would be specified from time to time on the terms and conditions contained therein. Under the said agreement, the contract price at which the IMFL was to be sold by the appellant to the respondent No.1, was exclusive of sales tax and other taxes, and the respondent No.1 was required to bear the same.

4. It appears that sometimes in 2001-2002, certain disputes arose between the parties. A major dispute between them related to the outstanding amount payable at the foot of the running account between them. The respondent No.1 claimed that amongst others, amounts to the tune of Rs.1,22,30,692 and Rs.70,23,107.52 were due and payable to the respondent No.1, whereas the appellant maintained that an amount of Rs.39,37,993 was payable to the appellant. According to the first respondent, the appellant had obtained from the Sales Tax Department set-off/refund on the sales tax paid on packaging material, and such set-off/refund operated to reduce the sales tax liability of the appellant, which was ultimately being borne by the respondent No.1. The respondent No.1 therefore, claimed that it was entitled to the benefit of the said set-off/refund, and accordingly debited the appellant for the amount of set-off/refund.

5. It was the case of the first respondent that although the appellant had accounted for some of these entries in its accounts, it did not account for a major portion of the same. Clause 14 of the agreement between the parties provided that any dispute or difference arising or relating to or connected with the said agreement, was to be referred to arbitration. The above dispute was, therefore, referred to the Arbitration of Hon'ble Mr. Justice D.M. Rege, former Judge of Bombay High Court. However, the Learned Judge resigned as arbitrator, and thereafter the proceedings were continued before another arbitrator Hon'ble Mrs. Justice Sujata Manohar, former Judge of the Supreme Court of India.

6. Thereafter, the advocates of the respondent No.1 gave a notice to the advocate on record of the appellant on 17.3.2007, calling upon them to give inspection and to produce the following documents before the learned Arbitrator:-

(a) All sales tax returns filed by the appellant with the sales tax authorities for the assessment years 1995-1996 to 2001-2002.

(b) All sales tax assessment orders passed with regard to the appellant for the above-mentioned period, and all appellate orders, if any passed in any appellate proceedings arising out of the same.

(c) The objection, if any, filed by the appellants against the Notice in Form 40, and proposed order at pages 123 & 124 of Volume VI of the documents filed in the arbitration, the order, if any, passed thereon, and the appellate proceedings, if any, therein.

(d) The letter dated 26th May 2000 mentioned in the letter at page 32 of Volume III of the documents filed in the arbitration.

7. The advocate of the appellant vide his reply dated 21.3.2008, protested and objected to the production of these documents, since according to the appellant the same were being sought at a late stage when the proceeding had reached the stage of cross-examination of the witnesses of the respondent No.1. In paragraph 3 of this reply the learned advocate stated as follows:-

> "*3. As regards the inspection of documents sought by your clients, my clients repeat that your clients are not entitled to inspection of any documents at this belated stage. In any event, my clients are not relying on any of the documents referred to in paragraphs (a), (b) and (c) of your letter. As regards the documents referred to in paragraph (d) of your letter, the said document is already on record before the Hon'ble Arbitrator and hence a copy of the said document is already available with you."*

8. Inasmuch as the appellant declined to give inspection / and produce the document as sought for, the respondent No. 1 made an application on 26.3.2007 before the learned Arbitrator, and in paragraph No. 5 thereof, sought a direction to produce the documents mentioned at Sl. Nos.(a) to (c) in the notice dated 17.3.2007. The learned Arbitrator by her order dated 27.3.2007 allowed the application only to the extent of the assessment orders relating to the period 1995-1996 to

2001-2002 and the appellate orders mentioned in paragraph 5(b). The prayer for producing the sales tax returns mentioned in paragraph 5(a) was not entertained. Similarly, the prayer to produce the documents as sought in paragraph 5(c) was not entertained. The learned Arbitrator held in paragraph 4 of her order as follows:-

> "*4. …. The documents in paragraphs 5 (a) and 5 (b) relate to Sales Tax Returns filed by the Respondents for Assessment Years 1995-1996 till 2001-2002 and Sales Tax Assessment Orders passed in respect of the Respondents for this period including any Appellate Orders. One of the claims made by the Claimants in these proceedings against the Respondents related to the benefit of any sales tax set-off granted to the Respondents in connection with the goods in question which, according to the Claimants, should accrue to their benefit. Therefore, Sales Tax Assessment Orders relating to the period in dispute passed in respect of the Respondents are relevant for the purpose of determination of this aspect of the dispute. Mr. Savant, learned counsel for the Respondents has contended that these Sales Tax Assessments are not relevant because in any case, the Claimants have quantified the set-off which they are claiming, and hence, it is not necessary to look at Sales Tax Assessments to ascertain the quantum of set-off. However, the quantification is done by the Claimants on the theoretical basis that full set-off must have been granted to the Respondents and hence, 75% of the value of the set-off until May 2000 and the full value of such set-off thereafter should be considered as having accrued for the benefit of the Claimants. A hypothetical calculation on such basis should not be resorted to when actual Sales Tax Assessments are available which show the quantum of set-off allowed. This is in the interest of both the parties. Hence, the argument of Mr. Savant cannot be accepted."*

9. The appellants were dissatisfied with the order passed. In their subsequent correspondence they made certain allegations against the learned Arbitrator, who therefore, resigned from the said proceeding. The parties therefore, appointed an Arbitral Tribunal consisting of three Judges, Hon'ble Mr. Justice M. Jagannadha Rao (Presiding Arbitrator) and Hon'ble Mr. Justice S.N. Variava (both former Judges of the Supreme Court of India), and Hon'ble Mr. Justice M.S. Rane (Former Judge of Bombay High Court). On reconstitution of the Arbitral Tribunal the respondent No.1 pointed out that the order passed by the earlier Arbitrator dated 27.3.2007 had not been complied with. The Tribunal, therefore, called upon the appellant to state their position on an affidavit. Thereupon the Chairman of the appellant filed an affidavit before the Tribunal on 16.9.2011 stating that the appellant would not produce the sales tax assessment orders. In paragraph 3 of his affidavit he specifically stated as follows:-

"3. I humbly and most respectfully submit before this Hon'ble Tribunal that, Sales Tax Returns are the documents which are highly confidential and hence the same cannot be subject matter to be produced before this Hon'ble Tribunal especially when, sales tax set off is already quantified by the Claimants and the same is forming a part of their claim in the present arbitration proceedings. I say that, it is not necessary to inspect the said sales tax assessment orders in order to ascertain the quantum of set off. I say that, the Claimants' demand of sales tax set off to an extent of 75% and somewhere also 100% is completely vague and arbitrary and that the same is completely de hors the contents of the agreement dated 25.03.1997. I therefore say that, disclosure of any such sales tax assessment orders shall be completely detrimental to the rights and interest of the Respondent Company."

10. In view of this affidavit of the Chairman of the appellant, the Tribunal noted that the party in possession of the concerned

documents was refusing to produce them, even though it had been directed to do so. The Tribunal vide its order dated 16.9.2011, held that the earlier order dated 27.3.2007 passed by the previous arbitrator could not be reviewed, nor did the Tribunal have any jurisdiction to do so. The Tribunal, therefore, permitted the respondent No.1 to apply to the court under Section 27 of the Act of 1996, and to seek production of the sales tax assessment order for the period 1995-1996 to 2001-2002, including any appellate orders in support thereof. The Tribunal observed as follows:-

"7…….*One would have expected the Respondent to obey the directions of this Tribunal and produce the above said documents. However, in as much as they have not been produced for more than four years and now there is categorical statement by the Chairman of the Respondent Company that they will not produce these documents, the Tribunal is compelled to exercise the powers under Section 27 of the Act and grant permission to the Claimant to apply to the Court for production of the documents from the Respondent and/or the Sales Tax Authorities……"*

11. Pursuant to the said permission granted by the Tribunal, the respondent No.1 filed the Arbitration Petition before the Single Judge of Bombay High Court invoking the powers of the Court under Section 27 of the Act of 1996, to seek a direction to the appellants to produce the earlier mentioned assessment orders and appellate orders. The Assistant Commissioner of Sales Tax, Pune was joined as respondent No. 2, and a direction to produce those documents from his records was as well sought. The appellant herein, opposed the said Arbitration Petition. Now for the first time, in paragraphs 5 and 6 of the reply the appellants stated as follows:-

"*5. The Petitioner's demand pertains to records for the period 1995-1996 to 2001-02. I say and submit that these are very old records. The same are not available with the Respondent No. 1. I say and submit that*

Respondent No. 1 is not able to trace these old records. I say that in fact when I made my Affidavit dated 16th September, 2011, I had in fact not searched the Company's records to ascertain whether the sales tax orders were in fact available with it. I say that accordingly I had made the said Affidavit dated 16th September, 2011 opposing the disclosure on the grounds stated therein. I say that during the pendency of the present petition, I have checked in order to ascertain whether these records were in fact available with the Company and have discovered that they cannot be traced."

6. Without prejudice to the aforesaid, I further say that the information that is being requested for by the petitioner is confidential and accordingly the same ought not be disclosed."

12. The learned Single Judge thereupon heard the parties. It was submitted on behalf of the appellant before the Learned Single Judge, that the provisions of Section 27 of the Act of 1996 were analogous to Section 43 of the Arbitration Act, 1940. A judgment of the Delhi High Court in the case of *Union of India v. Bhatia Tanning Industries* reported in AIR 1986 Delhi 195, on the said Section 43 was relied upon to submit that the said section applies only to calling witnesses, and not for giving any direction to the parties. It was further submitted that at the highest, an adverse inference may be drawn against the appellant under Order 21, Rule 11 of Code of Civil Procedure (hereinafter referred as CPC). Reliance was also placed on the provision of Section 71 of Maharashtra Value Added Tax Act, 2002 (hereinafter referred as the Maharashtra Act) which is pari materia with Section 64 of the Bombay Sales Tax Act, 1959, and it was contended that the assessment orders were confidential, and could not be directed to be produced. The Assistant Commissioner of Sales Tax who was respondent No.2 to the Writ Petition (and who is respondent No. 2 to this appeal also), submitted that the old record of the relevant period was not available with the Sales Tax Department, and was

already destroyed. In any case it was submitted that in view of the above referred Section 71, such a direction could not be issued.

13. The learned Judge repelled all these arguments. He held that the appellant was misreading the judgment of Delhi High Court, and that it could not be anybody's case that a party in a proceeding can not be examined as a witness. With respect to Section 71 of the Maharashtra Act, the learned Judge held that it barred only the production of statements and returns, and it was not applicable to the assessment orders. The learned Judge also noted that in the earlier affidavit filed before the Tribunal, the appellant had not taken any such plea that the assessment orders were not available, but within ten months thereafter in another affidavit before the High Court it was being contended that the said documents were not traceable. The learned Judge therefore, allowed the said petition invoking Section 27 of the Act of 1996, and directed the appellant herein to produce the documents sought for. Being aggrieved by this judgment and order the present SLP has been filed.

14. We have heard Mr. Ravindra Srivastava, learned senior counsel in support of this appeal, and Mr. Chander Uday Singh, learned senior counsel for the respondent no. 1. Respondent no. 2 is a proforma respondent. The challenge in this appeal is principally on two grounds. Firstly, that the type of order which was sought under Section 27 of the Act of 1996, against the appellant was not within the competence of the court, and at the highest the Arbitral Tribunal should have drawn an adverse inference against the appellant under Order 11 and Rule 21 of CPC for non-production of the documents, the production of which was sought by the respondent no.1. The second challenge was that in any case, the documents which were sought were confidential documents, and in view of the provision contained in Section 71 of the Maharashtra Value Added Tax 2002, and the order compelling the appellant to produce such documents could not have been passed.

15. As far as the first ground of challenge is concerned, as pointed out earlier, reliance was placed by the respondent no. 1 on the judgment of a Division Bench of Delhi High Court in *Bhatia Tanning Industries* (supra). Now, what had happened in this matter was that the respondent/industries were to supply certain material to the appellant, and since the respondent had committed default in making the supply, the appellant had raised a claim on account of risk purchase which was referred to arbitration. The arbitrator sent notices to the address of the respondents on record twice, and on both occasions the registered notices were returned to the arbitrator stating that the addressee was not available. It was in these circumstances that the arbitrator ordered that there shall be a publication of the notice in a newspaper. That having being done, nobody appeared for the respondent thereafter also, and the arbitrator made an ex-parte award. After the award was filed in court, and notice was sent to the respondent, an objection was raised that the arbitrator had no power to order service by means of publication in the newspaper. The learned Single Judge who heard the matter, set aside the award on the ground that the arbitrator should have gone to the court under Section 43 of the Arbitration Act, 1940 (Act of 1940 for short), and obtained an order from the Court for service by publication which had not been done.

16. This order was challenged in appeal, and a Division Bench of the High Court allowed the said appeal. The Division Bench held that the there are two separate sections in the Act of 1940. One was Section 42 which provided service of notice by a party or arbitrator, and the other was Section 43. Section 43 of the Act of 1940 reads as follows:-

> *"**43. Power of Court to issue processes for appearance before arbitrator –** (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.*

> *(2) Person failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court*
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> *(3) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents."*

The Division Bench in paragraph 9 of its judgment noted that Section 42 provides for the service of a notice by the arbitrator on a party before he proceeds to hear the case. On the other hand in paragraph 11, the court held that Section 43 is confined to cases where a person, whether a party or a third person, is required to appear as a witness before the arbitrator. Such witnesses whom the arbitrator or umpire desires to examine may be summoned through court.

17. We, therefore, fail to see as to how this judgment can advance the submission of the appellant, though it was contended that Section 27 of the Act of 1996 is similar to Section 43 of the Act of 1940. On the other hand, as stated above, the Division Bench judgment of Delhi High Court clearly lays down that Section 43 of the pre-cursor Act permitted the arbitrator to call a third person as well as a party as a witness, and the section was not confined only to calling third persons as witnesses.

18. It was contended on behalf of the appellant that whereas Section 43 used the phrase "parties and witnesses", Section 27 did not contain such a phrase, and it speaks of calling 'any person' as a witness. Section 27(2) (c) does provide that an application under this section seeking assistance of the court shall specify the name and address of

any person to be heard as a witness or as an expert witness. As far as the appearance of a party in pursuance to a notice of the arbitrator is concerned, there is a specific provision for proceeding in the event of default of a party under Section 25. We may refer to Sections 25 and 27 in this behalf which read as follows:-

*"**25. Default of a party**.- Unless otherwise agreed by the parties, where, without showing sufficient cause,——*

(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant.

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it."

***"27.Court assistance in taking evidence.-** (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*

(2) The application shall specify——

(a) the names and addresses of the parties and the arbitrators.

(b) the general nature of the claim and the relief sought;

(c) the evidence to the obtained, in particular,——

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request or ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making or order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences is suits tried before the Court.

(6) In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents."

19. As seen from these two sections, Section 25 (c) provides that in the event a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings, and make the arbitral award on the evidence before it. This evidence can be sought either from any third person or from a party to the proceeding itself. The substitution of the phrase "parties and witnesses" under Section 43 of the earlier act by the phrase 'any person' cannot make any difference, or cannot be read to whittle down the powers of the Arbitral Tribunal to seek assistance from the court where any person who is not cooperating with the Arbitral Tribunal or where any evidence is required from any person, be it a party to the proceedings or others. It is an enabling provision, and it has to be read as such. The term 'any person'

appearing under Section 27 (2) (c) is wide enough to cover not merely the witnesses, but also the parties to the proceeding. It is undoubtedly clear that if a party fails to appear before the Arbitral Tribunal, the Tribunal can proceed ex-parte, as provided under Section 25 (c). At the same time, it cannot be ignored that the Tribunal is required to make an award on the merits of the claim placed before it. For that purpose, if any evidence becomes necessary, the Tribunal ought to have the power to get the evidence, and it is for this purpose only that this enabling section has been provided.

20. The counsel for the appellant tried to take advantage of the first sentence of paragraph 12 of the Delhi High Court judgment, which reads as follows:-

> *"(12) Section 43 has no application where the party to an arbitration agreement has to be summoned for appearance before the arbitrator so that he may participate in the proceedings and state his defense."*

We must however note, what the Division Bench has stated thereafter, in the very paragraph which is to the following effect.

> *"The learned judge seems to have been misled by the expression 'parties' appearing in section 43. The word 'parties' is used in the sense where the party itself is desired to be examined as a witness by the arbitrator or umpire. The expression 'witnesses' used along with the word 'parties' makes the meaning of the legislature abundantly clear. The principle of construction is that words of the same feather flock together."*

As can be seen from the paragraph, the paragraph itself says that Section 43 has no application for summoning a party to appear to participate in the proceeding. It is meant for securing the presence of third persons as well as parties as witnesses. This position cannot be said to be altered due to the absence of these words and use of the words 'any person' in Section 27 of the Act of 1996.

21. It was contended that if the necessary documents are not produced, at the highest an adverse inference may be drawn against the appellant. That is a power, of course available with the Arbitral Tribunal, and if necessary the same can be used. However, as observed by the learned Arbitrator in her order dated 27.3.2007, the documents sought in the present matter were required to arrive at the decision on the claim of the respondent no. 1, since, the quantification in support of the claim had been done by the respondent no. 1 on a theoretical basis. A hypothetical calculation should not be resorted to when actual Sales Tax Assessments are available, which would show as to whether the quantum of set-off allowed and claimed was in fact justified.

22. In the circumstances, there is no substance in the first objection viz. an order passed by the earlier Arbitrator dated 27.3.2007, and the subsequent enabling order passed by the Arbitral Tribunal dated 16.9.2011 permitting the respondent to apply under Section 27 could not have been passed.

23. The second objection was that the assessment orders were confidential documents, and Section 71 of the Maharashtra Value Added Tax, 2002 and its pre-cursor Section 64 of the Bombay Sales Tax Act, did not permit production of these documents, and a direction as sought could not have been granted. Since, these two sections are invoked, the relevant part of both the sections are quoted below.

> *"**Section 71 (1) –** All particulars contained in any statement made, return furnished or accounts or documents produced in accordance with this Act, or in any record of evidence given in the course of any proceedings under this Act (other than proceeding before a Criminal Court) or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act shall, save as provided in sub-section (3), be treated as confidential; and notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), no court shall*

save as aforesaid, be entitled to require any servant of the Government to produce before it any such statement, return, account, document or record or any part thereof, or to given evidence before it in respect thereof."

"**Section 64 (1) –** *All particulars contained in any statement made, return furnished or accounts or documents produced in accordance with this Act, or in any record of evidence given in the course of any proceedings under this Act (other than proceeding before a Criminal Court) or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act shall, save as provided in sub-section (3), be treated as confidential; and notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), no court shall save as aforesaid, be entitled to require any servant of the Government to produce before it any such statement, return, account, document or record or any part thereof, or to given evidence before it in respect thereof."*

24. If we look at the words used in these two sections, they very clearly state that particulars contained in any return or statement made by a party, or document produced along therewith are confidential, and no court shall pass any order requiring the Government or a Government servant to produce any such statement, document or return. It is a settled principle of law that the words used in a statute are to be read as they are used, to the extent possible, to ascertain the meaning thereof. Both these provisions contained a bar only against the Government officers from producing the documents mentioned therein. There is no bar therein against a party to produce any such document. In *Tulsiram Sanganaria and Another v. Srimati Anni Rai and Ors.* reported in 1971 (1) SCC 284, a bench of three Judges of this Court interpreted an identical provision in Section 54(1) of the Income Tax Act, 1922, and held that the said provision created a bar on the production of the documents mentioned therein by the officials and other servants of the Income Tax Department, and made it obligatory on them to treat

as confidential the records and documents mentioned therein, but the assessee or his representative-in-interest could produce assessment orders as evidence, and such evidence was admissible. Thus, if a claim is to be decided on the basis of an order of assessment, the claimant as well cannot be denied the right to seek a direction to the party concerned to produce the assessment order. It is this very prayer which has been allowed by the earlier order dated 27.3.2007 passed by the then Arbitrator, and also by the subsequent order dated 16.9.2011 passed by the Arbitral Tribunal, and in our view rightly so. There is no substance in the second objection as well.

25. There is one more aspect which we must note, i.e., when the first respondent made an application for production of the assessment orders, the defence taken by the appellant in their affidavit dated 16.9.2011 was that those documents were confidential documents, and could not be directed to be produced. It was not stated at that time that the said documents were not available. It is ten months thereafter, that when the second affidavit was filed in the High Court, that the respondent for the first time contended that the said documents were not available. This was clearly an after thought, and this attitude of the Respondent in a way justified the earlier order permitting an application under Section 27 passed by the Arbitral Tribunal. The Assistant Commissioner of Sales Tax of the concerned area was also joined as respondent so that he could be directed to produce the required documents. However, he reported that those documents were old records, and were destroyed. The learned Single Judge did not pass any order against the respondent No.2 to produce the documents, as sought. However, the learned Single Judge rightly allowed the petition as against the appellant in terms of prayer clause 'A', directing the appellant to produce the documents which were sought by the respondent no. 1.

26. In the circumstances, there is no merit in the appeal. The appeal is, therefore, dismissed.

R.P. Appeal dismissed.