KUSHESWAR NATH PANDEY
*v.*
STATE OF BIHAR & ORS.
(Civil Appeal No. 6658 of 2013)

AUGUST 5, 2013

**[H.L. GOKHALE AND J. CHELAMESWAR, JJ.]**

*Service Law - Promotion - Time bound promotion - Granted to appellant in 1998 - Promotion subsequently found to be irregular as appellant had not passed promotional examination prior thereto - Orders issued in 2009 for cancellation of the promotion - Justification - Held: On facts, not justified - The appellant was not at all in any way at fault - It was a time bound promotion which was given to him and some eleven years thereafter, the Government Authorities woke up - Moreover, appellant had passed the required examination subsequently in 2007 much before the cancellation orders were issued in 2009 - Approach of the Government authorities was totally unjustified.*

**The appellant was in service under the State of Bihar. An order was issued by the Finance Department on 13.11.1998 granting him time bound promotion w.e.f. 1st September, 1991. Subsequently it was found that this promotion was irregular for not passing a promotional examination prior thereto and thereafter orders were issued on 16.9.2009 and 5.10.2009 for cancelling this time bound promotion. Aggrieved, the appellant filed writ petition. A Single Judge of the High Court allowed that writ petition holding that the promotion granted to the appellant eleven years earlier was not because of any fault or fraudulent act on the part of the appellant, and therefore could not be cancelled. The respondents filed appeal which was allowed by the Division Bench.**





**In the instant appeal, the appellant pointed out that there was no fraud or misrepresentation on the part of the appellant; that the appellant was given a time bound promotion by the concerned Department and if at all the examination was required to be passed, he had passed it subsequently in 2007 much before the cancellation orders were issued in 2009.**

**Allowing the appeal, the Court**

**HELD: 1.1. The facts of the present case are clearly covered under the two judgments of this Court in the cases of Bihar State Electricity Board and Purushottam Lal Das wherein it has been held that recovery can be permitted only in such cases where the employee concerned is guilty of producing forged certificate for the appointment or got the benefit due to misrepresentation. [Paras 7, 10] [596-G-H; 597-A, E]**

**1.2. The appellant was not at all in any way at fault. It was a time bound promotion which was given to him and some eleven years thereafter, the Authorities of the Bihar Government woke up and according to them the time bound promotion was wrongly given and then the relevant rules are being relied upon and that too after the appellant had passed the required examination. This approach was totally unjustified. The writ petition filed by the appellant will stand decreed as granted by the Single Judge. [Paras 10, 11] [597-E-G]**

*Bihar State Electricity Board and Another vs. Bijay Bhadur and Another* **(2000) 10 SCC 99 and** *Purushottam Lal Das and Others vs. State of Bihar and Others* **(2006) 11 SCC 492 - held applicable.**

*Chandi Prasad Uniyal and Others vs. State of Uttrakhand and Others,* **(2012) 8 SCC 417 - cited.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2000) 10 SCC 99** | **held applicable** | **Para 7** |
| **(2006) 11 SCC 492** | **held applicable** | **Para 7** |
| **(2012) 8 SCC 417** | **cited** | **Para 9** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6658 of 2013.

From the Judgment and Order dated 19.09.2012 of the High Court of Judicature at Patna in LPA No. 266 of 2011.

Nagendra Rai, Abhishek Kr. Singh, Shantanu Sagar, Shashank Singh, Amrita Rai (for Chandra Prakash) for the Appellant.

Mohan Jain ASG, Ardhendumauli Kumar Prasad, D.K. Thakur, Shashank Bajpai, M.S. Vishnu Sankar, D.S. Mahra for the Respondents.

The Judgment of the Court was delivered by

**H.L. GOKHALE, J.** 1. Heard Mr. Nagender Rai, learned senior counsel appearing for the appellant, Mr. Arijit Prasad, learned counsel for the State of Bihar and Mr. Mohan Jain, learned Additional Solicitor General for the respondent no.5.

2. Leave granted.

3. This appeal seeks to challenge the judgment and order rendered by the Division Bench of the Patna High Court in L.P.A. No. 266 of 2011 dated 19.9.2012 whereby the Division Bench reversed the judgment of the Learned Single Judge of that High Court in case No. 4369 of 2010.

4. The facts leading to this case are as under:

The appellant herein joined the service under the State of Bihar on 5th May, 1979 and on 29th August, 1981, he was promoted as a Correspondence Clerk. An order was subsequently issued by the Finance Department on 13.11.1998 granting him promotion with effect from Ist September, 1991



which was a time bound promotion. Subsequently it was found that this promotion was irregular for not passing a promotional examination prior thereto and therefore the orders were issued on 16.9.2009 and 5.10.2009 for canceling this time bound promotion.

5. Being aggrieved by that order, the appellant filed the above referred writ petition No. 4369/2010. Learned Single Judge of the High Court who heard the matter allowed that writ petition. He held that the time bound promotion granted to the appellant eleven years earlier was not because of any fault or fraudulent act on the part of the appellant, and therefore could not be cancelled. The Learned Single Judge allowed that writ petition and set aside the order of cancelling his promotion. It is also relevant to note that the appellant had passed the required examination in the meantime in 2007 and had retired on 31st May, 2009.

6. Being aggrieved by that order, respondents herein, filed an appeal which has been allowed by the Division Bench. The Division Bench found that the promotion was not approved by the competent authority and passing of the Accounts examination was condition precedent and therefore the decision of the Government to cancel his promotion was a proper one. Being aggrieved by this judgment, the present special leave petition has been filed.

7. Mr. Rai, learned senior counsel for the appellant points out that there was no fraud or misrepresentation on the part of the appellant. The appellant was given a time bound promotion by the concerned Department. If at all the examination was required to be passed, he had passed it subsequently in 2007 much before the cancellation orders were issued in 2009. Mr. Rai relied upon two judgments of this Court in case of *Bihar State Electricity Board and Another vs. Bijay Bhadur and Another* reported in (2000) 10 SCC 99 and *Purushottam Lal Das and Others vs. State of Bihar and Others* reported in (2006) 11 SCC 492 wherein it has been held that recovery can be permitted only in such cases where the employee

concerned is guilty of producing forged certificate for the appointment or got the benefit due to misrepresentation.

8. The learned counsel for the State of Bihar submitted that under the relevant rules passing of this examination was necessary. He referred us to the counter affidavit of the respondent No.1 wherein a plea has been taken that under the particular Government Circular dated 26.12.1985 the amounts in excess are permitted to be recovered. He relied upon clause (j) of the Government Circular dated Ist April, 1980 to the same effect.

9. Mr. Jain, learned Additional Solicitor General appearing for the Accountant General drew our attention to another judgment of this Court in *Chandi Prasad Uniyal and Others vs. State of Uttrakhand and Others* reported in (2012) 8 SCC 417 and particularly paragraph 14 thereof which states that there could be situations where both the payer and the payee could be at fault and where mistake is mutual then in that case such amounts could be recovered.

10. In our view, the facts of the present case are clearly covered under the two judgments referred to and relied upon by Mr. Rai. The appellant was not at all in any way at fault. It was a time bound promotion which was given to him and some eleven years thereafter, the Authorities of the Bihar Government woke up and according to them the time bound promotion was wrongly given and then the relevant rules are being relied upon and that too after the appellant had passed the required examination.

11. In our view, this approach was totally unjustified. Learned Single Judge was right in the order that he has passed. There was no reason for the Division Bench to interfere. The appeal is therefore allowed. The judgment of the Division Bench is set aside. The writ petition filed by the appellant will stand decreed as granted by the Learned Single Judge. The parties will bear their own costs.

B.B.B. Appeal allowed.



M/S TIRUPATI DEVELOPERS
*v.*
STATE OF UTTARAKHAND & ORS.
(Civil Appeal No. 6619 of 2013)

AUGUST 08, 2013

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

*Indian Stamp Act, 1899 - s.28 r/w Art.5 (b-1) of Schedule 1B [as applicable to the State of Uttarakhand] and ss.33, 38 and 47A - Deficit stamp duty - Agreements for sale executed in favour of appellant - Presented before the Deputy Registrar for registration - Matter referred by him to Assistant Commissioner (Stamp and Registration) who held that the stamp duty paid on the documents was deficient and directed the appellant to make up for the deficit stamp duty alongwith penalty imposed as well as interest - Writ Petitions in High Court - Partial relief given to appellant modifying the orders of Deputy Registrar, inasmuch as deficient stamp duty was worked out at a lesser amount and on this reduced penalty of 15% was imposed - Held: The subject matter of the documents fell u/s.33 - Subsequent conduct of the parties in cancelling the agreements cannot be a reason for not taking action u/s.33/38 - Main argument of the appellant before the High Court was that at the relevant time stamp duty was payable @ Rs. 80/- per thousand whereas the Assistant Commissioner (Stamps) had calculated the same @ Rs. 125/- per thousand - This argument has already been accepted by the High Court whereby stamp duty payable was reduced and relief to that extent has already been given - Likewise the High Court also set aside the order of the Assistant Commissioner (Stamps) in so far as the interest payment was imposed upon the appellant - In any case, High Court reduced the penalty to 15% of the deficit stamp duty, thereby giving sufficient succour to the appellant - No further relief can be granted to the appellants.*

**Eleven Agreements for sale were executed in favour of the appellant/petitioner. In each of these agreements a part of land situated in a village in Uttarakhand was sought to be purchased by the appellant. The Deputy Registrar concerned impounded all these documents as he felt that the documents were not sufficiently stamped. Matter was referred by him to the Assistant Commissioner (Stamp and Registration) who directed the appellant to make up for the deficit stamp duty alongwith penalty imposed as well as interest. Revision Petition before the Additional Commissioner was dismissed. That order was challenged by filing Writ Petitions in the High Court which met the same fate in so far as issue regarding deficient stamp duty is concerned. However, partial relief was given to the appellant modifying the orders of Deputy Registrar, inasmuch as deficient stamp duty was worked out at a lesser amount and on this reduced penalty of 15% was imposed.**

**In the instant appeals, the appellant referred to the provisions of Section 2, Section 3 and Section 10 of the Indian Stamp Act, 1899, and on that basis submitted that at the time of agreement to sale, stamp duty is not payable at all.**

**The appellant, further argued that in the instant cases, the Assistant Commissioner (Stamps) had adjudicated the matter under Section 33/38 of the Stamp Act which was clearly illegal as these provisions were not applicable and instead, the case should have been dealt with u/s 47 A of the Stamp Act.**

**Dismissing the appeals, the Court**

**HELD: 1. A conjoint reading of Section 28 of the Indian Stamps Act, 1899 read with Article 5 (b-1) of Schedule 1B, as applicable to the State of Uttarakhand clearly depict that the stamp duty is payable on 50% of**



**the Value of consideration of the sale agreement. As per this, in the illustrative case chosen by this Court, where the total consideration was Rs. 24,70,000/-, stamp duty was to be calculated on Rs. 12,35,000/-. Instead the appellant had paid stamp duty of Rs. 10,000/- only. It is manifest, therefore, that the stamp duty paid on the document was deficient which was rightly impounded by the Deputy Registrar and sent for adjudication. [Paras 11 and 12] [606-B, F-H]**

**2. As per Section 33 of the Stamps Act, every person having, by law or consent of parties authority to receive the evidence or every person in-charge of a public office is duty bound to impound the instrument when produced before him, and he finds that such an instrument is not duly stamped. The agreements in question were presented before the Deputy Registrar for registration who felt that the stamp duty on these documents was deficient. Therefore, it is rightly held by the Courts below that the subject matter of the documents fell under Section 33 of the Act and not under Section 47 A of the Act. [Para 14] [607-E-F]**

**3. The main argument of the petitioner before the High Court was that at the relevant time the stamp duty was payable at the rate of Rs. 80/- per thousand whereas the Assistant Commissioner (Stamps) had calculated the same at the rate of Rs. 125/- per thousand. This argument has already been accepted by the High Court whereby stamp duty payable was reduced and relief to that extent has already been given. Likewise the High Court had also set aside the order of the Assistant Commissioner (Stamps) in so far as the interest payment was imposed upon the appellant. Even the penalty was reduced to 15 percent only. [Para 16] [607-H; 608-A-B]**

**4. In regard to the contention that no adjudication was permissible at all because of the reason that these**

**agreements for sale were subsequently cancelled, that too within two months of the execution thereof, this Court is of the opinion that the subsequent conduct of the parties in cancelling the agreements cannot be a reason for not taking action under Section 33/38 of the Act. That action was necessitated when the documents were produced before the Dy. Registrar and he found the same to be deficient. The subsequent cancellation would be of no avail. In any case, keeping in view this aspect the High Court reduced the penalty to 15 percent of the deficit stamp duty, thereby giving sufficient succour to the appellant. No further relief can be granted to the appellants. [Paras 17, 18] [608-C-F]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6619 of 2013.

From the Judgment and Order dated 29.09.2011 of the High Court of Uttarakhand at Nainital in Writ Petition (M/S) No. 2068 of 2011.

WITH

C.A. Nos. 6620, 6621, 6622, 6623, 6624, 6627, 6628, 6629, 6630 & 6631 of 2013.

Vibha Datta Makhija, Ashok Kumar Sharma for the Appellant.

Rachana Srivastava, Prateek Dwivedi (for Anuvrat Sharma) for the Respondents.

The Judgment of the Court was delivered by

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

2. Eleven Agreements for sale were executed in favour of the petitioner herein. In each of these agreements a part of land comprising area 0.385 Hectare, falling in Khasra No. 25



situated in village Mahua Kheda, Tehsil Kashipur, Udham Singh Nagar, Uttarakhand was sought to be purchased by the petitioner. The petitioner had also paid earnest money of varying amounts against the total consideration which are agreed to in each of the agreements. For example, in one agreement dated 4.12.2007, total consideration mentioned was Rs. 24,70,000/- and at the time of signing the agreement for sale, an advance amount of Rs. 6,15,000/- was paid. A sum of Rs. 10,000/- was paid as stamp duty on this deed of Agreement of Sale. In a similar manner, other 10 agreements were also presented for registration, paying a sum of Rs. 10,000/- as stamp duty on each of them.

3. The Deputy Registrar concerned impounded all these documents as he felt that the documents were not sufficiently stamped. Matter was referred by him to the Assistant Commissioner (Stamp and Registration) for adjudication of proper stamp duty and to recover deficit stamp duty from the petitioner. Notices were issued to the petitioner by the Assistant Commissioner (Stamp and Registration) and an enquiry was conducted. After receiving his objections, the Assistant Commissioner (Stamp and Registration) passed the orders holding that the stamp duty paid on these documents was deficient. In each of the cases, he directed the petitioner to make up for the deficit stamp duty alongwith penalty imposed as well as interest. For example, in respect of, document, illustrated above, the petitioner was called upon to pay Rs. 1,44,375/- as deficient stamp duty and Rs. 70,000/- as penalty with interest. Similar orders were passed in other ten cases.

4. Challenging these orders, the petitioner preferred Revision Petition before the Additional Commissioner, Kumaon Mandal, Nainital which was, however, dismissed by an order dated 10.3.2011. That order was challenged by filing Writ Petitions in the High Court of Uttarakhand, Nainital which have met the same fate in so far as an issue regarding deficient stamp duty is concerned. However, partial relief is given to the

petitioner modifying the orders of Deputy Registrar, in as much as deficient stamp duty is worked out at Rs. 88,800/- and not Rs. 1,44,375/-. On this amount reduced penalty of 15% is imposed i.e. Rs. 13,320/-.

5. Similar corrections are made in other Writ Petitions in so far as exact quantum of deficit stamp duty is concerned and the Writ Petitions are allowed partly to this extent.

6. Undeterred and unsatisfied with the aforesaid outcome, present Special Leave Petitions are filed invoking extraordinary jurisdiction under Article 136 of the Constitution of India, impugning the aforesaid verdict dated 29th September, 2011 of the High Court of Uttarakhand, Nainital.

7. Operative portion of the impugned order reads as under:

> "Considering the peculiar facts and circumstances of the case that the agreement for sale had been cancelled within a period of two months from the date of execution of agreement for sale coupled with the fact that no opportunity of hearing was afforded to the petitioner on the point of imposition of penalty, this Court is of the opinion that to meet the ends fo justice, penalty be imposed at the rate of 15 percent of the deficit stamp duty. This order shall not be treated as a precedent for other cases".

8. Ms. Vibha Datta Makhija, learned Counsel who appeared on behalf of the petitioner in all these cases, referred to the provisions of Section 2, Section 3 and Section 10 of the Indian Stamp Act, 1899 (hereinafter to be referred as the Stamp Act), on the basis of which her submission was that at the time of agreement to sale, stamp duty is not payable at all. She, further argued that in the instant cases, the Assistant Commissioner (Stamps) had adjudicated the matter under Section 33/38 of the Act which was clearly illegal as these provisions were not applicable and instead, the case should



have been dealt with u/s 47 A of the Stamp Act.

9. In so far as first argument of the petitioner's Counsel is concerned, on the reading of the aforesaid provisions of the Indian Stamp Act to which our attention was brought, one would get an impression that there is some merit in the said submission. However, this argument ignores that there is a State amendment thereto and applicability of this provision demolishes the aforesaid plea comprehensively.

10. Section 28 of the Stamp Act reads as under:

**"28. Direction as to duty in case of certain conveyances.**

(1) When any property has been contracted to be sold for one consideration for the whole, and is conveyed to the purchaser in separate parts by different instruments, the consideration shall be apportioned in such manner as the parties think fit, provided that a distinct consideration for each separate part is set forth in the conveyance relating thereto, and such conveyance shall be chargeable with ad valorem duty in respect to such distinct consideration.

(2) Where property contracted to be purchased for one consideration for the whole, by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts by separate instruments to the persons by or for whom the same was purchased, for distinct parts of the consideration, the conveyance of each separate part shall be chargeable with ad valorem duty in respect of the distinct part of the consideration therein specified.

(3) Where a person, having contracted for the purchase of any property but not having obtained

a conveyance thereof, contracts to sell the same to any other person and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance shall be chargeable with ad valorem duty in respect of the consideration for the sale by the original purchaser to the sub-purchaser.

(4) Where a person having contracted for the purchase of any property but not having obtained a conveyance thereof, contracts to sell the whole, or any part thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts, the conveyance of each part sold to a sub-purchaser shall be chargeable with ad valorem duty in respect only of the consideration paid by such sub-purchaser, without regard to the amount or value of the original consideration; and the conveyance of the residue (if any) of such property to the original purchaser shall be chargeable with ad valorem duty in respect only of the excess of the original consideration over the aggregate of the consideration paid by the sub-purchaser.

Provided that the duty on such last-mentioned conveyance shall in no case be less than one rupee.

(5) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with ad valorem duty in respect fo the consideration paid by him and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable with a duty equal to that which would be chargeable on a conveyance for the consideration



obtained by such original seller or, where such duty would exceed five rupees, with duty of five persons."

11. The aforesaid provision has to be read with Article 5 (b-1) of Schedule 1B of the Indian Stamps Act, as applicable to the State of Uttarakhand, which is as under:

| Description of Instrument | Proper Stamp Duty |
|---|---|
| (bi) If relating to the sale of an immovable property where possession is not admitted to have been delivered nor is agreed to be delivered nor is agreed to be delivered without executing the conveyance.<br><br>Provided that when conveyance in pursuance of such agreement is executed, the duty paid under this clause in excess of the duty payable under Cl.(c) shall be adjusted towards the duty payable on the conveyance." | The same duty as on conveyance [No. 23 Cl. (a) on one half of the amount of consideration as set forth in the agreement. |

12. The conjoint reading of the aforesaid provisions would clearly depict that the stamp duty is payable on 50% of the Value of consideration of the sale agreement. As per this, in the illustrative case chosen by us, where the total consideration was Rs. 24,70,000/-, stamp duty was to be calculated on Rs. 12,35,000/-. Instead the appellant had paid stamp duty of Rs. 10,000/- only. It is manifest, therefore, that the stamp duty paid on the document was deficient which was rightly impounded by the Deputy Registrar and sent for adjudication. In fact, this legal position was even conceded to by the appellant before the High

Court which has been recorded in the impugned judgment as follows:

> "It is admitted to both the parties that the petitioner is liable to pay the stamp duty, which is payable on 50 percent of the valuation of the sale consideration on the date of execution of the agreement for sale".

13. In so far as second argument predicated on, Section 47 A of the Stamp Act is concerned, we find no substance therein. Section 33 of the Act, which was invoked in the present case reads as under:

> "Every person having by law or consent of parties authority to receive evidence and every person in-charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion with duty is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same".

14. As per the aforesaid provisions, every person having, by law or consent of parties authority to receive the evidence or every person in-charge of a public office is duty bound to impound the instrument when produced before him, and he finds that such an instrument is not duly stamped. The agreements in question were presented before the Deputy Registrar for registration who felt that the stamp duty on these documents was deficient. Therefore, it is rightly held by the Courts below that the subject matter of the documents fell under Section 33 of the Act and not under Section 47 A of the Act.

15. Presumably, knowing this legal position, this argument was, though, taken before the Assistant Commissioner (Stamps) and was not, thereafter, pressed before the High Court.

16. The main argument of the petitioner before the High Court was that at the relevant time the stamp duty was payable



at the rate of Rs. 80/- per thousand whereas the Assistant Commissioner (Stamps) had calculated the same at the rate of Rs. 125/- per thousand. As mentioned above, this argument has already been accepted by the High Court whereby stamp duty payable is reduced and relief to that extent has already been given. Likewise the High Court has also set aside the order of the Assistant Commissioner (Stamps) in so far as the interest payment was imposed upon the appellant. Even the penalty is reduced to 15 percent only.

17. Last attempt of Ms. Makhija was that no adjudication was permissible at all because of the reason that these agreements for sale were subsequently cancelled, that too within two months of the execution thereof. We are of the opinion that the subsequent conduct of the parties in cancelling the agreements cannot be a reason for not taking action under Section 33/38 of the Act. That action was necessitated when the documents were produced before the Dy. Registrar and he found the same to be deficient. The subsequent cancellation would be of no avail. In any case, keeping in view this aspect the High Court reduced the penalty to 15 percent of the deficit stamp duty, thereby giving sufficient succour to the appellant.

18. We are of the opinion that no further relief can be granted to the appellants. Thus, these appeals are dismissed as devoid of any merits.

19. No costs.

B.B.B. Appeals dismissed.

STATE OF UTTARANCHAL AND ANOTHER
*v.*
SRI SHIV CHARAN SINGH BHANDARI AND OTHERS
(Civil Appeal Nos.7328-7329 of 2013)

AUGUST 23, 2013.

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

*SERVICE LAW:*

*Ad hoc promotion – Granted to junior – Held: A senior has right to be considered even for adhoc promotion -- If seniors are eligible as per the rules and there is no legal justification to ignore them, the employer, at his whim or caprice, cannot extend the promotional benefit to a junior on ad hoc basis.*

*Ad hoc promotion – Granted to junior – Belated claim by seniors to promote them from the date their junior was granted ad hoc promotion – However on regular promotion, their seniority in promotional post maintained – Held: Though claim of promotion is based on the concept of equality and equitability, relief has to be claimed within a reasonable time -- In the instant case, cause of action had arisen for assailing the order when junior employee was promoted on ad hoc basis -- A stale claim of getting promotional benefits should not have been entertained by Tribunal and accepted by High Court -- Direction given by Tribunal which has been concurred with by High Court, being unsustainable in law, is set aside – Delay/laches.*

*Service matters – Limitation – Held: The issue of limitation or delay and laches should be considered with reference to the original cause of action -- A mere submission of representation to competent authority does not arrest time.*





**One of the juniors to the respondents, namely, 'MS' was given ad hoc promotion from Subordinate Agricultural Services (SAS) Group III to SAS Group II, by the Deputy Director of Agriculture on 15.11.1983. Thereafter the respondents and 'MS' were promoted on regular basis in Group II posts. In the final seniority list issued on 12.2.1994 in respect of promotional cadre, the respondents were shown senior to 'MS'. On 14.10.2003, the respondents filed a petition before the Public Services Tribunal claiming that they were entitled to promotion from SAS Group III to SAS Group II with effect from 15.11.1983, the date on which their junior, 'MS', was promoted and, accordingly, to get their pay fixed along with other consequential benefits. The Tribunal allowed the claim and held that the respondents would be entitled to notional promotional benefits from 15.11.1983. The High Court upheld the order.**

**In the instant appeals filed by the State Government, it was contended for the appellants that both, the Tribunal and the High Court, failed to appreciate that the claim of the respondents was hit by the doctrine of delay and laches. It was submitted that the grant of notional promotion along with other consequential benefits to the respondents solely on the ground that the junior functioned in the promotional post from a prior date, was not justified. The respondents, on the other hand, contended that they had been submitting representations since 1984 till they approached the Tribunal.**

**Allowing the appeals, the Court**

**HELD: 1.1. If senior incumbents are eligible as per the rules and there is no legal justification to ignore them, the employer cannot extend the promotional benefit to a junior on ad hoc basis at his whim or caprice; and the person aggrieved can always challenge the same in an appropriate forum, for he has a right to be considered even**

**for ad hoc promotion and a junior cannot be allowed to march over him solely on the ground that the promotion granted is ad hoc in nature. [para 12] [617-D-F]**

**1.2. Although the claim of promotion is based on the concept of equality and equitability, yet the relief has to be claimed within a reasonable time. [Para 19] [620-C-D]**

*Ghulam Rasool Lone v. State of Jammu and Kashmir and another* **2009 (10) SCR 591 = (2009) 15 SCC 321;** *New Delhi Municipal Council v. Pan Singh and others* **2007 (3) SCR 711 = (2007) 9 SCC 278;** *P.S. Sadasivasway v. State of Tamil Nadu* **1975 (2) SCR 356 = (1975) 1 SCC 152 – relied on**

**1.3. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. A mere submission of representation to the competent authority does not arrest time. [Paras 14-15] [618-G-H; 619-B-C]**

*State of Orissa v. Pyarimohan Samantaray* **(1977) 3 SCC 396;** *State of Orissa v. Arun Kumar Patnaik* **1976 (0) Suppl. SCR 59 = (1976) 3 SCC 579;** *Bharat Sanchar Nigam Limited v. Ghanshyam Dass and others* **2011 (4) SCR 380 = (2011) 4 SCC 374;** *Jagdish Lal v. State of Haryana* **(1977) 6 SCC 538;** *State of T.N. v. Seshachalam* **2007 (10) SCR 53 = (2007) 10 SCC 137;** *Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and another* **2006 (3) SCR 783 = (2006) 4 SCC 322;** *C. Jacob v. Director of Geology and Mining and another* **2008 (14) SCR 634 = (2008) 10 SCC 115;** *Union of India and others v. M.K. Sarkar* **2009 (16) SCR 249 = (2010) 2 SCC 59 – referred to**



**1.4. In the instant case, the cause of action had arisen for assailing the order when the junior employee was promoted on ad hoc basis on 15.11.1983. The respondents could have challenged the ad hoc promotion conferred on the junior employee at the relevant time. However, they chose to sleep over the matter and any one who sleeps over his right is bound to suffer. Neither the Tribunal nor the High Court has appreciated these aspects in proper perspective; they proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. However, the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court. True it is, notional promotional benefits have been granted but the same is likely to affect the State exchequer regard being had to the fixation of pay and the pension. These aspects have not been taken into consideration. Equality has to be claimed at the right juncture and not after expiry of two decades. There may not be any provision providing for limitation but a grievance relating to promotion cannot be given a new lease of life at any point of time. [Para 13 and 22] [617-G; 618-B; 621-D-H; 622-A]**

**1.5. The direction given by the Tribunal which has been concurred with by the High Court being unsustainable in law is set aside. [Para 23] [622-F]**

**Case Law Reference:**

| | | |
|---|---|---|
| **2008 (14) SCR 634** | **referred to** | **Para 13** |
| **2009 (16) SCR 249** | **referred to** | **Para 14** |

| | | |
|---|---|---|
| **2006 (3) SCR 783** | **referred to** | **Para 15** |
| **(1977) 3 SCC 396** | **referred to** | **Para 16** |
| **1976 (0) Suppl. SCR 59** | **referred to** | **Para 16** |
| **2011 (4) SCR 380** | **referred to** | **Para 17** |
| **(1977) 6 SCC 538** | **referred to** | **Para 17** |
| **2007 (10) SCR 53** | **referred to** | **Para 18** |
| **2009 (10) SCR 591** | **relied on** | **Para 19** |
| **2007 (3) SCR 711** | **relied on** | **Para 20** |
| **1975 (2) SCR 356** | **relied on** | **Para 21** |

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7328-7329 of 2013.

From the Judgment & Order dated 02.03.2012 of the High Court of Uttarakhand at Nainital in Review Petition No. 82 of 2012 and Judgment & Order dated 04.11.2009 in Writ Petition No. 133 of 2006.

Rachana Srivastava, Utkarsh Sharma for the Appellants.

Gaurav Goel, Rajesh Kumar (for E.C. Agrawala) for the Respondents.

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. Delay condoned.

2. Leave granted in both the special leave petitions.

3. The respondents were appointed in Group III posts in Subordinate Agricultural Services (SAS) in the Department of Agriculture in the undivided State of Uttar Pradesh. Some of them were appointed in 1974 and some in the year 1975. A provisional seniority list in the cadre of SAS Group III was prepared where they were shown senior to one Madhav Singh Tadagi. The said Madhav Singh Tadagi, who was working as



Agriculture Plant Protection Supervisor, Group III, was given ad hoc promotion to the post of Assistant Development Officer (Plant Protection, Group II) by the Deputy Director of Agriculture on 15.11.1983. In the year 1983 a Selection Committee was constituted for making promotion to Group II posts on the basis of seniority-cum-fitness from amongst the employees of Group III posts and in the said selection process the respondents as well as Madhav Singh Tadagi were promoted on regular basis in Group II posts. After regular promotion was made, a seniority list was finalized in respect of promotional cadre and the respondents were shown senior to Madhav Singh Tadagi. The final seniority list was issued on 12.2.1994.

4. On 9.11.2000, under U.P. Reorganization Act, 2000 the State of Uttaranchal (presently State of Uttarakhand) was created. The respondents as well as Madhav Singh Tadagi were allocated to the State of Uttarakhand. On 14.10.2003, the respondents filed a claim petition No. 154 of 2003 before the Public Services Tribunal of Uttarakhand at Dehradun (for short "the tribunal") claiming that they were entitled to promotion from SAS Group III to SAS Group II with effect from 15.11.1983 the date on which the junior was promoted and, accordingly, to get their pay fixed along with other consequential benefits, namely, arrears of salary and interest thereof. Be it noted, the respondents had submitted number of representations during the period from July, 2002 to June, 2003 but the said representations were not dealt with.

5. The claims put forth by the respondents were resisted by the State and its functionaries contending, inter alia, that promotion to Madhav Singh Tadagi was given by an officer who was not competent to promote any incumbent from SAS Group III to SAS Group II post; that the promotion was made without prejudice to the seniority of other employees; and that the grievance put forth was hit by limitation. The tribunal, after hearing the rival submissions urged before it, came to hold that as a junior person was extended the benefits of promotion in

the year 1983, the seniors could not be deprived of the said promotional benefits and, hence, they are entitled to get promotion from the said date. Being of this view, the tribunal directed that the respondents shall be given benefits of promotion with effect from November, 1983 and as they had already been promoted in the year 1989, they would be entitled to notional promotional benefits from 15.11.1983.

6. Assailing the order of the tribunal the State of Uttarakhand and its functionaries preferred Writ Petition No. 133 of 2006 before the High Court of Uttarakhand at Nainital. The High Court opined that Madhav Singh Tadagi was promoted on ad hoc basis, continued in the said post and was allowed increments and the promotional pay-scale till his regular promotion, and the claimants though seniors, were promoted on a later date on regular basis and, therefore, the directions issued by the tribunal could not be found fault with. After disposal of the writ petition, an application for review was filed with did not find favour with the High Court and accordingly it dismissed the same by order dated 2.3.2012. Hence, the present appeals by special leave have been preferred challenging the said orders.

7. We have heard Ms. Rachna Srivastava, learned counsel appearing for the appellants, and Mr. Gaurav Goel, learned counsel appearing for the respondents.

8. It is urged by learned counsel for the appellants that both the tribunal and the High Court have failed to appreciate that the claim put forth before the tribunal did not merit any consideration being hit by the doctrine of delay and laches inasmuch as the respondents did not challenge the grant of ad hoc promotion to the junior employee from 15.11.1983 till 14.10.2003. It is her further submission that the respondents really cannot have any grievance in praesenti as said Madhav Singh Tadagi's promotion from 1983 has been cancelled during the pendency of the special leave petition by the competent authority of the State Government, and quite apart from that



when the junior employee was only given ad hoc promotion and continued in the said post but not conferred seniority in the promotional grade when regular promotions took place in 1989. The learned counsel for the State would further submit that the grant of notional promotion along with other consequential benefits to the claimant-respondents solely on the ground that the junior functioned in the promotional post from a prior date, is not justified.

9. Mr. Gaurav Goel, learned counsel appearing for the respondents, in oppugnation to the aforesaid proponements, would contend that the respondents had raised their grievance by bringing it to the notice of the Competent Authority in the year 1984 but they fell in deaf ears. Thereafter, they submitted number of representations but when sphinx like silence was maintained by the State which is totally unexpected from a model employer, they approached the tribunal and, in the obtaining factual matrix, the tribunal has appositely not thrown their claim overboard on the ground of delay and laches and, hence, the order passed by the tribunal, which has been given the stamp of approval by the High Court, cannot be flawed. It is canvassed by him that the submission that Madhav Singh Tadagi's promotion has been cancelled and, therefore, the grievance of the respondents stands mitigated, has no legs to stand upon, and that apart the order of cancellation has already been assailed before the High Court and an order of stay is in vogue. A submission has also been propounded that setting aside of the order would be inequitable as the junior has already received the benefit and the seniors have been deprived of the same.

10. At the very outset, we would like to make it clear that we are not going to deal with the cancellation of promotion of the said Madhav Singh Tadagi as the same is sub-judice before the High Court and an order of stay has been passed. We may further clarify that advertence to the same by us is not required for the adjudication of the controversy involved in these appeals.

11. The centripodal issue that really warrants to be dwelled upon is whether the respondents could have been allowed to maintain a claim petition before the tribunal after a lapse of almost two decades inasmuch as the said Madhav Singh Tadagi, a junior employee, was conferred the benefit of ad hoc promotion from 15.11.1983. It is not in dispute that the respondents were aware of the same. There is no cavil over the fact that they were senior to Madhav Singh Tadagi in the SAS Group III and all of them were considered for regular promotion in the year 1989 and after their regular promotion their seniority position had been maintained. We have stated so as their inter-se seniority in the promotional cadre has not been affected. Therefore, the grievance in singularity is non-conferment of promotional benefit from the date when the junior was promoted on ad hoc basis on 15.11.1983.'

12. It can be stated with certitude that when a junior in the cadre is conferred with the benefit of promotion ignoring the seniority of an employee without any rational basis the person aggrieved can always challenge the same in an appropriate forum, for he has a right to be considered even for ad hoc promotion and a junior cannot be allowed to march over him solely on the ground that the promotion granted is ad hoc in nature. Needless to emphasise that if the senior is found unfit for some reason or other, the matter would be quite different. But, if senior incumbents are eligible as per the rules and there is no legal justification to ignore them, the employer cannot extend the promotional benefit to a junior on ad hoc basis at his whim or caprice. That is not permissible.

13. We have no trace of doubt that the respondents could have challenged the ad hoc promotion conferred on the junior employee at the relevant time. They chose not to do so for six years and the junior employee held the promotional post for six years till regular promotion took place. The submission of the learned counsel for the respondents is that they had given representations at the relevant time but the same fell in deaf



ears. It is interesting to note that when the regular selection took place, they accepted the position solely because the seniority was maintained and, thereafter, they knocked at the doors of the tribunal only in 2003. It is clear as noon day that the cause of action had arisen for assailing the order when the junior employee was promoted on ad hoc basis on 15.11.1983. In *C. Jacob v. Director of Geology and Mining and Another,*[1] a two-Judge Bench was dealing with the concept of representations and the directions issued by the court or tribunal to consider the representations and the challenge to the said rejection thereafter. In that context, the court has expressed thus: -

> "Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim."

14. In *Union of India and Others v. M.K. Sarkar,*[2] this Court, after referring to *C. Jacob* (supra) has ruled that when a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued

1. (2008) 10 SCC 115..
2. (2010) 2 SCC 59.

without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

15. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time. In *Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and Another,*[3] the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silent mere making of representations could not justify a belated approach.

16. In *State of Orissa v. Pyarimohan Samantaray*[4] it has been opined that making of repeated representations is not a satisfactory explanation of delay. The said principle was reiterated in *State of Orissa v. Arun Kumar Patnaik.*[5]

17. In *Bharat Sanchar Nigam Limited v. Ghanshyam Dass (2) and Others,*[6] a three-Judge Bench of this Court reiterated the principle stated in *Jagdish Lal v. State of Haryana*[7] and proceeded to observe that as the respondents therein preferred to sleep over their rights and approached the tribunal in 1997, they would not get the benefit of the order dated 7.7.1992.

18. In *State of T.N. v. Seshachalam,*[8] this Court, testing the equality clause on the bedrock of delay and laches

3. (2006) 4 SCC 322.
4. (1977) 3 SCC 396.
5. (1976) 3 SCC 579.
6. (2011) 4 SCC 374.
7. (1977) 6 SCC 538.
8. (2007) 10 SCC 137.



pertaining to grant of service benefit, has ruled thus: -

> "....filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

19. There can be no cavil over the fact that the claim of promotion is based on the concept of equality and equitability, but the said relief has to be claimed within a reasonable time. The said principle has been stated in *Ghulam Rasool Lone v. State of Jammu and Kashmir and Another.*[9]

20. In *New Delhi Municipal Council v. Pan Singh and Others,*[10] the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

21. Presently, sitting in a time machine, we may refer to a two-Judge Bench decision in *P.S. Sadasivasway v. State of Tamil Nadu,*[11] wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period

9. (2009) 15 SCC 321.
10. (2007) 9 SCC 278.
11. (1975) 1 SCC 152.

of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.

22. We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Any one who sleeps over his right is bound to suffer. As we perceive neither the tribunal nor the High Court has appreciated these aspects in proper perspective and proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the tribunal and accepted by the High Court. True it is, notional promotional benefits have been granted but the same is likely to affect the State exchequer regard being had to the fixation of pay and the pension. These aspects have not been taken into consideration. What is urged before us by the learned counsel for the respondents is that they should have been equally treated with Madhav Singh Tadagi. But equality has to be claimed at the right juncture and not after expiry of two decades. Not for nothing, it has been said that everything may stop but not the time, for all are in a way slaves of time. There may not be any provision providing for limitation but a grievance relating to promotion cannot be given a new lease of life at any point of time.



23. We will be failing in our duty if we do not state something about the benefit of promotion conferred on the junior employee. We have been apprised by the learned counsel for the State that the promotion extended to him on 15.11.1983 has been cancelled and, as further put forth by the learned counsel for the respondents, the same is under assail before the High Court. The said Madhav Singh Tadagi was neither a party before the tribunal nor before the High Court and he is also not a party before this Court. As presently advised, we refrain ourselves from expressing any opinion on the cancellation of promotion and the repercussions of the same. As the matter is sub-judice before the High Court, suffice it to say that the High Court shall deal with the same in accordance with the settled principles of law in that regard. We say no more on the said score. However, we irrefragably come to hold that the direction given by the tribunal which has been concurred with by the High Court being absolutely unsustainable in law is bound to be axed and we so do.

24. Consequently, the appeals are allowed and the orders passed by the High Court and that of the tribunal are set aside. There shall be no order as to costs.

R.P. Appeals allowed.

COMMISSIONER OF CENTRAL EXCISE, JALANDHAR

*v.*

M/S. KAY KAY INDUSTRIES

(Civil Appeal No. 7031 of 2009)

AUGUST 26, 2013

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

*CENTRAL EXCISE RULES, 1944:*

*rr. 57-A(4) and (5) read with r.57-A(6) and (1) – Notification No. 58/97-CE(NT) dated 1.9.1997 – Deemed MODVAT credit – Claimed by manufacturer of final product – Adjudicating authority and appellate authority ordered recovery of the amount on the ground that the supplier of inputs had not discharged full duty liability – Held: In the instant case, a declaration was given by manufacturer of inputs indicating that excise duty had been paid on the said inputs under the Act – Further, the said inputs were directly received from manufacturer and not purchased from the market – When the prescribed procedure has been duly followed by assessee-manufacturer of final products, it cannot be said that the assessee has not taken reasonable care as prescribed in the notification – Orders of adjudicating authority and appellate authority rightly quashed by Tribunal and High Court – Notification No. 58/97-CE (NT) dated 1.9.1997 – Clause (6) – Customs Tariff Act, 1975 – s. 3 – Central Excise Act, 1944.*

*s.57-A(6), Proviso – Credit of duty of excise or additional duty – Held: The proviso postulates and requires "reasonable care" and not verification from the department whether the duty stands paid by the manufacturer-seller.*

**The respondent-company (in Civil Appeal No. 7031 of 2009) availed deemed MODVAT credit of Rs.77,546/-**





**during the quarter of March, 2000 on the strength of invoices issued by the manufacturer supplier of inputs. During MODVAT verification it was found that the supplier of inputs had not discharged full duty liability for the period covered by the invoices. The deemed MODVAT benefit availed was disallowed. Recovery of the said sum along with interest and a penalty of Rs.40,000/- was ordered. The Commissioner (Appeals), Central Excise concurred with the view taken by the adjudicating authority, but reduced the penalty from Rs.40,000/- to Rs.20,000/-. The Customs, Excise and Service Tax Appellate Tribunal held that the declaration given by the appellant satisfied the conditions for claiming the deemed MODVAT credit and, accordingly, quashed the orders passed by the adjudicating authority and that of the appellate authority. The High Court dismissed the appeal of the Revenue.**

**Dismissing the appeals, the Court**

**HELD: 1.1. Rule 57A (1) of the Central Excise Rules, 1994 makes it clear that a manufacturer of final products can avail the credit of any duty of excise or the additional duty u/s. 3 of the Customs Tariff Act, 1975, as may be specified by the notification in the Official Gazette, subject to provisions of the section and the conditions and restrictions that may be specified in the notification. The proviso further stipulates that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted. Thus, the conditions and restrictions have been left to be prescribed by way of notification in respect of certain classes of goods. [Para 20] [636-F-H; 637-A]**

**1.2. Sub-r. (6) of r. 57A commences with a non-obstente clause and it empowers the Central Government to issue notification declaring the inputs on which the**

**duty of excise paid u/s. 3A of the Act to be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such duty in respect of the said inputs at such rates or such amount and such conditions as may be specified in the notification. The proviso to the said Rule stipulates that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise, as indicated in the documents accompanying the goods, has been paid. Thus, an assessee is expected to take reasonable steps that appropriate duty, as indicated in the documents, has been paid. [Para 21] [637-B-D]**

**1.3. Clause (2) of the Notification No. 58/97-CE (NT) dated 1-9-1997 issued under sub-r. (6) of r.57A spells about the concept of deemed payment of duty on the inputs and further prescribes that it shall be equivalent to the amount calculated at the rate of twelve per cent of the price, as declared by the manufacturer, in the invoice accompanying the said inputs. On a plain reading of the clauses (4) and (5) it is clear that there are two mandates to avail the benefit of the said notification. One part is couched in the affirmative language and the other part is in the negative. As per the first part it is obligatory on the part of the assessee to produce the invoice declaring that the appropriate duty of excise has been paid on such inputs under the provision of s. 3-A of the Act. The second command, couched in the negative, is that the provisions of the said notification shall not apply to inputs where the manufacturer of the said inputs has not declared the invoice price of the said inputs correctly in the documents at the time of their clearance from his factory. [Para 23] [638-E-H; 639-A]**

**1.4. In the case at hand, there is no dispute that a declaration was given by the manufacturer of the inputs**



**indicating that the excise duty had been paid on the said inputs under the Act. It is also not in dispute that the said inputs were directly received from the manufacturer but not purchased from the market. The manufacturer of the inputs had declared the invoice price of the inputs correctly in the documents. The case of Revenue is that at the time of MODVAT verification it was found that the supplier of the inputs had not discharged full duty liable for the period covered under the invoices. This lapse of the seller is different and not a condition or rather a pre-condition postulated in the notification. [Para 24] [639-A-C]**

*Vikas Pipes v. CCE* **2003 (158) ELT 680 (P&H) - referred to.**

**1.5. Rule 57A (6) requires the manufacturer of final products to take reasonable care that the inputs acquired by him are goods on which the appropriate duty of excise as indicated in the documents accompanying the goods, has been paid. The notification has been issued in exercise of the power under the said Rule. The notification clearly states to which of those inputs it shall apply and to which of the inputs it shall not apply and what is the duty of the manufacturer of final inputs. Thus, when there is a prescribed procedure and that has been duly followed by the manufacturer of final products, it leaves no justifiable reason to hold that the assessee-appellant had not taken reasonable care as prescribed in the notification. Due care and caution was taken by the respondent. The proviso postulates and requires "reasonable care" and not verification from the department whether the duty stands paid by the manufacturer-seller. When all the conditions precedent have been satisfied, to require the assessee to find out from the departmental authorities about the payment of excise duty on the inputs used in the final product which have been made allowable by the notification would be travelling beyond the notification, and in a way,**

**transgressing the same. This would be practically impossible and would lead to transactions getting delayed. The conclusion in the instant case is pertaining to clauses 4 and 5 of the Notification. This Court concurs with the view expressed by the High Court. [Para 25] [639-D-H; 640-A-C]**

*Collector of Central Excise, Vadodara v. Dhiren Chemical Industries* **2001 (5) Suppl. SCR 607 = (2002) 2 SCC 127 – distinguished.**

*Collector of Central Excise, Patna v. Usha Martin Industries* **1997(3) Suppl. SCR 601 = 1997 (7) SCC 47; and** *Motiram Tolaram and another v. Union of India and another* **1999 (1) Suppl. SCR 82 = 1999 (6) SCC 375 - referred to.**

**Case Law Reference:**

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|---|---|---|
| **2003 (158) ELT 680 (P&H)** | **referred to** | **para 4** |
| **2001 (5) Suppl. SCR 607** | **distinguished** | **para 7** |
| **1997(3) Suppl. SCR 601** | **referred to** | **para 10** |
| **1999 (1) Suppl. SCR 82** | **referred to** | **para 10** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7031 of 2009.

From the Judgment & Order dated 26.09.2006 of the High Court of Punjab & Haryana at Chandigarh in Central Excise Appeal No. 65 of 2006.

WITH

C.A. Nos. 7032, 7034 of 2009 & C.A. Nos. 7392 & 7393 of 2010, C.A. No. 7148 of 2013.

Arijit Prasad, B. Krishna Prasad for the Appellant.

Ajay Aggarwal, Rajan Narain for the Respondents.

The Judgment of the Court was delivered by



**DIPAK MISRA, J.** 1. Leave granted in Special Leave Petition (C) No. 26499 of 2008.

2. The controversy that emerges for consideration in this batch of appeals, being consubstantial, was heard together and is disposed of by a common judgment. For the sake of convenience the facts from Civil Appeal No. 7031 of 2009 are set out herein.

3. The respondent-company availed deemed MODVAT credit of Rs.77,546/- during the quarter of March, 2000 on the strength of invoices issued by M/s. Sawan Mal Shibhu Mal Steel Re-Rolling Mills, Mandi Govindgarh. During MODVAT verification it was found that the supplier of inputs had not discharged full duty liability for the period covered by the invoices. The Competent Authority was of the view that appropriate duty of excise had not been paid by the manufacturer of inputs under the invoices on the strength of which the respondent took the benefit of deemed MODVAT credit and it was obligatory on the part of the respondent to take all reasonable steps to ensure that the appropriate duty of excise had been paid on the inputs used in the manufacture of their final product as required under Rule 57A(6) of the Central Excise Rules, 1944 (for short "the Rules") read with notification No. 58/97-CE(NT) dated 30.8.1997 and the aforesaid opinion of the Competent Authority persuaded him to issue a show-cause notice on 19.1.2001 proposing recovery of deemed MODVAT credit of Rs.77,546/- and imposition of penalty. The adjudicating authority, after receipt of the reply to the show-cause notice, by order dated 22.3.2002, disallowed the deemed MODVAT benefit earlier availed and ordered for recovery of the said sum along with interest, and, further imposed penalty of Rs.40,000/-.

4. Being aggrieved by the aforesaid order the respondent preferred an appeal before the Commissioner (Appeals), Central Excise, Jalandhar, who ruled that the credit of deemed duty paid by the manufacturer under Section 3A of the Central

Excise Act, 1944, (for brevity "the Act") was available subject to the condition that the inputs were received directly from the factory of manufacturer under cover of an invoice declaring therein that the appropriate duty of excise had been paid on such inputs under the provisions of the Act. The appellate authority referred to the provisions of sub-rule (6) of Rule 57A and notification No. 58/97-CE(NT) dated 1.9.1997 and opined that the manufacturer of the inputs had not discharged the appropriate duty liability against the goods cleared vide the invoices and the respondent had not furnished the requisite documentary evidence which could controvert the said allegation made against the manufacturer of inputs. The appellate authority observed that unless and until payment of appropriate duty had been made, the assessee could not have availed the benefit. Expressing such an opinion, it concurred with the view taken by the adjudicating authority. However, it reduced the penalty from Rs.40,000/- to Rs.20,000/-.

5. The unsuccess in appeal compelled the respondent to prefer Appeal No. E/1474/04-SM before the Customs, Excise and Service Tax Appellate Tribunal (for short "the tribunal") and the tribunal placing reliance on the decision in *Vikas Pipes v. CCE*[1] came to hold that the declaration given by the appellant therein satisfied the conditions enumerated in the notification for claiming the deemed MODVAT credit and, accordingly, quashed the orders passed by the adjudicating authority and that of the appellate authority.

6. Questioning the justifiability of the aforesaid order, Revenue preferred Civil Appeal No. 65 of 2006 before the High Court. The High Court reproduced the proposed substantial question of law which reads as follows: -

> "Whether the manufacturer of final products is entitled to deemed credit, under Notification 58/97-CE dated 30.8.97 when the manufacturer-supplier of inputs has not paid Central Excise Duty and given a wrong certificate on the body of invoices about duty dischargement under Rule 96ZP of Central Excise Rules, 1944?"

1. 2003 (158) ELT 680 (P & H)



7. While dealing with the aforesaid substantial question of law, the High Court referred to its earlier decision in *Vikas Pipes* (supra) and distinguished the decision in *Collector of Central Excise, Vadodara v. Dhiren Chemical Industries*[2] and ultimately concurring with the view expressed by the tribunal dismissed the appeal. Hence, the present appeal by the Revenue.

8. Assailing the legal substantiality of the impugned judgment it is urged by Mr. Arjit Prasad, learned counsel for the appellant that the tribunal as well as the High Court has fallen into error in their interpretation of Rule 57A(6) of the Rules and the notification which imposes conditions, for as per the conditions enumerated in the notification it is obligatory on the part of the manufacturer of the final products to satisfy the adjudicating authority that appropriate duty of excise had been paid. The learned counsel would submit that the "appropriate duty" has been squarely dealt with by the Constitution Bench in the case of *Dhiren Chemical Industries* (supra) but the High Court has failed to appreciate the ratio laid down therein and distinguished the same in an extremely cryptic manner which makes the verdict sensitively susceptible.

9. Resisting the aforesaid submissions, Mr. Ajay Aggarwal, learned counsel for the respondent, has contended that the tribunal and the High Court have appositely relied upon the decision in *Vikas Pipes* (supra) and correctly opined that the respondent had satisfied the conditions enshrined in the notification and, therefore, there was no warrant to proceed for recovery of the benefit availed of by the final manufacturer. The learned counsel would submit that the "appropriate duty", as interpreted by this Court in *Dhiren Chemical Industries* (supra),

2. (2002) 2 SCC 127.

supports the case of the respondent and the conditions prescribed in the notification having been satisfied, the adjudicating authority as well as the first appellate authority has erred in holding that there was a failure on the part of the respondent to satisfy the conditions.

10. To appreciate the rival submissions raised at the Bar and the bold assertion by Mr. Prasad, learned counsel for the Revenue, that it was the duty of the assessee-respondent, the manufacturer of the final products, to see that the manufacturer of the inputs had actually paid the appropriate duty on the inputs on the bedrock of law laid down by the Constitution Bench in *Dhiren Chemical Industries* (supra), it is necessary to understand how and under what circumstances the controversy travelled to the Constitution Bench. Be it noted, the Constitution Bench was required to resolve the conflict between the two pronouncements, namely, *Collector of Central Excise, Patna v. Usha Martin Industries*[3] and *Motiram Tolaram and Another v. Union of India and Another.*[4]

11. In *Usha Martin Industries* (supra) the Court was interpreting the exemption notification dated 30.11.1963 as amended on 7.4.1981 and the question before the three learned Judges was whether the benefit of excise duty exemption (granted by the Central Government as per certain notifications) could be claimed in respect of commodities made out of raw material on which no excise duty was payable. The Central Government had exempted iron or steel products falling under a particular category made from certain materials or combination thereof. One of them was fresh unused re-rollable scrap on which the appropriate amount of duty of excise had already been paid. The Bench adverted to various aspects and, eventually, came to hold that the duty could legitimately be claimed by the assessee in respect of those goods referred to in the notification under consideration the raw material of

3. (1997) 7 SCC 47.

4. (1999) 6 SCC 375.



which were not exigible to any excise duty at all.

12. In *Motiram Tolaram* (supra), another three-Judge Bench was dealing with notification No. 185 of 1983. It was a notification pertaining to exemption of alcohol falling under item 15-A of the First Schedule to the Central Excises and Salt Act, 1944 and manufactured from vinyl acetate monomer, from so much of the duty of excise leviable thereon under the said Act at the rate specified in the First Schedule, as in excess of the amount calculated at the rate of 10% ad valorem. The proviso to the notification stipulated that such polyvinyl alcohol was required to be manufactured from vinyl acetate monomer on which the appropriate amount of duty of excise under Section 3 of the Central Excises and Salt Act or the additional duty under Section 3 of the Customs Tariff Act, 1975, as the case may be, had been paid. A contention was raised before the Court that in India there was only one manufacturer of polyvinyl alcohol and the commodity in question could be produced only from vinyl acetate monomer and the Indian manufacturer was, in fact, paying duty at the rate of 10% ad velorem and that was the only duty which could be charged from the appellants therein. It was urged before the Court that the appellants were manufacturing that item in India from vinyle acetate monomer on which appropriate duty of excise had been paid and, therefore, the concessional duty should be charged from them. The learned Judges referred to the language employed in the exemption notification and opined that onus was on the assessee to prove and show that the conditions, as imposed in the exemption notification, had been satisfied. In that context the Bench proceeded to state that the condition for getting the benefit of the lower rate of duty is that on the raw material used appropriate amount of duty has been paid. If perchance or for any reason, the manufacturer of polyvinyl alcohol in India is unable to prove or show that the same has been manufactured from vinyl acetate monomer on which appropriate amount of duty of excise has been paid, then the said manufacturer would not be entitled to get the benefit of the said notification.

13. Thereafter, the Court referred to Section 3 of the Customs Tariff Act, 1975 and observed that one has to assume that the importer of polyvinyl alcohol had actually manufactured the same in India. One can further assume, possibly without any difficulty, that the said polyvinyl alcohol has been manufactured from vinyl acetate monomer, but it is not possible to assume or presume or imagine that the raw material used is the one on which appropriate amount of duty of excise has been paid in India and hence, the condition which is contained in the said notification has to be fulfilled in order to get the benefit of the notification.

14. The Court further stressing on the purpose of the notification expressed thus: -

> "**11.** It appears to us that Excise Notification No. 185 of 1983 was deliberately worded in such a way that the importer of polyvinyl alcohol, who may not be able to prove that on the raw material appropriate duty in India has been paid, will not be able to get the benefit of the concessional rate of duty. It has to be borne in mind that the normal duty which is payable on polyvinyl alcohol is 40%. That is the rate of excise duty which would be payable by an Indian manufacturer of polyvinyl alcohol who is unable to show that he has complied with the condition contained in the proviso, namely, use in the manufacture of vinyl acetate monomer on which appropriate amount of duty has been paid. Similarly an importer of polyvinyl alcohol would be required to pay under Section 3 duty at the rate of 40% because on the polyvinyl alcohol imported duty under Section 3 of the Central Excises and Salt Act or additional duty under Section 3 of the Customs Tariff Act has not been paid on the vinyl acetate monomer used in the manufacture of polyvinyl alcohol. If it was possible to have shown that duty-paid vinyl acetate monomer had been used in the manufacture of imported polyvinyl alcohol, then the benefit of Excise Notification No. 185 of 1983 would have been available."



15. Eventually, the Court ruled that appropriate duty means the duty payable under the Central Excise and Salt Act or under the Customs Tariff Act and the condition had not been satisfied in the said case.

16. As a conflict was perceived in the aforesaid two judgments, it was referred to the Constitution Bench in *Dhiren Chemical Industries* (supra). The Constitution Bench adverted to the law laid down in *Usha Margin Industries* and *Motiram Tolaram* (supra) and, eventually, opined thus: -

> **"6.** In the case of *Motiram Tolaram* reliance was placed upon the case of *Usha Martin* to contend that the appropriate duty being nil, because the raw material was not manufactured in India, it must be taken that appropriate duty had been paid and the appellants would be entitled to the benefit of the exemption notification in question, which used the said phrase. The Court was unable to agree. It said that the raw material being an item which was manufactured in India, a rate of excise duty was leviable thereon. On the raw material which had been imported, the appropriate amount of duty had not been paid. It was only if this payment had been made that the exemption notification would be applicable.
>
> **7.** In our view, the correct interpretation of the said phrase has not been placed in the judgment in the case of *Usha Martin*. The stress on the word "appropriate" has been mislaid. All that the word "appropriate" in the context means is the correct or the specified rate of excise duty.
>
> **8.** An exemption notification that uses the said phrase applies to goods which have been made from duty-paid material. In the said phrase, due emphasis must be given to the words "has already been paid". For the purposes of getting the benefit of the exemption under the notification, the goods must be made from raw material on which excise duty has, as a matter of fact, been paid,

and has been paid at the "appropriate" or correct rate. Unless the manufacturer has paid the correct amount of excise duty, he is not entitled to the benefit of the exemption notification."

17. At this juncture, we are obliged to state that the factual and legal matrix in the case at hand is quite different. The decision proceeded on the language of the notifications. Moreover, we are not dealing with a notification for exemption. The controversy pertains to the interpretation of the notification No. 58/97-CE dated 30.8.1997 which has been issued in exercise of powers conferred by sub-rule (6) of Rule 57A of the Rules dealing with availing of MODVAT credit under certain circumstances subject to satisfaction of certain conditions precedent.

18. Before we advert to the notification it is necessary to refer to Rule 57A(1) and (6). The relevant part of Rule 57A(1) reads as follows: -

"57A: Applicability. – (1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the 'final products') as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the 'specified duty') paid on the goods used in or in relation to the manufacture of the said final products whether directly or indirectly and whether contained in the final product or not (hereinafter referred to as the 'inputs') and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:



(i) Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted."

19. Sub-rule (6) of Rule 57A in exercise of which the notification has been issued is as follows: -

"(6) Notwithstanding anything contained in sub-rule (1), the Central Government may, by notification in the Official Gazette, declare the inputs on which the duty of excise paid under section 3A of the Central Excise Act, 1944 (1 of 1944), shall be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification, and allow the credit of such duty in respect of the said inputs at such rates or such amount and subject to such conditions as may be specified in the said notification:

Provided that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise as indicated in the documents accompanying the goods, has been paid under section 3A of the Central Excise Act, 1944 (1 of 1944)."

[Emphasis supplied]

20. On a careful reading of Rule 57A(1), it is clear as crystal that a manufacturer of final products can avail the credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975, as may be specified by the notification in the Official Gazette subject to provisions of the Section and the conditions and restrictions that may be specified in the notification. The proviso further stipulates that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted. Thus, the conditions and restrictions have been left to be prescribed by way of notification in respect of certain

classes of goods.

21. Sub-rule (6) of Rule 57A commences with a non-obstente clause and it empowers the Central Government to issue notification declaring the inputs on which the duty of excise paid under Section 3A of the Act to be deemed to have been paid at such rate or equivalent to such amount as may be specified in the said notification and allow the credit of such duty in respect of the said inputs at such rates or such amount and such conditions as may be specified in the notification. It is pertinent to state here that the proviso to the said Rule stipulates that the manufacturer shall take all reasonable steps to ensure that the inputs acquired by him are goods on which the appropriate duty of excise, as indicated in the documents accompanying the goods, has been paid. Thus, what is expected of an assessee is to take reasonable steps that appropriate duty, as indicated in the documents, has been paid.

22. At this juncture, it is relevant to refer to the notification issued under sub-rule (6) of Rule 57A on 30.8.1997. In the said notification iron and steel have been mentioned as goods notified for the purposes of credit of duty under MODVAT. The relevant clauses of the notification for the present purpose are clauses 2, 4 and 5 and, hence, they are reproduced below: -

> "2. The Central Government further declares that the duty of excise under the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as said Act), shall be deemed to have been paid (hereinafter referred to as deemed duty), on the inputs declared herein and the same shall be equivalent to the amount calculated at the rate of twelve per cent of the price, as declared by the manufacturer, in the invoice accompanying the said inputs (hereinafter referred to as invoice price), and credit of the deemed duty so determined shall be allowed to the manufacturer of the final products.



> xxx xxx xxx xxx
>
> 4. The provisions of this notification shall apply to only those inputs which have been received directly by the manufacturer of the final products from the factory of the manufacturer of the said inputs under the cover of an invoice declaring that the appropriate duty of excise has been paid on such inputs under the provisions of section 3A of the said Act.
>
> 5. The provisions of this notification shall not apply to inputs where the manufacturer of the said inputs has not declared the invoice price of the said inputs correctly in the documents issued at the time of their clearance from his factory."
>
> [Emphasis supplied]

23. We have referred to the aforesaid notification in extenso as the controversy really rests on the understanding of the language employed in the notification. Clause (2) spells about the concept of deemed payment of duty on the inputs and further prescribes that it shall be equivalent to the amount calculated at the rate of twelve per cent of the price, as declared by the manufacturer, in the invoice accompanying the said inputs. Clause (3) deals with a different fact situation and, hence, it need not be dwelled upon. Clauses (4) and (5) are really relevant for the present purpose. On a plain reading of the said clauses it is clear to us that there are two mandates to avail the benefit of the said notification. One part is couched in the affirmative language and the other part is in the negative. As per the first part it is obligatory on the part of the assessee to produce the invoice declaring that the appropriate duty of excise has been paid on such inputs under the provision of section 3-A of the Act The second command, couched in the negative, is that the provisions of the said notification shall not apply to inputs where the manufacturer of the said inputs has not declared the invoice price of the said inputs correctly in the

documents at the time of their clearance from his factory.

24. In the case at hand, there is no dispute that a declaration was given by the manufacturer of the inputs indicating that the excise duty had been paid on the said inputs under the Act. It is also not in dispute that the said inputs were directly received from the manufacturer but not purchased from the market. There is no cavil over the fact that the manufacturer of the inputs had declared the invoice price of the inputs correctly in the documents. It is perceivable from the factual matrix that the only allegation is that at the time of MODVAT verification it was found that the supplier of the inputs had not discharged full duty liable for the period covered under the invoices. This lapse of the seller is different and not a condition or rather a pre-condition postulated in the notification.

25. Mr. Prasad, learned counsel for the revenue has vehemently urged that it was requisite and, in a way imperative, on the part of the assessee to verify from the concerned authority of the department whether the excise duty had actually been paid or not. The aforesaid submission leaves us unimpressed. As we notice Rule 57A (6) requires the manufacturer of final products to take reasonable care that the inputs acquired by him are goods on which the appropriate duty of excise as indicated in the documents accompanying the goods, has been paid. The notification has been issued in exercise of the power under the said Rule. The notification clearly states to which of those inputs it shall apply and to which of the inputs it shall not apply and what is the duty of the manufacturer of final inputs. Thus, when there is a prescribed procedure and that has been duly followed by the manufacturer of final products, we do not perceive any justifiable reason to hold that the assessee-appellant had not taken reasonable care as prescribed in the notification. Due care and caution was taken by the respondent. It is not stated what further care and caution could have been taken. The proviso postulates and requires "reasonable care" and not verification from the



department whether the duty stands paid by the manufacturer-seller. When all the conditions precedent have been satisfied, to require the assessee to find out from the departmental authorities about the payment of excise duty on the inputs used in the final product which have been made allowable by the notification would be travelling beyond the notification, and in a way, transgressing the same. This would be practically impossible and would lead to transactions getting delayed. We may hasten to explicate that we have expressed our opinion as required in the present case pertaining to clauses 4 and 5 of the notification.

26. Consequently, we concur with the view expressed by the High Court and accordingly the appeals, being devoid of merit, stand dismissed without any order as to costs.

R.P. Appeals dismissed.

LAXMI NARAIN MODI
*v.*
UNION OF INDIA AND OTHERS
(Writ Petition (C) No. 309 of 2003)

AUGUST 27, 2013

**[K.S. RADHAKRISHNAN AND PINAKI CHANDRA GHOSE, JJ.]**

*PREVENTION OF CRUELTY TO ANIMALS (SLAUGHTER HOUSE) RULES, 2000:*

*Slaughter houses - Maintenance, supervision and periodical inspection of -- Transportation of animals, their loading and unloading, effluent disposal, solid waste disposal etc - Orders dated 9.7.2013 and 23.8.2012 passed by Supreme Court - Implementation of - Functioning of State Committees -- Guidelines framed by MoEF -- Held: Few of the States have filed the action taken reports detailing the functioning of the Committees constituted -- MoEF, on 27.8.2013, filed a compliance report enclosing the broad framework to be followed by the State Committees for effective supervision of slaughter houses and also with regard to transportation of animals, loading and unloading, effluent disposal, solid waste disposal and also with regard to the periodical inspection of slaughter houses by respective State Animal Welfare Boards - It is of extreme importance that State Governments, State Animal Welfare Boards, Pollution Control Board etc. should scrupulously follow the guidelines issued by MoEF, in obedience to the direction given by the Court on 10.10.2012 - States of Tamil Nadu, Karnataka, Kerala, Delhi, Maharashtra and Uttar Pradesh are further directed to implement the provisions of the Act as well as the guidelines issued by the MoEF, and file an action taken report - Environment Protection Act, 1986, the Solid Wastes*





*(Management and Handling) Rules, 2000 - Prevention of Cruelty to Animals (Establishment And Registration of Societies for Prevention of Cruelty to Animals) Rules, 2000.*

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 309 of 2003.

Under Article 32 of the Constitution of India.

Rakesh Khanna, ASG, Raj Panjwani, Sanchar Anand, Manjit Singh, Irshad Ahmed, AAG, Pranab Kumar Mullick, Soma Mullick, Purnima Bhat Kak, Vijay Panjwani, Aditya Singh, Kiran Bhardwaj (for S.N. Terdal), D.S. Chadha, Pradhuman Gohil, Vikash Singh, Bina Madhavan, Anip Sachthey, Saakar Sardana, M. Yogesh Kanna, A. Santha Kumaran, Sasi Kala, Aniruddha P. Mayee, Charudatta Mahindrakar, Mishra Saurabh, Asha G. Nair, Chetan Chawla, Suryanarayana Singh (for Pragati Neekhra), Aruna Mathur, Yusuf Khan, Nishi Sharma (for Arputham Aruna & Co.), Gopal Prasad, Jayesh Gaurav, Vibha Datta Makhija, M.P. Singh, Sunil Fernandes, Insha Mir, Astha Sharma, Mandeep Vinayak, Anjali Sharma, Praveena Gautam, Bhavanishankar V. Gadnis, Sunita B. Rao, B.D. Sharma, N. Vyas, Deep Shikha Bharati, Ved P. Arya, S.C. Verma, Krishna Sarma, Riku Sharma, Mohan Prasad Gupta, Sunita Sharma, M. Khairati, Vikas Malhotra, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Samir Ali Khan, Ranjan Mukherjee, S.C. Ghosh, S. Bhowmick, R.P. Yadav, Anil Shrivastav, Rituraj Biswas (for Gopal Singh), K. Enatoli Sema, Amit Kr. Singh, Pragyan Pradip Sharma, Heshu Kayina, Sapam Biswajit Meitei, Kh.Nobin Singh, Mukesh Verma (for Yash Pal Dingra), B.S. Banthia, V.K. Verma, Nikhil Nayyar, R. Ayyam Perumal, Pradeep Misra, P.V. Yogeswaran, Dharam Bir Raj Vohra, Abhijit Sengupta, Kuldip Singh, V.N. Raghupathy, P.V. Dinesh, Ashok E. Srivastava, C.D. Singh, Anuvrat Sharma, Punit Dutt Tyagi, Tara Chandra Sharma, Kamini Jaiswal, Sanjay R. Hegde, Mukesh K. Giri, Shibashish Misra, Arun K. Sinha, Hemantika Wahi, T.V. Ratnam, Sumita Hazarika,

Mohan Prasad Meharia, Aruneshwar Gupta, K.R. Sasiprabhu, Naresh K. Sharma, Ajay Pal, Manik Karanjawala, C.K. Sucharita for the appearing parties.

The Order of the Court was delivered by

**K.S. RADHAKRISHNAN, J.** 1. We have passed a detailed order on 9.7.2013 expressing the apprehension as to whether the Committees constituted, following our earlier order dated 23.8.2012, are effectively functioning and whether proper steps are being taken for proper implementation of the provisions of the various legislations which have been passed, with regard to the transportation of animals, maintaining of slaughter houses, effluent and solid waste disposal etc.

2. Vide our order dated 9.7.2013, we had directed all the State Governments/Union Territories to file their action taken reports within one month. Few of the States have filed the action taken reports detailing the functioning of the Committees constituted. We also directed the MoEF to finalize the guidelines for the effective and proper functioning of the State Committees for overseeing the functioning of the slaughter houses. In obedience to our direction, the MoEF, on 27.8.2013, filed a compliance report enclosing the broad framework to be followed by the State Committees for effective supervision of the slaughter houses and also with regard to the transportation of animals, loading and unloading, effluent disposal, solid waste disposal and also with regard to the periodical inspection of slaughter houses by the respective State Animal Welfare Boards.

3. We reiterate the importance of proper implementation of the provisions of the Prevention of Cruelty to Animals (Establishment and Registration of Societies for Prevention of Cruelty to Animals) Rules, 2000, the Environment Protection Act, 1986, the Solid Wastes (Management and Handling) Rules, 2000 and the Prevention of Cruelty to Animals (Slaughter



House) Rules, 2000. Over and above, it is also of extreme importance that all the State Governments, the State Animal Welfare Boards, Pollution Control Board etc. should scrupulously follow the guidelines issued by the MoEF, in obedience to the direction given by this Court on 10.10.2012. The guidelines are extracted hereinbelow for easy reference:

"GUIDELINES FOR TRANSPORTATION OF ANIMALS AND SLAUGHTER HOUSES

RESPONSIBILITIES OF ANIMAL HUSBANDRY DEPARTMENT

- Any livestock which are procured from the market are to be certified by a Veterinary Surgeon for issuing a fitness certificate in the form specified by the Central Government for the purpose of transportation.

- The loading and unloading of the animals in the market place and before transportation shall be supervised by the concerned officials of the Animal Husbandry Department to ensure that the animals are not subjected to unnecessary pain or suffering.

- In addition to the above health certificate a certificate has to be issued as per the Rule 96 of the Transport of Animals (Amendment) Rules, 2001 by the Officer of the Animal Husbandry Department not below the rank of Assistant Director/Deputy Director/Chief Veterinary Officer.

- The Animal Husbandry authority shall ensure that all animals are provided with shade, shelter, food and water as necessary and they are tethered securely in a way which does not cause unnecessary discomfort to animals.

- The Animal Husbandry Department shall ensure that the sick, lame, injured and pregnant animals are not transported for Slaughter.

- They should also ensure that the animals are never lifted or dragged by head, horns, ears, feet, tail or any other part of the Body which might cause unnecessary suffering.

DOCUMENTATION BY DIFFERENT AUTHORITIES

- It should be ensured that each consignment shall bear a label showing in bold red letters the name, address and telephone number (if any) of the consignor and consignee, the number and types of cattle being transported and quantity of rations and food provided.

- The consignor shall be informed about the train or vehicle in which the consignment of cattle is being sent and its arrival time in advance.

- The consignment of cattle shall be booked by the next train or vehicle and shall not be detained after the consignment is accepted for booking.

GUIDELINES TO BE FOLLOWED BY THE AUTHORITIES FOR TRANSPORTATION OF DIFFERENT ANIMALS (CATTLE, SHEEP AND GOAT, PIG) THROUGH RAIL OR RAOD.

- The average space provided per cattle in Railway wagon or vehicle shall not be less than two square metres.

- Suitable rope and platforms should be used for loading cattle from vehicles.



- In case of railway wagon the dropped door of the wagon may be used as a ramp when loading or unloading is done to the platform.

- Cattle shall be loaded after they are properly fed and given water.

- Watering arrangements on route shall be made and sufficient quantities of water shall be carried for emergency.

- Sufficient feed and fodder with adequate reserve shall be carried to last during the journey.

- Adequate ventilation shall be ensured.

- Emergency / first-aid equipment is carried.

- Vehicle should have suitable ramps and platforms for loading and unloading.

- There should be sufficient bedding on the floor of the vehicle.

- Vehicle breast bars should be properly placed.

- Vehicles are maintained so as not to cause injury, pain or suffering.

- Vehicle is clearly identified as an animal carrier.

- There is a permanent indication of the maximum animal/vehicle load.

- The latest amended space allowance for transporting the cattle by rail or vehicle is given in the Table I & II given below:

| | |
|---|---|
| Cattle weighing upto 200 Kg. | 1 Square Meter (Sq. Mtr.) |
| Cattle weighing 200-300 Kg. | 1.20 Square Meter |
| Cattle weighing 300-400 Kg. | 1.40 Square Meter |
| Cattle weighing above 400 Kg. | 2.0 Square Meter |

**TABLE - II**

Space requirement for Cattle while being transported in commonly sized road vehicles

| | | Number of Cattle | | | |
|---|---|---|---|---|---|
| Vehicle Size Length x Width Square Meter | Floor Area of Vehicle in Square Meter (Sq. mtr.) | Cattle weighing upto 200 Kg (1 Sq. mtr. Space per cattle) | Cattle weighing 200-300 Kg (1.20 Sq. mtr space per cattle) | Cattle weighing 300-400 Kg (1.40 Sq. mtr. Space per cattle) | Cattle weighing above 4r00 Kg (2.0 Sq mtr. Space per cattle) |
| 6.9 x 2.4 | 16.56 | 16 | 14 | 12 | 8 |
| 5.6 x 2.3 | 12.88 | 12 | 10 | 8 | 6 |
| 4.16 x 1.9 | 7.904 | 8 | 6 | 6 | 4 |
| 2.9 x 1.89 | 5.481 | 5 | 4 | 4 | 2 |

GUIDELINES FOR TRANSPORT OF SHEEP AND GOATS BY RAIL OR ROAD INVOLVING JOURNEYS OF MORE THAN SIX HOURS

- Sheep and goats shall be transported separately; but if lots are small special partition shall be provided to separate them.
- Rams and male young stock shall not be mixed with female stock in the same compartment.
- Sufficient food and fodder shall be carried to last during the journey and watering facility shall be provided at regular intervals.



- Material for padding, such as straw, shall be placed on the floor to avoid injury if an animal lies down, and this shall be not less than 5 cm thick.

PRECAUTIONS TO BE TAKEN WHILE TRANSPORTING SHEEP AND GOATS

- The animals shall not be fettered unless there is a risk of their jumping out and their legs shall not be tied down.
- Adequate ventilation shall be provided in every wagon. Upper door of one side of wagon shall be kept open and properly fixed and the upper door of the wagon shall have wire gauge closely welded mesh arrangements to prevent burning cinders from the engines entering the wagon and leading to fire breakout.
- The space required for a goat shall be the same as that for a woolled sheep and the approximate space required for a sheep in a goods vehicle or a railway wagon is prescribed in the Rules.
- Goods vehicles of capacity of 5 or 4½ tons, which are generally used for transporting animals, shall carry not more than forty sheep or goats.
- In the case of large goods vehicles and wagons, partitions shall be provided at every two or three meters across the width to prevent the crowding and trapping of sheep and goats.
- In the case of ewes, goats or lambs or kids under six weeks of age, separate panels shall be provided.

Note: the latest space allowance required for transportation of sheep and goats is given below:

| Approximate weight of animals in Kilogram | Space required in Square Meter |
|---|---|
| | Wooled Shorn |
| Not more than 20 | 0.17 0.16 |
| More than 20 but not more than 25 | 0.19 0.18 |
| More than 25 but not more than 30 | 0.23 0.22 |
| More than 30 but not more than 40 | 0.27 0.25 |
| More than 40 | 0.32 0.29 |

GUIDELINES FOR TRANSPORT OF PIGS BY RAIL OR ROAD "PIGS" INCLUDES PIGLETS, HOGS, HOGLETS AND ANIMALS OF PIGS FAMILY INVOLVING JOURNEY MORE THAN SIX HOURS

MANDATORY REQUIREMENTS

- A valid health certificate by a veterinary doctor to the effect that the pigs are in a fit condition to travel by rail or road and are not suffering from infectious or contagious or parasitic disease shall accompany each consignment in the transport of pigs by rail or road.

- In addition to the above health certificate a certificate has to be issued as per the Rule 96 of the Transport of Animals (Amendment) Rules, 2001 by the officer of the Animal Husbandry Department not below the rank of Assistant Director/Deputy Director; Chief Veterinary Officer.

- In the absence of a certificate under sub-rule (1), the carrier shall refuse to accept the consignment for transport.



- The certificate under sub rule (1) shall be in a form specified in Schedule-K.

GUIDELINES FOR CONSIGNOR AND CONSINEE

- Each consignment shall bear a label showing in bold red letters the name, address and telephone number (if any) of the consignor and consignee, the number and type of pigs being transported and quantity of rations and food provided to them.

- The consignee shall be informed in advance about the train or vehicle in which the consignment of pigs is being sent and its arrival time.

- The consignment of pigs shall be booked by the next train or vehicle and shall not be detained after the consignment is accepted for booking.

- First-aid equipment shall accompany the pigs.

- Suitable ramps shall be provided for loading and unloading the pigs.

- In the case of a railway wagon, when the loading or unloading is done on the platform the dropped door of the wagon shall be used as a ramp.

NECESSARY PRECAUTIONS TO BE FOLLOWED

- While transporting group of pigs by rail or road, male young stock shall not be mixed with female stock in the same compartment.

- While transporting pigs by rail or road, sufficient food and fodder shall be carried to last during the journey and watering facility shall be provided at regular intervals.

- While transporting pigs by rail or road, materials for

padding, such as straw, shall be placed on the floor to avoid injury if an animal lies down, and this shall be not less than 5 cm thick.

- While transporting pigs by rail or road, the animals shall not be fettered unless there is a risk of their jumping out and their legs shall not be tied down.

SPACE REQUIREMENT DURING RAIL TRAVEL - IN TRANSPORT OF PIGS BY RAIL

- No railway wagon shall accommodate more than the number of pigs as specified in the Table below:

| Broad gauge (1) | | Meter gauge (2) | | Narrow gauge (3) |
|---|---|---|---|---|
| Area of wagon | Area of wagon | Area of wagon | Area of Wagon | |
| Less than 21.1 Square Metre | 21.1 Square Metre and above | Less than 12.5 Square Metre | 12.5 Square Metre and above | |
| Number of Pigs 35 | Number of Pigs 50 | Number of Pigs 25 | Number of Pigs 30 | Not allowed |

- Adequate ventilation shall be provided in every wagon and the upper door of one side of wagon shall be kept open and properly fixed and the upper door of the wagon shall have wire gauge closely welded mesh arrangements to prevent burning cinders from the engines entering the wagon and leading to fire breakout.

SPACE REQUIREMENT DURING ROAD TRAVEL - IN



TRANSPORAT OF PIGS BY ROAD

- Goods vehicles of capacity of 5 or 4.5 tons, which are generally used for transportation of animals, shall carry not more than twenty pigs.

- In the case of large goods vehicles and containers, partition shall be provided at every two or three metres across the width to prevent the crowding and trapping of pigs.

- In the case of pigs under six weeks of age, separate panels shall be provided.

Note: The latest update on number of pigs which can be transported through rail is given below:

| "Broad Gauge (1) |
|---|
| Area of Wagon |
| VPU having Floor Area 63.55 Square Meter Number of Pigs 104 (0.61 Square Meter per Pig)" |

(2) The latest update on number of pigs which can be transported through vehicle is given below:

| | | Maximum number of Pigs permitted for Road Vehicles | | | |
|---|---|---|---|---|---|
| S. No. | Type of Animal | Vehicle having size 5.6m x 2.35m | Vehicle having size 5.15 m x 2.18 m | Vehicle having size 3.03m x 2.18 m | Vehicle having size 2.9m x 2.0 m |
| 1. | Weaner | 43 | 37 | 22 | 19 |
| 2. | Young | 31 | 26 | 15 | 13 |
| 3. | Adult | 21 | 18 | 10 | 9 |

Note:- For the purpose of Pigs of all breeds, ages and sex, the following Space allowances shall apply:

- Weaner - Piglet which has just been separate from the mother for the purpose of independent rearing and commonly in the weight range of 12 kg - 15 kg.

- Young - Male or female pig between 0.3 to 0.6 months of age and commonly in the weight range of 15 Kg - 50 Kg.

- Adult - A male or female pig above 06 months of age and having weigh more than 50 Kg.

SPECIFICATIN TO BE FOLLOWED FOR UNLOADING AND TILL THE ANIMALS ARE SUBJECT TO SLAUGHTER

- The reception area of slaughter house shall have proper ramps for direct unloading of animals from vehicles or railway wagons and the said reception area shall have adequate facility sufficient for feeding and watering of animals.

- The unloading of animals should be supervised by the animal husbandry authorities.

- Separate isolation pens shall be provided in slaughter house with watering and feeding arrangements for animals suspected to be suffering from contagious and infectious diseases, and fractious animals, in order to segregate them from the

- .

- Ante-mortem and pen area on slaughter house shall be paved remaining animals.

- Adequate holding area shall be provided in slaughter house according to the class of animals to be slaughtered and the said holding area shall have water and feeding facilities.



- The resting grounds in slaughter house shall have overhead protective shelterswith impervious material such as concrete non-slippery herring-bone type suitable to stand wear and tear by hooves, or brick, and pitched to suitable drainage facilities and the curbs of said impervious material 150 to 300 mm high shall be provided around the borders of livestock pen area, except at the entrances and such pen shall preferably be covered.

- Every animal after it has been subjected to veterinary inspection shall be passed on to a lairage for resting for 24 hours before slaughter.

- The lairage of the slaughter house shall be adequate in size sufficient for the number of animals to be laired.

- The space provided in the pens of such lairage shall be not less than 2.8 sq. mt. per large animal and 1.6 sq. mt. per small animal.

- The animals shall be kept in such lairage separately depending upon their type and class and such lairage shall be so constructed as to protect the animals from heat, cold and rain.

- The lairage shall have adequate facilities for watering and post-mortem inspection.

- Feeding and watering arrangements in the Animal Holding area should be made available.

- Whether ante and post mortem examination by a qualified Veterinarian is being carried out.

- Animals not to be slaughtered except in recognized or licensed houses.

- No person shall slaughter any animal within a municipal area except in a slaughter house recognized or licensed by the concerned authority empowered under the law for the time being in force to do so.

- No animal which is pregnant, or has an offspring less than three months old, or is under the age of three months or has not been certified by a veterinary doctor that it is in a fit condition to be slaughtered, shall be slaughtered.

- The slaughter house shall have a reception area of adequate size sufficient for livestock subject to veterinary inspection.

- The veterinary doctor shall examine thoroughly not more than 12 animals in an hour and not more than 96 animals in a day.

METHOD OF SLAUGHTER OF ANIMAL AND PROCEDURE

- No animal shall be slaughtered in a slaughter house in sight of other animals.

- No animal shall be administered any chemical, drug or hormone before slaughter except drug for its treatment for any specific disease or ailment.

- The slaughter halls in a slaughter house shall provide separate sections of adequate dimensions sufficient for slaughter of individual animals to ensure that the animals to be slaughtered is not within the slight of other animals.

- Knocking section in slaughter house may be so planned as to suit the animal and particularly the ritual slaughter, if any and such knocking section and dry landing area associated with it shall be so



built that escape from this section can be easily carried out by an operator without allowing the animal to pass the escape barrier.

**BROAD FRAMEWORK UNDER ENVIRONMENT (PROTECTION) ACT 1986 AND RULES FRAMED THEREUNDER:**

**Effluent Disposal:**

The affluent disposal standards notified under the Environment (Protection) Rules, 1986 are:

| Category | Parameters | Concentration in not to exceed, mg/1 |
|---|---|---|
| **A. Slaughter House** | | |
| Above 70 TLWK/ day | BOD (3 days at 27ºC)<br>Suspended Solids<br>Oil and Grease | 100<br>100<br>10 |
| 70 TLWK/day and below | BOD (3 days at 27ºC) | 500 |
| **B. Meat Processing** | | |
| | BOD (3 days at 27ºC)<br>Suspended Solid<br>Oil and Grease | 30<br>50<br>10 |

Note: (i) TLWK - Tonnes of Live Weight Killed: (ii) In case of disposal into municipal sewer where sewage is treated, the industries shall install screen and oil & grease separation units: (iii) The industries having slaughter house along with meat processing units will be considered in

meat processing category as far as standards are concerned.

The Pollution Control Board may specify more stringent standards from the above depending upon the quality requirement of recipient system.

**Solid waste disposal:**

As per the Municipal Solid Waste (Management and Handling) Rules, 2000, the wastes from slaughter house, meat and fish markets, fruits and vegetables markets, which are biodegradable in nature, shall be managed to make use of such wastes.

**INSPECTION OF SLAUGHTER HOUSE:** (1) The Animals Welfare Board of India or a State Animals Welfare Board or any person who is qualified veterinarian is authorized by Animal Welfare Board of India may at least once in every six months period, inspect any slaughter house without notice to its owner or the person in-charge of it at any time during the working hours to ensure that the provisions of these rules are being complied with.

(2) The person or the Animal Welfare Organization authorized under sub-rule (1) shall after inspection send its report to Animal Welfare Board of India as well as to the municipal or local authority for appropriate action including initiation of legal proceedings, if any, in the event of violation of any provisions of these rules."

4. We direct all the State Governments/UTs and the Committees constituted to effectively follow the above-mentioned guidelines. For giving further directions, initially we are inclined to direct the States of Tamil Nadu, Karnataka, Kerala, Delhi, Maharashtra and Uttar Pradesh to implement the provisions of the Act mentioned earlier as well as the guidelines issued by the MoEF, and file an action taken report within three months. Post after months along with the Action Taken Reports. Communicate the order to the Chief Secretaries of the above-mentioned States.

R.P. Matter adjourned.



SINGARENI COLLIERIES CO. LTD.
*v.*
VEMUGANTI RAMAKRISHAN RAO & ORS.
(Civil Appeal No. 7212-7213 of 2013)

AUGUST 29, 2013

**[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]**

*LAND ACQUISITION ACT, 1894:*

*s.11-A, Explanation, read with ss. 4 and 6 - Limitation to make award - Time taken for obtaining copy of stay order - Held: Cannot be excluded to bring the award within limitation -- Explanation to s. 11-A permits exclusion of the period during which the court had stayed the acquisition proceedings for the purpose of reckoning the period of two years prescribed for making the Award, but it does not provide for exclusion of the time taken to obtain a certified copy of the judgment or order by which the stay order was either granted or vacated - s.12 of Limitation Act has no application to making of an award under LA Act - Doctrine of casus omissus also cannot be applied - In the instant case, award made stood elapsed - Limitation Act, 1963 - s.12 - Interpretation of Statutes - Incorporation by reference - Casus omissus.*

**Notification u/s. 4(1) of the Land Acquisition Act, 1894 was issued on 30.08.1992 for acquisition of certain land for the purpose of the appellant, a Government company. A final declaration in terms of s. 6 was made on 02.03.1994, validity whereof was unsuccessfully assailed by four land-owners-respondents in a writ petition before the High Court. The Collector made the award on 05.11.1999. Respondents Nos. 1 to 4 filed another writ petition challenging the validity of the award on the ground that the same was beyond the period of two years stipulated u/s. 11-A of the Act. The single Judge**

**of the High Court held that the award having been passed beyond the period of limitation as provided u/s. 11-A of the Act, the land acquisition proceedings had lapsed. The Division Bench of the High Court affirmed the said view.**

**In the instant appeals, it was contended for the appellant that the period taken to obtain the copy of the order by which the High Court vacated the stay earlier granted by it, ought also to be excluded from consideration and when so excluded the Award would fall within the outer limit of two years stipulated u/s 11-A.**

**Dismissing the appeals, the Court**

**HELD: 1.1 Section 11-A of the Land Acquisition Act, 1894, in terms does not provide for exclusion of the time taken to obtain a certified copy of the judgment or order by which the stay order was either granted or vacated. Section 11-A prescribes that in order to be valid, the award must be made within a period of two years from the date of the publication of the declaration u/s. 6 of the Act. Explanation to s. 11-A permits exclusion of the period during which the court had stayed the acquisition proceedings for the purpose of reckoning the period of two years prescribed for making the award. The declaration in the instant case was published on 02.03.1994 while the award was made on 05.11.1999. The interim order of stay issued by the High Court on 06.12.1995 and vacated on 28.07.1999, with the dismissal of the writ petition, remained in force for a period of 3 years, 7 months and 22 days. That period shall have to be added to the period of two years prescribed for making the Award in the light of Explanation to s. 11-A. However, even if the said period is added to the time allowed for making the award, the same stands beyond the period prescribed. [Para 8 and 15] [666-F-G, H; 667-A-C; 672-C-D]**



*R. Indira Saratchandra v. State of Tamil Nadu and Ors.* **(2011) 10 SCC 344;** *Padma Sundara Rao (dead) and Ors. v. State of T.N. and Ors.* **2002 (2) SCR 383 = (2002) 3 SCC 533 - relied on.**

*N. Narasimhaiah and Ors. v. State of Karnataka and Ors. Union of India and Ors.* **1996 (1) SCR 698 = (1996) 3 SCC 88;** *State of Karnataka v. D.C. Nanjudaiah* **1996 (5) Suppl. SCR 222 = (1996) 10 SCC 619 - stood overruled.**

**1.2 Section 12 of the Limitation Act has no application to the making of an award under the Land Acquisition Act. In the absence of any enabling provision either in s. 11-A of the Land Acquisition Act or in the Limitation Act, there is no room for borrowing the principles underlying s. 12 of the Limitation Act for computing the period or determining the validity of an award by reference to s. 11-A of the Act. [Para 15] [672-D-E]**

*Ravi Khullar and Another v. Union of India & Ors.* **2007 (4 ) SCR 598 = (2007) 5 SCC 231- relied on.**

**1.3 Plea of casus omissus cannot be of any avail. Firstly, because while applying the doctrine of casus omissus the court has to look at the entire enactment and the scheme underlying the same. In the case at hand, Parliament has, wherever it intended, specifically provided for exclusion of time requisite for obtaining a copy of the order. [Proviso to s.28-A]. Absence of a provision analogous to proviso to s.28A in the scheme of s. 11-A, makes the position clear. Secondly, this Court has in several decisions held that casus omissus cannot be supplied except in the case of clear necessity and when reason for it is found within the four corners of the statute itself. [para 18-19] [672-F-G; 673-B; 674-F]**

*Padma Sundara Rao (dead) and Ors. v. State of T.N. and Ors.* **2002 (2) SCR 383 = (2002) 3 SCC 533;** *Commissioner*

*Of Income Tax, Central Calcutta v. National Taj Tradus* **1980 (2) SCR 268 = (1980) 1 SCC 370 - relied on.**

*Union of India v. Dharmendra Textile Processors* **2008 (14) SCR 13 = (2008) 13 SCC 369,** *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti & Ors.* **2008 (14 ) SCR 419 = (2008) 12 SCC 364,** *Sangeeta Singh v. Union of India* **2005 (2) Suppl. SCR 823 = (2005) 7 SCC 484,** *State of Kerala & Anr. v. P.V. Neelakandan Nair & Ors.* **2005 (1) Suppl. SCR 426 = (2005) 5 SCC 561,** *UOI v. Priyankan Sharan and Anr.* **2008 (13) SCR 237 = (2008) 9 SCC 15,** *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat* **(2004) CriLJ 3860,** *Unique Butyle Tube Industries Pvt. Ltd. v. U.P. Financial Corporation and Ors.* **2002 (5) Suppl. SCR 666 = (2003) 2 SCC 455,** *UOI v. Rajiv Kumar with UOI v. Bani Singh* **(2003) SCC (LS) 928,** *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and Ors.* **2003 (3) SCR 762 = (2003) 6 SCC 659,** *Prakash Nath Khanna and Anr. v. Commissioner of Income Tax and Anr.* **2004 (2) SCR 434 = (2004) 9 SCC 686,** *State of Jharkhand & Anr. v. Govind Singh* **2004 (6) Suppl. SCR 651 = (2005) 10 SCC 437,** *Trutuf Safety Glass Industries v. Commissioner of Sales Tax, U.P.* **2007 (8) SCR 860 = (2007) 7 SCC 242 - relied on.**

*Wentworth Securities v. Jones* **(1980) AC 1974;** *Inco Europe v. First Choice Distribution* **(2000) 1 All ER 109- referred to.**

*Maxwell on Interpretation of Statutes (12th Edn.) pg. 33* **- referred to.**

**1.5 There is, in the case at hand no ambiguity nor is there any apparent omission in s. 11-A to justify application of the doctrine of casus omissus and by that route re-write s. 11-A providing for exclusion of time taken for obtaining a copy of the order, which exclusion is not currently provided by the said provision. The omission of a provision u/s. 11-A analogous to the proviso**



**u/s. 28A is obviously not unintended or inadvertent which is the very essence of the doctrine of casus omissus. [Para 22] [677-F-H]**

**1.6 The High Court was perfectly justified in holding that the award made by the Collector/Land Acquisition Officer was non est and that the acquisition proceedings had elapsed by reason of a breach of s. 11-A of the Act. However, it is made clear that the declaration granted by the High Court and proceedings initiated by the Collector shall be deemed to have elapsed only qua the writ petitioners-respondents. [Para 23] [678-A-C]**

*State of Tamil Nadu and Ors. v. L. N. Krishnan and Ors.* **1995 (4) Suppl. SCR 663 = 1996 (1) SCC 250;** *Executive Engineer, Jal Nigam Central Stores Division, U.P. v. Suresha Nand Juyal alial Musa Ram (Deceased) by Lrs. and Ors.* **1997(2) SCR 1128 =1997 (9) SCC 224;** *Municipal Corporation of Greater Bombay v. Industrial Development Investment Co. Pvt. Ltd. and Others* **1996 (5) Suppl. SCR 551 = 1996 (11) SCC 501;** *Municipal Council, Ahmednagar v. Shah Hyder Beig and Ors.* **1999 (5) Suppl. SCR 197 = 2000 (2) SCC 48;** *Tej Kaur and Ors. v. State of Punjab* **2003 (4) SCC 48 - cited.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2002 (2) SCR 383** | **relied on** | **para 8** |
| **1996 (5) Suppl. SCR 222** | **stood overruled** | **para 8** |
| **(2011) 10 SCC 344** | **relied on** | **para 9** |
| **1996 (1) SCR 698** | **stood overruled** | **para 8** |
| **1995 (4) Suppl. SCR 663** | **cited** | **para 10** |
| **1997 (2) SCR 1128** | **cited** | **para 10** |
| **1996 (5) Suppl. SCR 551** | **cited** | **para 10** |

| | | |
|---|---|---|
| **1999 (5) Suppl. SCR 197** | **cited** | **para 10** |
| **2003 (4) SCC 48** | **cited** | **para 10** |
| **2007 (4) SCR 598** | **relied on** | **para 12** |
| **(2000) 1 All ER 109** | **referred to** | **para 18** |
| **(1980) AC 1974** | **referred to** | **para 18** |
| **1980 (2) SCR 268** | **relied on** | **para 19** |
| **2008 (14) SCR 13** | **referred to** | **para 20** |
| **2008 (14) SCR 419** | **referred to** | **para 20** |
| **2005 (2) Suppl. SCR 823** | **referred to** | **para 20** |
| **2005 (1) Suppl. SCR 426** | **referred to** | **para 20** |
| **2008 (13) SCR 237** | **referred to** | **para 20** |
| **(2004) CriLJ 3860** | **referred to** | **para 20** |
| **2002 (5) Suppl. SCR 666** | **referred to** | **para 20** |
| **2003 (3) SCR 762** | **referred to** | **para 20** |
| **2004 (2) SCR 434** | **referred to** | **para 20** |
| **2004 (6) Suppl. SCR** | **referred to** | **para 20** |
| **2007 (8) SCR 860** | **referred to** | **para 20** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7212-7213 of 2013.

From the Judgment and Order dated 21.08.2009 of the High Court of Judicature of Andhra Pradesh, Hyderabad in Review W.A.M.P. No. 2901 of 2008 in W.A. No. 936 of 2006.

Altaf Ahmad, Anurag Mathur, P.Parmeswaran for the Appellant.



Sridhar Potaraju, Gaichangpou Gangmei, Nisha Pandey, C.K. Sucharita, Rumi Chanda for the Respondents.

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 7th September 2006 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in Writ Appeal No.936 of 2006 and an order dated 21st August 2009 passed in W.A.M.P. No.2901 of 2008 in W.A. No.936 of 2006 whereby the High Court has dismissed the Writ Appeal and the review petition filed by the appellant holding that the LAO/Collector, Land Acquisition having made the Award beyond the period of two years stipulated in Section 11-A of the Land Acquisition Act, the acquisition proceedings initiated by the authorities have lapsed.

3. The appellant happens to be a Government company engaged in coal mining operations in the State of Andhra Pradesh. In terms of a notification dated 30th August, 1992 issued under Section 4(1) of the Land Acquisition Act, a large extent of land measuring 35 acres and 09 gts. in Survey Nos.285, 287 and 288 situated in village Jallaram, Kamanpur Mandal and Karimnagar Districts was notified for acquisition for the benefit of the appellant-company. A final declaration in terms of Section 6 was made on 2nd March, 1994, the validity whereof was assailed by four owners (Pattadars), respondents in this appeal in Writ Petition No.27/483 of 1995 primarily on the ground that the declaration under Section 6 had been issued beyond the period of limitation stipulated for the purpose. An application for interim stay was also moved by the writ-petitioners, in which a Single Judge of the High Court of Andhra Pradesh granted an interim stay on 6th September, 1995. The writ petition was finally dismissed by the High Court by a judgment and order dated 20th July, 1999. Aggrieved by the said order of dismissal the respondent filed Writ Appeal

No.1228 of 1999 which too failed and was dismissed by the Division Bench on 13th August, 1999.

4. With the dismissal of the writ petition and the appeal arising out of the same, the Collector made an Award under Section 11 of the Land Acquisition Act on 5th November, 1999. The appellant-company's case is that all the owners, except the four respondents who had moved the High Court, sought a reference of the dispute regarding the quantum of compensation payable to them to the Civil Court in which Senior Civil Judge, Manthani, District Karimnagar, A.P. held the expropriated owners entitled to receive compensation @ Rs.60,000/- per acre besides enhanced value of the structure, wells and trees standing on the same. The appellant-company claims to have deposited one third of the enhanced value of compensation in the appeal preferred by it against the Award made by the Civil Court. The appeal is, according to the appellant, pending for disposal by the High Court.

5. In the meantime respondents 1 to 4 in this appeal who apparently did not seek any reference to the Civil Court for enhancement of the compensation filed Writ Petition No.22875 of 1999 challenging the validity of the Award made by the LAO/ Collector on the ground that the same was beyond the period of two years stipulated under Section 11-A of the Act. That contention found favour with the learned Single Judge of the High Court before whom the matter was argued. The Single Judge held that the Award having been passed beyond the period of limitation stipulated under Section 11-A of the Act, the land acquisition proceedings had lapsed.

6. Aggrieved by the judgment of the learned Single Judge, the appellant filed Writ Appeal Nos.1315 of 2001 and 936 of 2006 before the Division Bench of the High Court who affirmed the view taken by the Single Judge and dismissed the appeals by its order dated 7th September, 2006. The appellant-company then appears to have filed review petition No.2901 of 2008 which too failed and was dismissed by the Division



Bench by its order dated 21st August, 2009 as already indicated. The present appeals call in question the said two judgments and orders.

7. We have heard learned counsel for the parties at length. Section 11-A of the Land Acquisition Act reads as follows:

> **"11-A. Period within which an Award shall be made.** - (1) The Collector shall make an Award under section 11 within a period of two years from the date of the publication of the declaration and if no Award is made within that period, the entire proceedings for the acquisition of the land shall lapse:
>
> Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the Award shall be made within a period of two years from such commencement.
>
> Explanation - In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded."

8. It is evident from the above that in order to be valid, the Award must be made within a period of two years from the date of the publication of the declaration under Section 6 of the Act. The declaration in the instant case was published on 2nd March, 1994 while the Award was made on 5th November, 1999. The same was, therefore, clearly beyond two years' period stipulated under the above provisions. Even so the Award could be held to be valid if the same was within two years of the declaration after excluding the period during which the High Court had stayed the proceedings in the writ petition filed by the respondent-landowners. That is because Explanation to Section 11-A (supra) permits exclusion of the

period during which the Court had stayed the acquisition proceedings for the purpose of reckoning the period of two years prescribed for making the Award. In the case at hand the interim order of stay was issued by the High Court on 6th December, 1995 which order was finally vacated on 28th July, 1999 with the dismissal of the writ petition. This means that the restraint order remained in force for a period of 3 years, 7 months and 22 days. That period shall have to be added to the period of two years prescribed for making the Award in the light of Explanation to Section 11-A. The difficulty is that even if the said period is added to the time allowed for making an Award, the Award stands beyond the period prescribed. Confronted with this proposition Mr. Altaf Ahmad argued that the period taken to obtain a copy of the order by which the High Court vacated the stay earlier granted by it ought also to be excluded from consideration and when so excluded the Award would fall within the outer limit of two years stipulated under Section 11-A. Reliance in support of that submission was placed by Mr. Altaf Ahmad on the decision of this Court in *N. Narasimhaiah and Ors. v. State of Karnataka and Ors. Union of India and Ors.* (1996) 3 SCC 88. It was contended that although the said decision was reversed by a Constitution Bench of this Court in *Padma Sundara Rao (dead) and Ors. v. State of T.N. and Ors.* (2002) 3 SCC 533, the law declared by this Court was made applicable prospectively. This would, according to Mr. Altaf Ahmad, imply that on the date the Award in question was made, the legal position stated in *Narasimhaiah's* case (supra) would hold the field. It would also, according to the learned counsel, mean that the time taken for obtaining a copy of the order of the High Court would have to be excluded in the light of the judgment in *Narasimhaiah's* case (supra).

9. On behalf of the respondents, on the contrary, learned counsel placed reliance upon a decision of this Court in *R. Indira Saratchandra v. State of Tamil Nadu and Ors.* (2011) 10 SCC 344 to contend that this Court having noticed the previous decisions on the subject had clearly repelled the



contention that a stay order vacated by the Court should all the same remain operative till delivery or receipt of a copy of such order by the Collector/LAO. It was submitted that the view expressed in *N. Narasimhaiah's* case (supra) which was followed in *State of Karnataka v. D.C. Nanjudaiah* (1996) 10 SCC 619 having been overruled by this Court in case of Padma Sundara Rao's case, there was no question of placing reliance upon the ratio of the said two decisions. The contrary view expressed in A.S. Naidu and Others v. State of Tamil Nadu and Others (2010) 2 SCC 801 having been found to be the correct view, not only by the Constitution Bench in *Padma Sundara Rao's* case (supra) but also in *R. Indira Sartchandra's* case (supra), the ratio of the said decisions alone stated the correct legal position, which was squarely applicable to the case at hand.

10. It is, in our opinion, not necessary to delve deep into the merits of the contention urged on behalf of the appellant which is founded entirely on the ratio of the decision of this Court in *N. Narasimhaiah's* case (supra). Correctness of the view taken in *N. Narasimhaiah's* case (supra) was examined by the Constitution Bench of this Court in Padma Sundara Rao's case (supra) and overruled. If the matter rested there, we may have examined the question whether the prospective overruling of the decision in *N. Narasimhaiah's* case (supra) was of any assistance to the appellant in the facts and circumstances of the case at hand. That exercise is rendered unnecessary by the decision rendered by this Court in *R. Indira Sartchandra's* case (supra), which places the matter beyond the pale of any further debate on the subject. In *R. Indira Sartchandra's* case (supra) also the Award made by the Collector was sought to be supported on the ground that the period of two years prescribed under Section 11-A of the Act should be counted, not from the date of the Judgment by which the interim stay order was vacated but from the date on which a copy thereof was supplied to the Collector. The High Court had accepted that contention relying upon the decisions of this

Court in *N Narasimhaiah and Ors. v. State of Karnataka and Ors. Union of India and Ors.* (1996) 3 SCC 88; *State of Tamil Nadu and Ors. v. L. N. Krishnan and Ors.* 1996 (1) SCC 250; *Executive Engineer, Jal Nigam Central Stores Division, U.P. v. Suresha Nand Juyal alial Musa Ram (Deceased) by Lrs. and Ors.* 1997 (9) SCC 224; *Municipal Corporation of Greater Bombay v. Industrial Development Investment Co. Pvt. Ltd. and Others* 1996 (11) SCC 501; *Municipal Council, Ahmednagar v. Shah Hyder Beig and Ors.* 2000 (2) SCC 48; *Tej Kaur and Ors. v. State of Punjab* 2003 (4) SCC 48.

11. This Court, however, reversed the view taken by the High Court holding that Section 11-A did not admit of an interpretation by which the period of two years would start running from the date a copy of the order vacating the stay granted by the Court is served upon the Collector. This Court observed:

> "10. There is nothing in Section 11-A from which it can be inferred that the stay order passed by the court remains operative till the delivery of copy of the order. Ordinarily, the rules framed by the High Court do not provide for supply of copy of the judgment or order to the parties free of cost. The parties to the litigation can apply for certified copy which is required to be supplied on fulfillment of the conditions specified in the relevant rules. However, no period has been prescribed for making of an application for certified copy of the judgment or order or preparation and delivery thereof. Of course, once an application is made within the prescribed period of limitation, the time spent in the preparation and supply of the copy is excluded in computing the period of limitation prescribed for filing an appeal or revision."

12. The above, in our opinion, is a complete answer to the contention urged on behalf of the appellant that not only the period during which the interim order of stay remains in force but also the time taken for obtaining the copy of the order



vacating the stay should be excluded for reckoning the period of two years stipulated under Section 11-A of the Act.

13. There is yet another dimension to the contention urged before us which too in our opinion stands concluded by the decision of this Court in *Ravi Khullar and Another v. Union of India & Ors.* (2007) 5 SCC 231. That was a case where a preliminary notification under Section 4 was issued on 23rd January, 1965 and a declaration under Section 6 published on 26th December, 1968 i.e. before the commencement of the Amendment Act of 1984. In terms of sub-section (1) of Section 11-A applicable to such a declaration, an Award was required to be made within a period of two years from such commencement. So calculated, the Award ought to have been made on or before 28th September, 1986 when the period of two years from the commencement of the Amendment Act of 1984 expired. The land owner however had filed a writ petition before the High Court on 12th September, 1986 in which an order for maintenance of status quo was made on 18th September, 1986 restraining the Land Acquisition Officer from announcing the Award. That order continued to remain in force till 13th February, 2003. The High court, eventually, dismissed the writ petition on 13th February, 2003. An application was made for obtaining a certified copy of the judgment which was ready only on 27th February, 2003. The Award was then pronounced on 1st March, 2003 after excluding the period during which the interim stay order was operative. The Award should have been pronounced on or before 18th February, 2003. Having been pronounced on 1st March, 2003, the Award was made beyond the period prescribed under Section 11-A. The contention urged on behalf of the Land Acquisition Officer was that a public functionary had to look into the contents of the order passed by the Court before taking any action, including the pronouncement of the Award and, therefore, the time taken between 14th February, 2003 and 27th February, 2003 must also be excluded which meant that the Award could have been made up to any date till 4th March, 2003. Support

was drawn for that proposition from the provisions of Section 12 of the Limitation Act which according to the Land Acquisition Officer ought to have applied for computing the period of limitation under Section 11-A of the Land Acquisition Act. Rejecting that contention, this Court observed:

> "54. ……The Land Acquisition Collector in making an Award does not act as a court within the meaning of the Limitation Act. It is also clear from the provisions of the Land Acquisition Act that the provisions of the Limitation Act have not been made applicable to proceedings under the Land Acquisition Act in the matter of making an Award under Section 11-A of the Act. However, Section 11-A of the Act does provide a period of limitation within which the Collector shall make his Award. The Explanation thereto also provides for exclusion of the period during which any action or proceeding to be taken in pursuance of the declaration is stayed by an order of a court. Such being the provision, there is no scope for importing into Section 11-A of the Land Acquisition Act the provisions of Section 12 of the Limitation Act. The application of Section 12 of the Limitation Act is also confined to matters enumerated therein. The time taken for obtaining a certified copy of the judgment is excluded because a certified copy is required to be filed while preferring an appeal/revision/review, etc. challenging the impugned order. Thus a court is not permitted to read into Section 11-A of the Act a provision for exclusion of time taken to obtain a certified copy of the judgment and order. The Court has, therefore, no option but to compute the period of limitation for making an Award in accordance with the provisions of Section 11-A of the Act after excluding such period as can be excluded under the Explanation to Section 11-A of the Act."

14. This Court drew a comparison between Section 11-A and Section 28-A of the Act, and based on the difference between the two provisions, observed:



> "56. It will thus be seen that the legislature wherever it considered necessary incorporated by express words the rule incorporated in Section 12 of the Limitation Act. It has done so expressly in Section 28-A of the Act while it has consciously not incorporated this rule in Section 11-A even while providing for exclusion of time under the Explanation. The intendment of the legislature is therefore unambiguous and does not permit the court to read words into Section 11-A of the Act so as to enable it to read Section 12 of the Limitation Act into Section 11-A of the Land Acquisition Act."

15. We are in respectful agreement with the above line of reasoning. Section 11-A in terms does not provide for exclusion of the time taken to obtain a certified copy of the Judgment or order by which the stay order was either granted or vacated. Section 12 of the Limitation Act has no application to the making of an Award under the Land Acquisition Act. In the absence of any enabling provision either in Section 11-A of the Land Acquisition Act or in the Limitation Act, there is no room for borrowing the principles underlying Section 12 of the Limitation Act for computing the period or determining the validity of an Award by reference to Section 11-A of the Land Acquisition Act.

16. Mr. Altaf Ahmad made a feeble attempt to argue that omission of a specific provision in Section 11-A excluding the time taken in obtaining a copy of the order passed by the Court was casus omissus and that this Court could while interpreting the said provision supply the unintended omission of the Parliament. There is, in our view, no merit in that contention. We say so for more than one reasons. Firstly, because while applying the doctrine of casus omissus the Court has to look at the entire enactment and the scheme underlying the same. In the case at hand, we find that Parliament has, wherever it intended, specifically provided for exclusion of time requisite for obtaining a copy of the order. For instance, under Section

28A which provides for re-determination of the amount of compensation on the basis of the Award of the Court, the aggrieved party is entitled to move a written application to the Collector within three months from the date of the Award of the Court or the Collector requiring him to determine the amount of compensation payable to him on the basis of the amount Awarded by the Court. Proviso to Section 28A specifically excludes the time requisite for obtaining a copy of the Award while computing the period of three months within which the application shall be made to the Collector. It reads:

> "28A. **Re- determination of the amount of compensation on the basis of the Award of the Court.-** (1) Where in an Award under this part, the court allows to the applicant any amount of compensation in excess of the amount Awarded by the collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the Award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the Award of the Court require that the amount of compensation payable to them may be re- determined on the basis of the amount of compensation Awarded by the Court:
>
> Provided that in computing the period of three months within which an application to the Collector shall be made under this sub- section, the day on which the Award was pronounced and the time requisite for obtaining a copy of the Award shall be excluded."
>
> (emphasis supplied)

xxx xxx xxx

17. Absence of a provision analogous to proviso to



Section 28A (supra) in the scheme of Section 11-A militates against the argument that the omission of such a provision in Section 11-A is unintended which could be supplied by the Court taking resort to the doctrine of casus omissus.

18. Secondly, because the legal position regarding applicability of the doctrine of casus omissus is settled by a long line of decisions of this Court as well as Courts in England. Lord Diplock in *Wentworth Securities v. Jones* (1980) AC 1974, revived the doctrine which was under major criticism, by formulating three conditions for its exercise namely, (1) What is the intended purpose of the statute or provision in question; (2) Whether it was by inadvertence that the draftsman and the Parliament had failed to give effect to that purpose in the provision in question; and (3) What would be the substance of the provision that the Parliament would have made, although not necessarily the precise words that the Parliament would have used, had the error in the Bill been noticed. The House of Lords while approving the above conditions in *Inco Europe v. First Choice Distribution* (2000) 1 All ER 109, went further to say that there are certain exceptions to the rule inasmuch the power will not be exercised when the alteration is far-reaching or when the legislation in question requires strict construction as a matter of law.

19. The legal position prevalent in this country is not much different from the law as stated in England. This Court has in several decisions held that casus omissus cannot be supplied except in the case of clear necessity and when reason for it is found within the four corners of the statute itself. The doctrine was first discussed by Justice V.D. Tulzapurkar in the case of *Commissioner Of Income Tax, Central Calcutta v. National Taj Tradus* (1980) 1 SCC 370. Interpretative assistance was taken by this Court from *Maxwell on Interpretation of Statutes (12th Edn.) pg. 33 and 47*. The Court said:

> "10. Two principles of construction-one relating to casus omissus and the other in regard to reading the statute as

a whole-appear to be well settled. In regard to the former the following statement of law appears in Maxwell on Interpretation of Statutes (12th Edn.) at page 33:

Omissions not to be inferred-"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said: 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.' 'We are not entitled,' said Lords Loreburn L.C., 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.' A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission in consequence to have been unintentional.

In regard to the latter principle the following statement of law appears in Maxwell at page 47:

A statute is to be read as a whole-"It was resolved in the case of Lincoln College (1595) 3 Co. Rep. 58 that the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself.' Every clause of a statute is to 'be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute.' (Per Lord Davey in *Canada Sugar Refining Co., Ltd. v. R:* 1898 AC 735)

In other words, under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together



and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an, unreasonable result", said Danckwerts L.J. in Artemiou v. Procopiou [1966] 1 Q.B. 878 "is not to be imputed to a statute if there is some other construction available." Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction, (Per Lord Reid in Luke v. I.R.C.-1968 AC 557 where at p. 577 he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges. In the light of these principles we will have to construe Sub-section (2)(b) with reference to the context and other clauses of Section 33B."

20. Arijit Pasayat, J. has verbatim relied upon the above in *Padmasundara Rao v. State of Tamil Nadu* 2 (2002) 3 SCC 533, *Union of India v. Dharmendra Textile Processors* (2008) 13 SCC 369, *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti & Ors.* (2008) 12 SCC 364, *Sangeeta Singh v. Union of India* (2005) 7 SCC 484, *State of Kerala & Anr. v. P.V. Neelakandan Nair & Ors.* (2005) 5 SCC 561, *UOI v. Priyankan Sharan and Anr.* (2008) 9 SCC 15, *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat* (2004) CriLJ 3860, *Unique Butyle Tube Industries Pvt. Ltd. v. U.P. Financial Corporation and Ors.* (2003) 2 SCC 455, *UOI v. Rajiv Kumar with UOI v. Bani Singh* (2003) SCC (LS) 928, *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and Ors.* (2003) 6 SCC 659, *Prakash Nath Khanna and Anr. v. Commissioner of Income Tax and Anr.* (2004) 9 SCC 686, *State of Jharkhand & Anr. v. Govind Singh* (2005) 10 SCC

437, *Trutuf Safety Glass Industries v. Commissioner of Sales Tax, U.P.* (2007) 7 SCC 242.

21. In *Padma Sundara Rao's* (supra) this Court examined whether the doctrine of casus omissus could be invoked while interpreting Section 6(1) of the Land Acquisition Act so as to provide for exclusion of time taken for service of copy of the order upon the Collector. Repelling the contention this Court said:

> "12. The court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said.
>
> xxx xxx xxx
>
> 14. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."

22. There is in the case at hand no ambiguity nor do we see any apparent omission in Section 11-A to justify application of the doctrine of casus omissus and by that route re-write 11-A providing for exclusion of time taken for obtaining a copy of the order which exclusion is not currently provided by the said provision. The omission of a provision under Section 11-A analogous to the proviso under Section 28A is obviously not unintended or inadvertent which is the very essence of the doctrine of casus omissus. We, therefore, have no hesitation in rejecting the contention urged by Mr. Altaf Ahmad.



23. The High Court was in the above circumstances perfectly justified in holding that the Award made by the Collector/Land Acquisition Officer was non est and that the acquisition proceedings had elapsed by reason of a breach of Section 11-A of the Act. We, however, make it clear that the declaration granted by the High Court and proceedings initiated by the Collector shall be deemed to have elapsed only qua the writ petitioners-respondents herein. With those observations, these appeals fail and are hereby dismissed but in the circumstances without any orders as to costs.

R.P. Appeals dismissed.

NOOR SABA

*v.*

ANOOP MISHRA & ANR.

CONTEMPT PETITION NO.3 OF 2012

IN

CONTEMPT PETITION NO.6 & 7 OF 2009

IN

WRIT PETITION (CIVIL) NO. 503 of 2007

SEPTEMBER 2, 2013.

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

*Contempt of court:*

*Contempt petition alleging non-compliance of Court's order – Held: The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedience of the Court is normally made on admitted and undisputed facts – In the instant case, the respondents have filed affidavits stating that the order of the Court has been complied with and the revised family pension as due to the petitioner is being regularly paid to her and arrears have also been deposited in her bank account – Further, the dispute raised by the petitioner with regard to the last pay drawn by her husband is a disputed question of fact – Accordingly, the Court holds that no case for omission of any contempt of its order is made out.*

**The petitioner's husband passed away on 5.4.1980 while he was holding the post of Headmaster in the Government Public School. With regard to her claim for revised family pension, she ultimately filed Writ Petition (C) No. 503/2007, which was disposed of by the Supreme Court, on 29.7.2008 with a direction that the family pension of the petitioner should be determined in terms**





**of Government Order dated 24.2.1989 and other orders issued from time to time revising the family pension. The petitioner subsequently filed Contempt Petitions (C) Nos. 6 and 7 of 2009 alleging that the directions issued by the Court on 29.7.2008 were not implemented and certain forged and fabricated documents were placed by the official respondents before the Court. The Court by order dated 1.9.2010 directed the Accountant General, U.P. to consider the claim of the petitioner in terms of the order passed by the Court on 29.7.2008 and determine the amount payable to her and report to the Court. The petitioner filed Contempt Petition (C) No. 3 of 2012 alleging that the directions dated 1.9.2010 were also not complied with.**

**Since the order dated 1.9.2010 passed in Contempt Petitions Nos. 6 and 7 of 2009 was the subject matter of Contempt Petition No. 3/2012, the Court closed Contempt Petitions Nos. 6/2009 and 7/2009.**

**Dismissing the contempt petition, the Court**

**HELD: 1.1. To hold the respondents or anyone of them liable, a conclusion has to be arrived at that they have wilfully disobeyed the order of the Court. The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedience of the Court is normally made on admitted and undisputed facts. [para 12] [687-B-C]**

**1.2. In the instant case, respondent No. 1, namely, the Chief Secretary of the State of Uttar Pradesh has filed an affidavit stating that revised pension at the rate of Rs. 3058/- per month is being paid to the petitioner on a regular basis; that the amount of pension has been calculated on the basis of Rs. 620/- as the last pay drawn by the petitioner's husband and that the difference in**

**pension and the arrears accruing on account of revision of pension following the 6th Pay Commission Report has also been deposited in her bank account. Respondent No. 2 namely, the Accountant General, U.P. has also filed an affidavit categorically stating that the order dated 1.9.2010 passed by this Court has been complied with by him, and there is no apparent error in the calculation with regard to the pensionary entitlements of the petitioner. The dispute raised by the petitioner at this stage with regard to the last pay drawn by her husband is a disputed question of fact. Thus, not only there has been a shift in the stand of the petitioner with regard to the basic facts on which commission of contempt has been alleged, even the said new/altered facts do not permit an adjudication in consonance with the established principles of exercise of contempt jurisdiction so as to enable the Court to come to a conclusion that any of the respondents have wilfully disobeyed the order of this Court dated 1.9.2010. This Court, accordingly, holds that no case of commission of any contempt of this Court's order dated 1.9.2010 is made out. [Para 8, 9, 11 and 12] [685-C-E, F-G; 686-H; 687-A, C-E]**

CIVIL ORIGINAL JURISDICTION : Contempt Petition No.3 of 2012

IN

Contempt Petition No. 6 & 7 of 2009

In

Writ Petition (Civil) No. 503 of 2007

Under Article 32 of the Constitution of India

R.K. Khanna, ASG, Shobha Dixit, Sumeet Sharma, Prashant Bhushan, M.R. Shamshad, Malvika Trivedi, C.D. Singh, Sunita Sharma, Seema Rao, D.S. Mahra, Priyanka Sinha, Sushma Suri for the appearing parties.



The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. The contempt petitioner had filed a writ petition under Article 32 of the Constitution [W.P.(C) No. 503 of 2007] raising a plea that after her husband had passed away in the year 1980, while serving as the Headmaster in Government Public School, Rampur under the Uttar Pradesh Basic Shiksha Parishad, a meagre and inadequate amount of family pension was being paid to her leaving her in a dire state of penury and distress. The writ petition in question was filed before this Court even while a writ proceeding on the same issue was pending before the Allahabad High Court. Notwithstanding the above, taking into account the peculiar facts of the case, particularly, the distress that the petitioner claimed to be suffering from, this Court entertained the writ petition and disposed of the same by the order dated 29.7.2008 in the following terms :

> "Keeping in view the facts and circumstances of the case, we direct that the family pension of the petitioner shall be determined in terms of Government Order dated 24.2.1989 and other necessary orders issued from time to time revising the family pension. This exercise shall be done within a period of three months from today. After the family pension is determined in terms of the various Government Orders on the subject and the amount of arrears be calculated, the same shall be paid to the petitioner after deducting the payments already made to her on account of family pension. With the abovesaid direction, the writ petition is disposed of. No order as to costs." [*Para 12*]

2. While disposing of the writ petition in the above terms by order dated 29.7.2008, this Court had recorded certain facts which being relevant to the present proceedings are being noticed hereinafter.

The petitioner's husband late Masood Umer Khan was initially appointed as an Assistant Teacher in the year 1959 and

he was holding the post of Headmaster in the Government Public School, Rampur when he passed away on 5.4.1980. The petitioner was granted family pension at the rate of Rs. 200/- per month which was later revised to Rs. 425/-. The revised amount was reduced to Rs. 375/- per month and an attempt was made to recover the excess amount allegedly overdrawn by the petitioner. The aforesaid action of the State was challenged by the petitioner in a writ proceeding before the Allahabad High Court which was, however, dismissed on 4.3.2005. Aggrieved, an intra-court appeal was filed against the said order dated 4.3.2005 in which an interim order was passed directing continuance of payment of family pension to the petitioner at the rate of Rs. 425/- per month. While the matter was so situated the writ petition under Article 32 of the Constitution [W.P. (C) No. 503/2007] was filed before this Court which was disposed of in terms of the directions already noticed and extracted above.

3. Alleging that the directions issued by this Court on 29.7.2008 while disposing of W.P. (C) No. 503/2007 had not been implemented Contempt Petition (C) No. 6/2009 was filed. Simultaneously, another contempt petition i.e. Contempt Petition(C) No. 7/2009 was instituted contending that in the proceedings in W.P.(C) No. 503/2007 certain forged and fabricated documents were placed by the official respondents before this Court which amounted to an abuse of the process of the Court for which the respondents in the writ petition are liable in contempt.

4. In the course of hearing of Contempt Petition (C) Nos. 6 and 7/2009 this Court had passed an order dated 1.9.2010 to the following effect :

> "It is grievance of the petitioner that in spite of the above order the respondents have not settled the family pension as directed. Though learned counsel representing the State of U.P. states that the eligible pension has been settled and is being paid, in view of the stand taken by the petitioner, we direct the Accountant General, U.P. at Allahabad to go into the grievance of the petitioner in terms of the order passed by this Court vide para 12 which we had extracted and determine the amount payable till this date and report to this Court within a period of six weeks.
>
> List after the report is received."



5. Contending that the aforesaid directions dated 1.9.2010 has not been complied with Contempt Petition (C) No. 3 of 2012 has been instituted by the petitioner.

6. Two significant facts which would render it wholly unnecessary to adjudicate Contempt Petitions No. 6 and 7 of 2009 may be taken note of at this stage. The first is that by virtue of the order dated 1.9.2010 passed in the aforesaid two contempt petitions the issues before the Court have become crystallized in a somewhat different manner and the adjudication that would be necessary now has changed its complexion to one of compliance of the directions contained in the order of this Court dated 1.9.2010 by the Accountant General of the State of Uttar Pradesh. The second significant fact is that no serious issue has been raised on behalf of the petitioner with regard to the necessity of any further adjudication of Contempt Petitions No. 6/2009 and 7/2009 and the entire of the arguments advanced on behalf of the petitioner has centred around the issues arising in Contempt Petition No. 3/2012. We, therefore, proceed to consider Contempt Petition No. 3/2012 and deem it appropriate to close Contempt Petition Nos. 6/2009 and 7/2009 as not requiring any further orders of the Court.

7. In Contempt Petition No. 3/2012 the contempt petitioner had claimed that the Accountant General, State of Uttar Pradesh has not taken any steps to comply with the order/ directions dated 1.9.2010 of this Court and has not calculated the amount of pension payable to the petitioner. The contempt

petitioner has further alleged that inspite of the repeated reminders the default on the part of the Accountant General, State of Uttar Pradesh, had persisted. Furthermore, it is the case of the contempt petitioner that she is an old lady of 72 years of age who has been unjustly deprived of the pension due to her ever since her husband had passed away on 5.4.1980 while he was still in service.

8. The Respondent No. 1 in the contempt petition, namely, the Chief Secretary of the State of Uttar Pradesh has responded to the allegations made in the contempt petition by filing an affidavit wherein it is stated that the arrears of salary and pension, including revised pension at the rate of Rs. 3058/- per month, has been and is being paid to the petitioner on a regular basis. According to the Chief Secretary, the amount of pension has been calculated on the basis of Rs. 620/- as the last pay drawn by the petitioner's husband. Furthermore, according to the Chief Secretary, the difference in pension and the arrears accruing on account of revision of pension following the 6th Pay Commission Report has also been deposited in the bank account of the petitioner (No. 2622) in the District Cooperative Bank, Rajdwara, Rampur. Alongwith his affidavit, the Chief Secretary of the State has also enclosed the certificate of the last pay drawn by the petitioner's husband which clearly indicates the same to be Rs. 620/- per month.

9. The Respondent No. 2 in the contempt petition, namely, the Accountant General of the State of Uttar Pradesh has also filed an affidavit stating the facts relevant to the case and asserting that the calculations made by the Office of the Basic Shiksha Adhikari, Rampur with regard to family pension due to the petitioner corresponds to the calculation of such pension made by the office of the Accountant General and that there is no apparent error in the calculation with regard to the pensionary entitlements of the petitioner.

10. The order dated 1.9.2010 passed by this Court in Contempt Petition Nos. 6/2009 and 7/2009 required the



Accountant General of the State to determine the correct amount of family pension payable to the petitioner in accordance with the order dated 29.7.2008 passed by this Court in W.P.(C) No. 503/2007. It is the categorical stand of the Accountant General in the affidavit filed that the said order of this Court has been complied with by him. In this regard the specific statement of the Accountant General which is to the following effect may be taken note of :

> "However as per the calculations obtained by the office of the respondent from the office of the Basic Shiksha Adhikari, Rampur, the amount of the family pension mentioned therein is found to be the same as that of the amount determined by the office of the respondent as per the order of this Hon'ble Court and mentioned in the letter report dt. 4.11.2010. Hence there appears to be no difference in calculations of amount by the office of Respondent and the dept. of petitioner." (*Para 6 of the Affidavit dated 16.3.2012*)

11. Following the above stand taken by the Accountant General in his affidavit there has been a significant alteration in the stand of the petitioner as evident from the additional affidavit/rejoinder affidavit filed by her to the counter affidavit of the respondent No. 2. The petitioner now seeks to raise a dispute with regard to the last pay drawn by her husband which she contends to be Rs. 1620/- and not Rs. 620/-. On the aforesaid basis the claim to a higher amount of pension has been made by the petitioner. Though, the petitioner has brought on record some material in support of the said claim, i.e., another last pay drawn certificate showing the same as Rs. 1620/- and some extracts from the service book of her husband, the fact remains that the aforesaid documents relied upon by the petitioner stand contradicted by the last pay drawn certificate brought on record by the Accountant General in his affidavit as also the statements made by the Chief Secretary to the effect that the last pay drawn by the petitioner's husband

was Rs. 620/- per month. Disputed questions of fact therefore confront this Court.

12. To hold the respondents or anyone of them liable for contempt this Court has to arrive at a conclusion that the respondents have wilfully disobeyed the order of the Court. The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedience of the Court is normally made on admitted and undisputed facts. In the present case not only there has been a shift in the stand of the petitioner with regard to the basic facts on which commission of contempt has been alleged even the said new/altered facts do not permit an adjudication in consonance with the established principles of exercise of contempt jurisdiction so as to enable the Court to come to a conclusion that any of the respondents have wilfully disobeyed the order of this Court dated 1.9.2010. We, accordingly, hold that no case of commission of any contempt of this Court's order dated 1.9.2010 is made out. Consequently, Contempt Petition No. 3/2012 is dismissed. For reasons already recorded, Contempt Petition Nos. 6/2009 and 7/2009 shall also stand closed.

R.P. Contempt Petition dismissed.



PUNJAB SCHOOL EDUCATION BOARD
*v.*
DALIP CHAND AND OTHERS
(Civil Appeal No.7820 of 2013)

SEPTEMBER 06, 2013

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

*SERVICE LAW:*

*Service qualifying for pension - Service in Punjab Education Department - Reckoning of for pension on superannuation from Punjab School Education Board - Held: Employee is entitled to get benefit of Notification dated 17.03.2011 issued by Punjab School Education Board and shall be eligible to add his service qualifying for superannuation pension -- Punjab School Education Board (Employees Pension, Provident Fund and Gratuity) Regulations, 1991 --Regulation 6.*

**The respondent prior to his selection as Superintendant in Punjab School Education Board on 08.08.1979, had worked in Department of Education, Punjab from 7.4.1965 upto 08.08.1979. On his superannuation w.e.f. 31.10.2000 from the School Education Board, he claimed pension by reckoning his both the services, i.e. service in Education Department and that in School Education Board. His claim was rejected on the ground that since he was appointed neither on transfer nor on deputation but was appointed through direct recruitment, the service rendered by him in Education Department could not be treated as qualifying service for pension. However, his writ petition was allowed by the High Court.**

**Dismissing the appeal filed by the Board, the Court**

**HELD: The respondent had already put in more than eight years of service in the Board, consequently, he is also entitled to get the benefit of Notification dated 17.03.2011, which prescribe that an employee shall be eligible to add his service qualifying for superannuation pension. [Para 8 and 9] [691-C-G]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7820 of 2013.

From the Judgment and Order dated 03.05.2007 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 6259 of 2006.

S.K. Sabharwal, Nishtha Chawla, Prahlad Kumar for the Appellant.

Subhash Chander Pathala, Jagjit singh Chhabra, Yash Pal Dhingra for the Respondents.

The Judgment of the Court was delivered by

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

2. The question that has come up for consideration in this appeal is whether the service rendered by the respondent in the Department of Education, Punjab be treated as qualifying service for the purpose of pension under the Punjab School Education Board (Employees Pension, Provident Fund and Gratuity) Regulations, 1991 (for short "the Regulations 1991").

3. The respondent-herein was recruited as clerk by the Punjab Subordinate Service Selection Board on 07.04.1965 and he was posted in the Department of Education, Punjab. Later he was appointed as a lecturer in Political Science in Government Senior Secondary School, Valtoha, District Amritsar where he served upto 1970. He had worked as an assistant in Education Department from June 1970 to 08.08.1979.

4. Punjab School Education Board on 03.05.1979 advertised for the post of Superintendent. The respondent



applied for the said post and was selected. Appointment order dated 03.08.1979 was sent to him and he joined on 08.08.1979 in the service of the Board. For the purpose of joining service of the Board he was relieved from the Education Department in the forenoon of 08.08.1979. After joining the service in the Board, the respondent was contributing CPF under the Punjab School Education Board (Provident Fund) Regulations, 1970, since at that time service in the Board was not pensionable. Service in the Board was later made pensionable under the 1991 Regulations w.e.f. 01.04.1991. All the employees who were employed after the inception of the Board were asked to give option to be governed either by the Pension Regulations or by the Provident Fund Regulations. The respondent opted to be governed by the Pension Regulations.

5. The respondent retired from the service after serving the Board from 08.08.1979 to 31.10.2000. Previously, he had served the Education Department for 14 years 1 month and 21 days. The respondent had put in a total service of 35 years 4 months and 14 days, reckoning both the services of the Education as well as the Board and respondent claimed pension under Regulation 6 of the 1991 Regulations.

6. The claim of the respondent was rejected by the Board on the ground that the benefit of Regulation 6 would apply only to those employees who had joined the service of the Board either on transfer or on deputation and were subsequently absorbed in the Board. Further it was pointed out that since the respondent was appointed neither on transfer nor on deputation but through direct recruitment, the service rendered by him in the Education Department could not be treated as qualifying service for the purpose of pension for his eligibility to get pension under the 1991 Regulations.

7. The High Court did not find any merit in the contention of the Board, allowed the writ petition and quashed the impugned orders passed by the Board on 06.07.2005 and 29.09.2005 and directed the Board to reckon the service of the respondent in the Education Department as qualifying service

for the purpose of pension. Aggrieved by the same, the Board has come up with this appeal

8. We notice that a similar issue came for consideration before this Court in SLP(C) No.11837 of 2008, wherein a notification issued by the Board on 17.03.2011 was produced and this Court granted the benefit to a similarly placed pensioner. The order of this Court dated 14.03.2012 passed in SLP(C) No.11837 of 2008 reads as follows:

> "I.A. No.4 of 2012 has been filed by the respondents with a prayer to take on record Notification dated 17.03.2011 issued by the Punjab School Education Board (for short, 'the Board') under which an employee shall be eligible to add his service qualifying for superannuation pension, but not for any other pension. It further shows that benefit can be for a maximum period of 8 years only and not for more than 8 years. The respondents fall within this category.
>
> Thus, in the light of the subsequent Notification dated 17.03.2011 issued by the Board, which has been given retrospective effect and would be applicable to all those who have been appointed before 1.1.2004 and do not fall within the prohibited category as per the proviso would be entitled for getting the necessary benefit thereof. In the light of this, there is no substance in this special leave petition, which is accordingly hereby dismissed.
>
> The learned counsel appearing for the respondents informed that in fact they are already been paid pensionary benefits."

9. We are of the view that the said notification would equally apply to the respondent in this case as well. The respondent had already put in more than eight years of service in the Board, consequently, he is also entitled to get the benefit of notification dated 17.03.2011. In the circumstances, the appeal lacks merit and the same is dismissed, however, with no order as to costs.

R.P. Appeal dismissed.



ROHILKHAND MEDICAL COLLEGE & HOSPITAL, BAREILLY

*v.*

MEDICAL COUNCIL OF INDIA & ANOTHER

(Writ Petition (Civil) No. 585 of 2012

SEPTEMBER 06, 2013

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

*Medical Colleges Regulation (Amendment 2010 Part II):*

*Clause 8(3)(1)(d) – Revocation of permission/recognition for award of MBBS degree – Approval for renewal of permission to Medical College for increased intake from 100 to 150 seats for academic year 2013-2014 – Revoked by MCI on receipt of information from CBI with regard to conspiracy between the Chairman of the Medical College on the one hand and public functionaries of Union Ministry and Government Hospital on the other, which led to issuance of order passed for additional intake of students for academic year 2008-2009 – Held: CBI, in its charge-sheet, pointed out serious infirmities in the report submitted by the inspection team constituted by the Union Ministry – CBI investigation has revealed that fraud was practiced by the Central team as well as the college to get the sanction for the 3rd batch of MBBS students for the academic year 2008-09 – That was sufficient for the MCI to take action, and revoke the letter of permission granted for academic year 2013-14 – The decision of MCI is in accordance with Regulations 8(3)(1)(d) – Minimum Standard Requirements for the Medical College for 100 Admissions Annually Regulations, 1999.*

***Indian Medical Council Act, 1956:***

*ss. 10A and 19A — s. 10A, mandates that when a new medical college is to be established or the number of seats*

*to be increased, the permission of Central Government is a pre-requisite — s.19A obliges MCI to prescribe minimum required standards for medical education and the recommendations made by MCI to Central Government carry considerable weight — In the instant case, MCI constantly on all the occasions, recommended to Central Government not to renew permission for admission of the third batch for the academic year 2008-09, but in spite of the same, a Central Team was appointed, a favourable report was got and permission was accorded by Central Government for the year 2008-09, which was the subject matter of CBI investigation.*

*Education/Educational Institutions:*

*Admission to medical courses — Court took notice with concern, of unprecedented growth of Technical and Medical Institutions in the country which has resulted in widespread prevalence of various unethical practices and emphasized that there is extreme necessity of a Parliamentary Legislation for curbing these unfair practices – Legislation – Judicial notice – Constitution of India, 1950 – Art. 21.*

**The petitioner-Medical College and Hospital was established in the year 2005. It started the first M.B.B.S. course during the year 2006-07 with an annual intake of 100 seats for which permission was granted by the Central Government u/s 10A of the Indian Medical Council Act, 1956. The Medical Council of India (MCI) granted recognition to the College to award M.B.B.S. Degree by the University concerned. The College later submitted an application to the MCI for extension of renewal of permission for admission of 3rd batch of 100 seats of M.B.B.S. for the academic year 2008-09. The MCI after getting inspections of the College conducted, and on receipt of reports of the inspection teams and compliance reports submitted by the College, intimated the Central Government by letters dated 16.04.2008, 14.6.2008 and**



**4.9.2008 not to renew the permission for admission of the 3rd batch of students for the academic session 2008-09. The Central Government on receipt of report of the inspection team constituted by it, also asked the College on 27.7.2008 not to admit any fresh batch of MBBS students for the academic year 2008-09. However, on 12.9.2008, the College requested the Central Government to accord permission for 50 students of MBBS for the academic session 2008-09. Thereupon the Union Ministry constituted another team of two doctors, who conducted inspection of the College on 25.9.2009 and on the basis of its report, the Central Government issued the letter dated 26.9.2008 according sanction for renewal of permission for admission of 3rd batch of 100 students for the academic year 2008-09.**

**The MCI, by its letter dated 20.06.2013 conveyed its order of approval dated 4.6.2013 for renewal of permission for admission for the second batch of MBBS students against the increased intake i.e. from100 to 150 seats to the College for the academic year 2013-14. In the meantime, the MCI received a confidential letter dated 11.07.2013 from the Central Bureau of Investigation informing that it had registered a case against the Chairman of the College and officers of the Union Ministry of Health and Family Welfare, u/s 120B IPC and s. 13(2) read with s. 13(1)(d) of the Prevention of Corruption Act, 1988. A Charge-sheet was also enclosed along with the letter. The MCI by order dated 13.7.2013 revoked its decision dated 04.06.2013 and, communicated the same to the College. The College challenged legality of the said decision in the instant writ petition.**

**Dismissing the writ petition, the Court**

**HELD: 1.1. The Medical Council Act, 1956, especially s. 10A thereof, mandates that when a new medical college is to be established or the number of seats to be**

**increased, permission of the Central Government is a pre-requisite. Section 19A obliges the MCI to prescribe minimum required standards for medical education and the recommendation made by MCI to the Central Government carry considerable weight, it being an Expert Body. MCI has prescribed the regulation – "Minimum Standard Requirements for the Medical College for 100 Admissions Annually Regulations, 1999". In order to verify the minimum requirements, MCI gets inspection conducted by Inspectors, who are experts and submit their reports on the availability of the staff - teaching and residents - and other infrastructural facilities, clinical availability, etc. as per the regulations. [para 28] [713-G-H; 714-A-C]**

**1.2. In the instant case, the MCI constantly on all the occasions, recommended to the Central Government not to renew permission for admission of the third batch for the academic year 2008-09, but in spite of the same, a Central Team was appointed, a favourable report was got and permission was accorded by the Central Government for the year 2008-09. CBI in its charge-sheet has categorically reported that this was done on the basis of bogus, fake and forged records. CBI noticed that the college authorities had produced fabricated and forged documents before the inspection team and the team failed to verify the correctness or otherwise of those documents. CBI investigation has revealed that fraud has been practiced by the Central Team as well as the college to get the sanction for the 3rd batch of MBBS students for the academic year 2008-09. CBI's investigation *prima facie* establishes the criminal conspiracy between the Chairman of the College and the then Union Minister of Health and Family Welfare along with the then Deputy Secretary, Ministry of Health and Family Welfare and two doctors of the Government Hospital which led to the issuance of the order passed for the additional intake of 50 students for**



**the academic year 2008-09 on 26.09.2008. The CBI, in its charge-sheet, points out serious infirmities in the report submitted by the central team, which conducted the inspection of the College on 25.09.2008. [para 25-27 and 29] [709-G-H; 710-B-C; 713-E-G; 714-D-E]**

**1.3. When sanction was accorded and communicated by letter dated 20.06.2013 it was categorically stated by the MCI that the same was accorded subject to certain conditions. It was stated that in case false/wrong declaration or fabricated documents were used for procuring permission of the Board of Governors of the increased intake and if said misconduct was brought to the notice or comes to the knowledge of the MCI, at any stage during the current academic year (2013-14) institution/college would not be entitled to be considered for renewal of the permission against increased intake for the next academic year and that renewal of permission against the increased intake for the academic year 2013-14 and for the next academic year would be liable to be revoked. Having received the letter of the CBI as well as the charge-sheet, the decision taken by the MCI on 13.07.2013 revoking the letter of permission granted for the academic year 2013-14 is in accordance with Clause 8(3)(1)(d) of the Establishment of Medical Colleges Regulation (Amendment 2010 Part II), which states that when MIC finds that the college has employed fake/forged documents for renewal of permission/ recognition for processing applications etc., that institute will not be able to be considered for renewal of permission/ recognition for award of MBBS Degree/ processing the application for post-graduate courses for two academic years i.e. that academic year and the next academic year. [para 30-32 and 35] [714-F-H; 715-A-B; 717-C-D]**

**1.4. MCI need not wait till the culmination of the trial**

**initiated on the basis of the charge-sheet filed by the CBI. The investigation by a premier agency like the CBI has *prima facie* revealed that the college has used fake and forged materials to get sanction for the intake for the year 2008-09 and that is sufficient for the MCI to take action in accordance with the Regulations 8(3)(1)(d) of 2013 Regulations. [para 36 [717-F-G]**

**COURT'S CONCERN**

**2.1. Investigation of CBI, however, reveals a sorry state of affairs, which is an eye-opener for taking appropriate remedial measures in future so that medical education may attain the goals envisaged by the IMC Act and the Regulations and serve the community. It indicates the falling standards of our educational system at the highest level; sometimes even at the level of the Central Government making a serious inroad to the right to life guaranteed to the citizens of the country under Art. 21 of the Constitution. [para 39] [719-B-C, D-E]**

*T.M.A. Pai Foundation and others* v. *State of Karnataka and others* **2002 (3) Suppl. SCR 587 = (2002) 8 SCC 481 and** *P.A. Inamdar and others* v. *State of Maharashtra and others* **2005 (2) Suppl. SCR 603 = (2005) 6 SCC 537 – referred to.**

**2.2. The Court took notice with concern of the unprecedented growth of the Technical and Medical Institutions in the country which has resulted in widespread prevalence of various unethical practices. Collection of large amount by way of capitation fee, exorbitant fee, donation etc, by many of such self financing institutions, has kept the meritorious financially poor students away from those institutions. This Court can also take judicial notice of the fact that many a times the medical colleges, engineering colleges, etc. are established after availing large amounts by way of loans from the financial institutions and other borrowings, with**



**no funds of their own, and once the college gets approval and students are admitted, loan availed of is being repaid from the capitation fee charged from the students and ultimately that amount constitute their capital. Many a times, even without any sufficient facilities they put pressure on the various agencies and the Central Government and get approval overlooking the regulatory authority, like MCI, which adversely affects the quality of medical education. [para 24 and 27] [709-D-E; 713-B-D]**

**2.3. The Court also took notice that current policy of the Central Government in the higher education is to provide autonomy of institutions, but adoption of unfair practices is a serious violation of the law. Few States have passed some legislation to prohibit demand/ collection of capitation fee which have no teeth, the institutions who indulges in such practices can get away by paying some fine, which is meager. It is, therefore, emphasized that there is extreme necessity of a Parliamentary Legislation for curbing these unfair practices. [para 41-42] [720-B-E]**

**Case Law Reference:**

| | | |
|---|---|---|
| **2002 (3) Suppl. SCR 587** | **referred to** | **para 38** |
| **2005 (2) Suppl. SCR 603** | **referred to** | **para 38** |

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 585 of 2013.

Under Article 32 of the Constitution of India.

Rakesh Kr. Khanna, ASG, Mukul Rohatgi, Guru Krishna Kumar, Mukul Gupta, Amrendra Sharan, Abdhesh Choudhary, Amit Jaiswal, Rajiv Ranjan Dwivedi, Amit Kumar, Avijit Mani Tripathi, Rituraj Kumar, V. Mohana, Anirudh Tanwar, Dushyant Arora, Mudrika Bansal, Komal Jaiswal, B. Subrahmanya Prasad for the appearing parties.

The Judgment of the Court was delivered by

**K.S. RADHAKRISHNAN, J.** 1. The petitioners have invoked the extraordinary jurisdiction of this Court conferred under Article 32 of the Constitution of India to quash the letter dated 13.07.2013 issued by the Medical Council of India by which the permission granted for renewal of admission for additional intake of students for the academic session 2013-2014 was revoked.

2. Rohilkhand Medical College and Hospital was established by Rohilkhand Educational Charitable Trust in the year 2005. The Medical College started the first M.B.B.S. Course during the year 2006-07 with an annual intake of 100 seats for which permission was granted under Section 10A of the Indian Medical Council Act, 1956 (for short "the IMC Act) by the Central Government. Later, the Medical Council of India (for short "the MCI") granted recognition to the College to award M.B.B.S. Degree granted by M.J.P. Rohilkhand University, Bareily, U.P. The College is also conducting post-graduate courses during the year 2011-12.

3. Permission was granted under Section 10A of the IMC Act for admitting the second batch of 100 students in the year 2007-08. The College later submitted an application for extension of renewal of permission for the admission of 3rd batch of 100 seats of M.B.B.S. for the academic year 2008-09 to the MCI. The MCI after processing the application constituted a medical team for inspection of the College. The team conducted the inspection on 1st and 2nd April, 2008. The MCI team then submitted its report to the Secretary, MCI, New Delhi on 02.04.2008. The MCI team pointed out the following deficiencies in the College as per the MCI Regulations:

> "There was a shortage of teaching faculty by 21.05% (24 out of 114) and residents by 37.03% (30 out of 81) As under:



> (a) Professor – 4
>
> (b) Associate Professor – 13
>
> (c) Asstt. Professor – 3
>
> (d) Tutor – 4
>
> (e) Sr. Resident – 16
>
> (f) Jr. Resident – 14"

4. The MCI team also noticed that OPD attendance on the date of inspection was only 421 as against the minimum requirement of 850-900 and OPD bed occupancy was only 55% as against the minimum requirement of 83-85%. The MCI team inspection report, as per the Board Regulation, was placed before the Executive Committee in its meeting held on 14.04.2008 and it intimated its decision to the Central Government not to renew the permission for the admission of the 3rd batch of students for the academic session for the year 2008-09, vide its letter dated 16.04.2008. A copy of the letter was also sent to the Principal of the College with a request to submit the compliance in respect of the deficiencies pointed out by the MCI team on or before 30.04.2008.

5. The College later submitted its "compliance report". The MCI again constituted a team to examine whether the College had rectified the deficiencies pointed out by the MCI team. The MCI team again conducted an inspection on 20.05.2008 and submitted its report to the MCI. The report pointed out the following deficiencies :

> "(1) There was a shortage of teaching faculty by 18% (22 out of 110) and Residents by 5% (5 out of 82) as under:
>
> (a) Professor – 6
>
> (b) Associate Professor – 12

(c) Asstt. Professor – 4

(d) Tutor – NIL

(e) Sr. Resident – 3

(f) Jr. Resident – 2

(ii) The OPD attendance on the date of inspection was only 691 against the minimum requirement of 850-900.

(iii) IPD bed occupancy was only 55(74%) against the minimum requirement of 83-95%."

6. The MCI inspection report was later placed before the Executive Committee of MCI in its meeting held on 13/14-06-2008 and it was decided by the Committee not to renew the permission for the admission of 3rd batch of students for the academic year 2008-09. The Executive Committee's decision was communicated to the Central Government vide its letter dated 14.06.2008. The then Under Secretary, Ministry of Health and Family Welfare, New Delhi on 19.06.2008 forwarded the letter received from the MCI to the College requesting to submit the compliance in respect of the deficiencies pointed by the MCI inspection team. The College then forwarded the compliance report to the Secretary, MCI vide its letter dated 24.06.2008. The College also sent another letter dated 01.07.2008 to the Secretary, Ministry of Health and Family Welfare, New Delhi stating that the deficiencies pointed out by the MCI team were of minor nature and, therefore, requested to grant necessary permission by the Central Government for admission of the 3rd batch for the academic year 2008-09.

7. The Chairman of the Roholhand Medical College and Hospital on 03.07.2008 sent a letter to the Health Minister, Government of India requesting to grant necessary permission and the Central Government, for admission of the 3rd batch, followed by yet another letter on 04.07.2008 to the Secretary,



Ministry of Health and Family Welfare, New Delhi.

8. We notice, following the letter received by the Minister as well as the Secretary, the Central Government constituted a team of two doctors to carry out the compliance verification/ inspection of the College. The central team conducted the verification inspection on 11.07.2008 and submitted its report to the Deputy Secretary, Ministry of Health and Family Welfare, New Delhi on 10.07.2008. The central team pointed out the following deficiencies:

"(i) The shortage of teaching staff was found more than 11% (13 out of 116) as under:

(a) Professor

(b) Associate Professor – 7

(c) Asstt. Professor – 2

(d) Tutor – NIL

(e) Sr. Resident – 1

(f) Jr. Resident – 1

(ii) The faculty members holding same post were getting different salaries. Some of faculty members were getting less salary than resident doctors. Some of the Junior Residents were old in age. Some of Sr. Residents presented with their declaration forms seemed to be specialists doing private practice, as they were in the town much before the inception of the College/Institution. Some of the area and buildings were under construction, which was not advisable in working in working areas."

9. The then Under Secretary, Ministry of Health and Family Welfare, New Delhi then sent a letter dated 27.07.2008 to the

Chairman of the College requesting him not to admit any fresh batch of MBBS students for the academic year 2008-09. The College was also advised to rectify the deficiencies and send compliance report for consideration for the academic year 2009-10 for further admission.

10. The Chairman of the College then filed a Writ Petition (C) No.294 of 2008 before this Court which was clubbed with other similar writ petitions filed by other medical colleges. This Court passed an order on 03.09.2008 directing the MCI to submit its recommendations to the Central Government within two days and Ministry of Health and Family Welfare was directed to consider the issue of grant of permission within a week. Further it was also directed that the College be given an opportunity of being heard by the Ministry of Health and Family Welfare, New Delhi.

11. The MCI, in the meantime, conducted yet another inspection of the College on 19.08.2008 and the MCI team submitted its report to the Secretary, MCI again pointing out the following deficiencies:

"(i) The shortage of teaching staff was found to be 23.68% (27 out of 114):-

Professor – 3

Associate Professor -13

Asstt. Professor - 5

Tutor – 5

(ii) The shortage of resident was found to be 20.9% (17 out of 81):-

Sr. Resident – 5

Jr. Resident – 12"



12. The MCI report was then placed before the Executive Committee and the MCI in its meeting held on 21.08.2008, decided to inform the Central Government not to renew the permission for admission of the 3rd batch of students for the academic year 2008-09. The decision of the Executive Committee was communicated to the Central Government vide its letter dated 04.09.2008 with reference to the order passed by this Court on 03.09.2008 in Writ Petition (C) No.294 of 2008, filed the College.

13. The Under Secretary, Ministry of Health and Family Welfare, New Delhi then sent a letter dated 09.09.2008 to the Chairman of the College to appear before the Deputy Secretary, (Medical Education), Ministry of Health and Family Welfare, New Delhi on 10.09.2008 along with the compliance report and other documents mentioned in the order passed by this Court on 03.09.2008. The Chairman of the College then appeared, as directed, on 10.09.2008. The Under Secretary, Ministry of Health and Family Welfare, New Delhi then issued a letter to the Chairman of the College intimating that after considering the facts submitted by the College at the time of personal hearing and the recommendations of the MCI, it was decided by the Ministry not to grant renewal of permission for admission of 3rd batch of MBBS students for the academic year 2008-09.

14. The Chairman of the College then vide his letter dated 12.09.2008, addressed to the Secretary, Medical Education, Ministry of Health and Family Welfare, New Delhi requested him to grant permission for 50 students of MBBS for the academic session 2008-09. The Ministry of Health and Family Welfare, New Delhi again constituted a central team and deputed the team to inspect the College and submit a report by 25.09.2009 positively. The two doctors then conducted inspection of the College on 25.09.2008 and submitted the report on 26.09.2008 to the Ministry of Health and Family Welfare on the same day. On the basis of that report the Central Government issued a

letter dated 26.09.2008 according sanction for renewal of permission for admission of 3rd batch of 100 students for the academic year 2008-09.

15. On receipt of the said letter dated 12.09.2008 from the Chairman of the College, the Under Secretary, Ministry of Health and Family Welfare, wrote a letter on 24.09.2008 to the Secretary, MCI requesting to furnish their recommendations regarding reduced intake. The Secretary, MCI, in turn, intimated that on the basis of the deficiencies pointed out by the MCI team during the inspection of the College on 19.08.2008 the College was grossly lacking facilities even for admission of 50 students.

16. MCI team, it is seen, constituted yet another Committee to conduct an inspection of the College on 01.10.2008 and a report was submitted to the MCI on the same day pointing out various deficiencies. The report was submitted to the Executive Committee of MCI in its meeting held on 06.10.2008 and the Committee took a decision to inform the Central Government not to renew the permission for the academic year 2008-09 and urge the Central Government to recall the letter of permission dated 26.09.2008 issued to the College. The decision of the Executive Committee of the MCI was communicated to the Central Government vide its letter dated 06.10.2008.

17. We have noticed that the Central Government had accorded approval for 3rd batch of 100 students for the academic year 2008-09 on 26.09.2008, despite the repeated negative recommendations made by the MCI and before the grant of permission on 26.09.2008, the MCI was not even consulted. We have indicated the facts to show the situation that prevailed in the year 2008-09 and the manner in which permission was accorded for intake of 100 students by the Central Government.

18. The MCI, following its decision taken on 04.06.2013,



vide its letter dated 20.06.2013 decided to convey its approval for renewal of permission for admission for the second batch of MBBS students against the increased intake i.e. from100 to 150 seats to the College for the academic year 2013-14. The approval was granted taking into consideration of the assessment report dated 26/27-02-2013 submitted to the Board of Governors of MCI subject to certain conditions which are extracted herein below:

> "I am further directed to inform that you and your institution are fully responsible to fulfill and maintain norms including the infrastructure both physical and human resource, teaching faculty and clinical material, etc. throughout the academic year, as stipulated in Regulation of Medical Council of India. In case false/wrong declaration or fabricated documents have been used for procuring permission of the Board of Governors for the increased intake and the said misconduct is brought to notice or comes to the knowledge of MCI at any stage during the current academic year, your institution is not liable to be considered for renewal of permission against increased intake for the next academic year and this renewal of permission against the increased intake for the next academic year and this renewal of permission against the increased intake is also liable to be revoked for current academic year. Besides, MCI is entitled to take all such measures against you and your college/institution as permissible under the law."

19. The MCI, in the meantime, received a confidential letter dated 11.07.2013 from the Central Bureau of Investigation (for short "the CBI") informing that the CBI has registered a case against the Chairman of the College and officers of the Ministry of Health and Family Welfare, New Delhi under Section 120B IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short "the PC Act"). Charge-sheet was also enclosed along with the letter, which

was placed before the Board of Governors of the MCI in its meeting held on 12.07.2013. The Board then revoked its decision dated 04.06.2013 and communicated the same to the College vide its letter dated 20.06.2013. The Board of Governors of the MCI informed the College that the letter of permission accorded for renewal of admission of the 2nd batch of students against the increased intake i.e. from 100 to 150 for the academic year 2013-14 would stand revoked with immediate effect.

20. The legality of that decision, as already indicated, is the main issue that arises for consideration in this writ petition.

21. Shri Mukul Rohtagi, learned senior counsel appearing for the petitioners submitted that the letter dated 13.07.2013 revoking the permission granted for admission for the increased intake was mala fide and in violation of the principles of natural justice. Learned senior counsel submitted that a right has already been accrued to the petitioners by virtue of the decision taken by the MCI on 04.06.2013, which was communicated to the College vide its letter dated 20.06.2013. Learned senior counsel submitted that such a decision was validly taken on the inspection report dated 26/27.02.2013. Learned senior counsel submitted that since the College has complied with all the conditions stipulated in the Regulations and that there is no deficiency, as reported by the inspection team, there is no justification in revoking the permission already granted, that too, without giving the petitioners an opportunity of being heard. Learned senior counsel also submitted that mere fact that the CBI has registered a case against few officers of the Ministry of Health and Family Welfare, New Delhi and also against the Chairman of the College is not a ground at all to revoke the permission already granted for the additional intake of students for the academic year 2013-14 since the College has satisfied all the requirements under the Regulations for Establishment of Medical College Regulations, 1999. Learned senior counsel also submitted that even though the Chairman of the College



has been charge-sheeted, that itself is not a ground to revoke the letter of permission accorded by the Board of Governors, unless he has been convicted by a court of competent jurisdiction in a criminal investigation. Learned senior counsel made a reference to Regulations 3(5) of the "Enhancement of Annual Intake Capacity in Under-graduate Courses in Medical College for the Academic Session 2013-14 Only Regulation, 2013 (for short "the Regulation 2013).

22. Shri Amrendra Sharan, learned senior counsel appearing for the students submitted that on the basis of the decision of the MCI dated 20.06.2013, 21 students have already secured admission in the College by 10th July, 2013, since they were allotted the College after successfully competing the U.P. Combined Medical Entrance Test (for short "the UPCMET) and the decision taken by the MCI on 13.07.2013 would have serious consequences so far as the students are concerned since they would not be able to get admission in any other private institution for this academic year. Learned senior counsel also submitted that the College has facilitated as per the University Grants Commission (UGC) Regulations and there is no justification in not permitting the students to continue with their study in the College even if there was some infirmity in the grant of permission granted by the Central Government for the additional intake during the year 2008-09.

23. Shri Amit Kumar, learned counsel appearing for the Medical Council of India, on the other hand, justified the decision taken by the MCI on 13.07.2013. Learned counsel submitted that the MCI has the power to revoke its earlier decision taken on 04.06.2013 if sufficient materials have been brought to its knowledge which have got a vital bearing in the matter of conduct of courses in the College. Learned counsel also submitted and referred to the letter dated 20.06.2013 and pointed out that permission was accorded subject to certain conditions and those conditions have been violated by the

College. Learned counsel submitted that as per clause 8(3)(1)(d) of the Establishment of Medical Regulations (Amendment 2010 Part II), the MCI has got the power not to renew the permission/recognition, if it is observed later that any institute is found to have acted on fake/forged documents, such an institute could not be considered for renewal of permission/ recognition for the post-graduate courses for two years i.e for the academic year and the next academic year also. Hence, the decision taken by the MCI revoking the letter of permission for renewal of admission of the 2nd batch of students against the increased intake from 100 to 150 students for the academic year 2013-14 was justified.

24. We may notice with concern the unprecedented growth of the Technical and Medical Institutions in this country which has resulted in widespread prevalence of various unethical practices. Collection of large amount by way of capitation fee running into crores of rupees for MBBS and Post-Graduate seats, exorbitant fee, donation etc, by many of such self financing institutions, has kept the meritorious financially poor students away from those institutions. Pressure, it is also seen, is being extended by various institutions, for the additional intake of students, not always for the benefit of the student community and thereby serve the community, but for their own betterment.

25. We are not commenting upon the acceptability, or otherwise, of the charges leveled against the Minister, bureaucrats or the Chairman of the College. But the fact remains, the CBI after conducting an investigation had to charge-sheet them under Section 120B, 468, 471 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act. CBI's investigation prima facie establishes the criminal conspiracy between the Chairman of the College and the then Union Minister of Health and Family Welfare, Government of India, New Delhi along with the then Deputy Secretary, Ministry of Health and Family Welfare, New Delhi, two doctors, one is the



head of Nephrology VMMV and Safdarjung Hospital and the other is Professor of Department of Community Medicine, VMMC and Safdarjung Hospital, New Delhi which lead to the issuance of the order passed for the additional intake of 50 students for the academic year 2008-09 on 26.09.2008. For the prosecution of both the doctors necessary prior sanction was obtained from the competent authority by the CBI.

26. The CBI, in its charge-sheet, points out serious infirmities in the report submitted by the central team, which conducted the inspection of the College on 25.09.2008, which are as follow:

> "The above chart clearly proves that accused Dr. Vindu Amitabh and accused Dr. S.K.Rasania were party to the larger conspiracy and they deliberately by way of limiting the shortage of faculty to 2% in their report; had glossed over the glaring deficiencies in the strength of the faculty members (15% i.e. 17 out of 115) and thereby, facilitated the private College in getting permission of the Central Govt.
>
> Their involvement in the criminal conspiracy is further established by the fact that during the inspection they did not ask the faculty members as to whether they (faculty members) were full timers or part-timers/merely called to make up the members for the purpose of inspection. The investigation has established that at least 5 doctors, namely, Dr. Harbeer Singh Sodhi, Dr. Anil Madan, Dr. Birendra Kumar Sinha, Dr. Jamaludin and Dr. Shiv Nath Banerjee, who have been shown as full time faculty members and residents in the records of Rohilkhand Medical College, Bareily during 2008, have confirmed that they had never worked as full-timers in the said College during 2008, but were rather, visiting faculty. These facts prove that the inspection report of accused Dr. Vindu Amitabh and accused Dr. S.K. Rasania was perfunctory and biased in favour to the private Medical College.

The investigation further disclosed that accused Dr. Vindu Amitabh and accused Dr. S.K. Rasania have claimed to have done personal inspection of the wards and the departments. In their inspection report, they mentioned that the presence (of patients in the OPDs of all Departments was good, the bed occupancy was about 90% and that the ICU was full to its capacity. However, during the investigation , physical verification of 14 patients, who were shown present in the OPD registers on the date of inspection, i.e. 25.09.2003, was got conducted through the Postal Deptt. on the random basis. It was revealed that 09 of them were fake or non-existent. The claim of the accused doctors of the Central Team of having done personal inspection of the wards and the departments, which was one of the important criteria, on the basis of which they gave a green signal to the College, thus turns out to be devoid of merit and a falsehood.

The investigation further revealed that the Central Team comprising of accused Dr. Vindu Amitabh and accused Dr. S.K. Rasania has stated in its report that it accepted the photocopies of the declaration forms, submitted to MCI, for verification. During the investigation, it has been revealed that declaration forms are provided by the College concerned, include details of all faculty members, their educational qualification, appointment letter, identification documents (like PAN card, etc.) documents in support of their residence in the Medical College (like ration card, in order to certify their being permanent faculty members there).

During the investigation, 5 so called faculty members (Dr. Harbeer Singh Sodhi, Dr. Anil Madan, Dr. Birendra Kumar Sinha, Dr. Jamaludin and Dr. Shiv Nath Banerjee) have stated that they used to be called only for the inspections of the said College. They were at best, visiting faculty members. Incidentally, the MCI rules have not



provision for part-timers or visiting faculty members. Though the said 5 doctors have owned their signatures on their Declaration Forms, they have denied receiving the appointment letters shown to be annexed with their respective declaration forms. They have also stated that the ration cards, residential certificates, Form-16 (Income Tax) etc. shown as having been issued in their names, were never given to them. Besides, it has been found that they are all bogus/fake and forged, as they (the doctors) were neither resident on the addresses shown in the records nor had they ever applied for any ration card. The District Supply Officer, Bareilly has denied their issuance and confirmed that the said ration cards are fake and forged. It is pertinent to mention that the fake ration cards have been used by the College authorities to falsely establish before the MCI Inspectors that th said doctors were their permanent faculty members. Similarly no Form-16 was ever issued to them by the College.

The investigation further disclosed that in case of the aforesaid doctors, the appointment letters were issued in their name by the College authorities without their knowledge and the details of appointments do not even bear the signatures of their doctors/employees of the College in the acceptable column. This proves the fabrication and use of (forged) documents by the College authorities, for the purpose of obtaining the approval of Govt. of India on the recommendations of MCI/Central Team deputed by GOI. However, the accused doctors i.e. Dr. Vindu Amitabh and Dr. S.K. Rasania of the Central Team in pursuance of the criminal conspiracy did not confirm the genuineness of the documents put up by the College authorities and without verifying the documents accepted photocopies of the Declaration Forms and furnished a positive report in favour of the College on the very next day. It is pertinent to mention that despite mentioning about the presence of such doctors, who were

even practicing in Bareilly and the non-production of the original appointment letters, even when asked for, the said Central Team still went ahead to give a clean chit to the College. "

27. We can also take judicial notice of the fact that many a times the medical colleges and engineering colleges and others are being established after availing large amounts by way of loans from the financial institutions and other borrowings, with no funds of their own, and once the college gets approval and students are admitted, loan availed of is being repaid from the capitation fee charged from the students and ultimately that amount constitute their capital. Many a times, even without any sufficient facilities they put pressure on the various agencies and the Central Government and get approval overlooking the regulatory authority, like MCI, which adversely affects the quality of medical education in this country. For instance, the MCI has taken in the instant case a consistent view and sent negative reports to the Central Government, but overlooking all the reports submitted by the MCI, the Central Government got a report of its own and granted permission vide its letter dated 26.09.2008. CBI in its charge-sheet has categorically and clearly reported that this was done on the basis of bogus, fake and forged records. CBI noticed that the college authorities had produced fabricated and forged documents before the inspection team and the team failed to verify the correctness or otherwise of those documents. CBI investigation has revealed that fraud has been practiced by the Central team as well as the college to get the sanction for the 3rd batch of MBBS students for the academic year 2008-09.

**DUTY OF INSPECTION TEAM:**

28. The Medical Council Act, 1956, especially Section 10A, mandates that when a new medical college is to be established or the number of seats to be increased, the permission of the Central Government is a pre-requisite. Section 19A obliges the MCI to prescribe minimum required standards for medical



education and the recommendation made by MCI to the Central Government carry considerable weight, it being an Expert Body. MCI had prescribed the regulation – "Minimum Standard Requirements for the Medical College for 100 Admissions Annually Regulations, 1999" which is germane for our case, was published in the Gazette of India dated 29.1.2000. In order to verify the minimum requirements, MCI gets the inspection conducted by Inspectors, who are experts, submit their reports on the availability of the staff - teaching and residents - and other infrastructural facilities, clinical availability, etc. as per the regulations.

29. We notice, in this case, constantly on all the occasions, the MCI Team decided to recommend to the Central Government not to renew permission for admission of the third batch for the academic year 2008-09. Consistent stand of the MCI was communicated to the Central Government on various occasions, but without even ascertaining their view, a Central Team was appointed, got a favourable report and permission was accorded by the Central Government for the year 2008-09, which was the subject matter of CBI investigation.

30. We have now to examine the legality of decision of the MCI taken on 13.07.2013 in the light of the above factual and legal scenario. We have already indicated that when sanction was accorded on 20.06.2013 it was categorically stated by the MCI that the same was accorded subject to certain conditions. It was stated therein that in case false/wrong declaration or fabricated documents have been used for procuring permission of the Board of Governors of the increased intake and if said misconduct was brought to the notice or comes to the knowledge of the MCI, at any stage during the current academic year (2013-14) institution/college would not be liable to be considered for renewal of the permission against increased intake for the next academic year and that renewal of permission against the increased intake for the academic year 2013-14 and for the next academic year and the same would be liable to be revoked.

31. Having received the letter of the CBI as well as the charge-sheet the impugned order dated 13.07.2013 was issued by the MCI revoking the letter of permission granted for the academic year 2013-14.

32. We are of the view that the above decision taken by the MCI is in accordance with the Establishment of Medical Colleges Regulation (Amendment 2010 Part II). The above-mentioned Regulation was issued by the MCI in exercise of its powers under Section 33 of the IMC Act, 1956 with the previous sanction of the Central Government. Clause 8.3 of the Regulation deals with the Grant of Permission, sub-clause 8(3)(1)(d) deals with the colleges which are found to have employed teachers with faked/forged documents. Those provisions are extracted herein below:

> "8(3)(1)(d) Colleges which are found to have employed teachers with faked/forged documents:
>
> If it is observed that any institute is found to have employed a teacher with faked/forged documents and have submitted the Declaration Form of such a teacher, such an institute will not be considered for renewal of permission/recognition for award of M.B.B.S. degree/ processing the applications for postgraduate courses for two Academic Years – i.e. that Academic Year and the next Academic Year also.
>
> However, the office of the Council shall ensure that such inspections are not carried out at least 3 days before upto 3 days after important religious and festival holidays declared by the Central/State Government."

33. Learned senior counsel for the petitioner, as already indicated, submitted that only if the Chairman of the College is convicted by a court of competent jurisdiction in a criminal investigation then only the sanction accorded could be revoked. Such an argument was raised relying upon 2013 Regulations,



which in our view, would not apply to the facts of this case. Regulation 3 of Regulations 2013 reads as follow:

> **"3. Eligibility to make application :** (1) the application for enhance of annual intake capacity in the existing Medical Colleges may be made by the recognizations 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 enhance 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 Colleges 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."

34. Clause (2) of Regulation 3 clearly states that only such medical colleges shall be eligible under these Regulations that enjoy minimum 10 years of standing from the date of grant of initial letter of permission by the Central Government. So far as the petitioner is concerned, they have completed only eight years, consequently, Regulations 2013 would not apply to them.

35. The petitioners are governed by Establishment of Medical Colleges Regulations, (Amendment), 2010 (Part II), especially clause 8(3)(1)(d), in the event of which, when MIC finds that the college has employed fake/forged documents for renewal of permission/recognition for processing applications etc., that institute will not be able to be considered for renewal of permission/ recognition for award of MBBS Degree/ processing the application for post-graduate courses for two academic years i.e. that academic year and the next academic year. In this case, CBI letter was received on 11.07.2013 by the MCI and it was placed before the Board of Governors on 12.07.2013 and the revocation order was passed on 13.07.2013 revoking the renewal of permission for the 2nd batch of students against the increased intake from 100 to 150 students for the academic year 2013-14.

36. We are of the considered view that the MCI need not wait till the culmination of the trial initiated on the basis of the charge-sheet filed by the CBI. The investigation by a premier agency like the CBI has prima facie revealed that the college has used fake and forged materials to get sanction for the intake for the year 2008-09, in our view, that is sufficient for the MCI to take action in accordance with the Regulations 8(1)(3)(d) of Regulations 2013.

37. We are also not impressed by the argument raised by Mr. Amrendra Sharan, learned senior counsel appearing for the students that they have already joined the course on 10.07.2013. The information brochure issued by the UPCMET refers to two



important dates. The important dates are the date of results declaration as 15.06.2013 and counseling would start after 15.07.2013. If that be so, we fail to see how students could be admitted on 10.07.2013. Counsel, however, made reference to the newspaper 'Dainik Jagran' where it is indicated that the first counseling would be on July 5, 2013. We cannot give sanctity to that news items compared to the information brochure published by the U.P. Unaided Medical Colleges Welfare Association for the conduct of UPCMET. Even otherwise, in our view, once the medical council finds that the sanction had been obtained on the basis of fake and forge documents, clause 8(3)(1)(d) kicks in and the fraud unravels everything. We make it clear that the criminal case charge-sheeted by the CBI will, however, be disposed of uninfluenced by observations, if any, made by us in this judgment.

**COURT'S CONCERN**

38. We think, this is an apt occasion to ponder over whether we have achieved the desired goals, eloquently highlighted by the Constitution Bench judgments of this Court in *T.M.A. Pai Foundation and others v. State of Karnataka and others* (2002) 8 SCC 481 and *P.A. Inamdar and others v. State of Maharashtra and others* (2005) 6 SCC 537. TMA Pai Foundation case (supra) has stated that there is nothing wrong if the entrance test being held by self financial institutions or by a group of institutions but the entrance test they conduct should satisfy the triple test of being fair, transparent and not exploitative. *TMA Pai Foundation* (supra) and *Inamdar* (supra) repeatedly stated that the object of establishing an educational institution is not to make profit and imparting education is charitable in nature. Court has repeatedly said that the common entrance test conducted by private educational institutions must be one enjoined to ensure the fulfillment of twin object of transparency and merits and no capitation fee be charged and there should not be profiteering. Facts, however, give contrary picture. In Inamdar, this Court, in categorical terms, has

declared that no capitation fee be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee.

39. The CBI's investigation, however, reveals a sorry state of affairs, which is an eye-opener for taking appropriate remedial measures in future so that medical education may attain the goals envisaged by the IMC Act and the Regulations and serve the community. CBI had to charge-sheet none other than the then Union Minister of Health and Family Welfare, itself which depict how the educational system in this country is deteriorating. Many of regulatory bodies like MCI, AICTE, UGC etc. were also under serious clout in the recent years. CBI, in the year 2010, had to arrest the President of the MCI for accepting bribe to grant recognition to one Medical College in Punjab. Later, it is reported that the CBI found that the President of the MCI and its family members possessed disproportionate assets worth of 24 crores. We have referred to these instances only to indicate the falling standards of our educational system at the highest level, sometime even at the level of the Central Government making a serious inroad to the right to life guaranteed to the citizens of the country under Article 21 of the Constitution of India.

40. Mushrooming of large number of medical, engineering, nursing and pharmaceutical colleges, which has definitely affected the quality of education in this country, especially in the medical field which call for serious introspection. Private medical educational institutions are always demanding more number of seats in their colleges even though many of them have no sufficient infrastructural facilities, clinical materials, faculty members, etc. Reports appear in every now and then that many of the private institutions which are conducting medical colleges are demanding lakhs and sometimes crores of rupees for MBBS and for post-graduate admission in their respective colleges. Recently, it is reported that few MBBS seats were sold in private colleges of Chennai. We cannot lose sight of the fact that these things are happening in our country irrespective of



the constitutional pronouncements by this Court in TMA Pai Foundation that there shall not be any profiteering or acceptance of capitation fee etc. Central Government, Ministry of Health and Family Welfare, Central Bureau of Investigation or the Intelligence Wing have to take effective steps to undo such unethical practices or else self-financing institutions will turn to be students financing institutions.

41. We notice that the current policy of the Central Government in the higher education is to provide autonomy of institutions, but adoption of unfair practices is a serious violation of the law. Few States, like Karnataka, Tamil Nadu, Andhra Pradesh, Maharashtra, Kerala, Delhi etc. have passed some legislation to prohibit demand/collection of capitation fee which have no teeth, the institutions who indulges in such practices can get away by paying some fine, which is meager.

42. We, therefore, emphasise the extreme necessity of a Parliamentary Legislation for curbing these unfair practices, which is the demand of our society. "The Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and University Bill, 2010" has already been presented to both the Houses of Parliament. It is reported that the States have welcomed such a legislation, but no further follow up action has been taken. We are confident, earnest efforts would be made to bring in proper legislation, so that unethical and unfair practices prevalent in higher technical and medical institutions can be effectively curbed in the larger public interest.

43. We, therefore, find no good reason to invoke Article 32 of the Constitution of India and none of the fundamental rights guaranteed to the petitioners stand violated. The Petition, therefore, lacks merits and is dismissed.

R.P. Writ Petition dismissed.

BHANWAR LAL & ANR.
*v.*
RAJASTHAN BOARD OF MUSLIM WAKF & ORS.
(Civil Appeal No. 7902 of 2013)

SEPTEMBER 9, 2013

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

*Rajasthan Wakf Act, 1995:*

*s. 85 read with ss. 5,6 and 7 – Bar of jurisdiction of civil court – Jurisdiction of Tribunal – Explained – Held: In the instant case, the suit is for cancellation of sale deed, rent and for possession as well as rendition of accounts and for removal of trustees — Suit for possession and rent as also for cancellation of sale deed is to be tried by civil court — However, suit pertaining to removal of trustees and rendition of accounts would fall within the domain of the Tribunal — Since the suit was filed much before the Act came into force, the civil court, where the suit was filed, will continue to have the jurisdiction over the issue and would be competent to decide the same – Jurisdiction.*

**The property in dispute being in the possession of the petitioners, respondent no. 1, the Rajasthan Board of Muslim Wakf and Respondent No. 2 the Muslim Board Committee, claiming it to be a wakf property, filed a civil suit for possession of the said property and for rendition of accounts as also for a declaration to the effect that the sale deed dated 28.2.1983 in favour of the petitioners was invalid. The petitioners contested the suit, and all the parties led their evidence. When the matter was ready for final hearing, on 2.12.2000, respondents Nos. 1 and 2 filed an application u/s 85 of the Rajasthan Wakf Act, 1995 contending that the jurisdiction of the civil court having been barred, the suit could not be tried by it and prayed**





**that the plaint be returned to be presented before the Tribunal constituted under the Act. The application was allowed. The revision petition filed by the petitioners was dismissed by the High Court relying upon the judgment in *Syed Inamul Haq Shah's*[1] case.**

**Allowing the appeal, the Court**

**HELD: 1.1. As per sub-s. (1) of s.7 of the Rajasthan Wakf Act, 1995, the question whether a particular property specified as wakf property in a list of wakfs is wakf property or not has to be decided by the Tribunal and its decision is made final; and the jurisdiction of civil court stands concluded to decide such a question in view of specific bar contained in s.85. The subject matter of a suit which can be filed before the Tribunal, relates to the list of Wakfs as published in s.5. If any dispute arises in respect of the said list, namely, whether the property specified in the said list is Wakf property or not or it is Shia wakf or Sunni wakf, suit can be filed for decision on these questions. However, as per sub-s. (5) of s.7, if a suit or proceeding subject matter whereof is covered by sub-s.(1) of s.6, is already pending in a civil court before the commencement of the Act, then such proceedings before the civil court would continue and the Tribunal would not have any jurisdiction. [para 11 and 15] [730-F-H; 733-E-F]**

**1.2. On a conjoint reading of s.7 and s.85 of the Act, legal position is summed up as under:**

**(i) In respect of the questions/ disputes mentioned in sub-s. (1) of s.7, exclusive jurisdiction vests with the Tribunal, having jurisdiction in relation to such property.**

**(ii) Decision of the Tribunal thereon is made final.**

1. *Syed Inamul Haq Shah vs. State of Rajasthan* and Anr. AIR 2001 Raj 19.

**(iii) The jurisdiction of the civil court is barred in respect of any dispute/ question or other matter relating to any wakf, wakf property or other matter, which is required by or under the Act, to be determined by a Tribunal,**

**(iv) There is however an exception made u/s 7(5) viz., those matters which are already pending before the civil court, even if the subject matter is covered under sub-s. (1) of s. 6 , the jurisdiction of civil court would continue and the Tribunal shall have no the jurisdiction to determine those matters. [para 12] [731-A-E]**

*Sardar Khan and Os*. vs. *Syed Nazmul Hasan (Seth) and Ors*. **2007 (3) SCR 436 = 2007 (4) Scale 81= 2007(10) SCC 727;** *Ramesh Gobindram (Dead) Through LRs* v. *Sugra Humayun Mirza Wakf*; **2010 (10) SCR 945 = 2010 (8) SCC 726; and** *Board of Wakf, West Bengal & Anr.* v. *Anis Fatma Begum & Anr*. **2010 (13) SCR 1063 = (2010) 14 SCC 588 – relied on.**

*Syed Inamul Haq Shah* vs. *State of Rajasthan and Anr*. **AIR 2001 Raj 19 – stood overruled.**

**1.3. In the instant case, the suit is for cancellation of sale deed, rent and for possession as well as rendition of accounts and for removal of trustees. However, pleading in the suit have not been filed before this Court and, therefore, exact nature of relief claimed as well as averments made in the plaint or written statements are not known. Some of the reliefs claimed in the suit appear to be falling within the exclusive jurisdiction of the Tribunal whereas for other reliefs civil suit would be competent. However, the legal position may be clarified in that going by the ratio of *Ramesh Gobind Ram*, suit for possession and rent is to be tried by the civil court. But, suit pertaining to removal of trustees and rendition of**



**accounts would fall within the domain of the Tribunal. In so far as relief of cancellation of sale deed is concerned this is to be tried by the civil court for the reason that it is not covered by s.6 or 7 of the Act. Moreover, relief of possession, which can be given by the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the issue of sale deed and possession are inextricably mixed with each other. Since the suit was filed in the year 1980, i.e. much before the Act came into force, going by the dicta laid down in *Sardar Khan*, the civil court, where the suit was filed, will continue to have the jurisdiction over the issue and would be competent to decide the same. [para 13 and 23] [731-E; 740-E-H; 741-A-C]**

**1.4. The impugned judgment of the High Court is set aside. The application filed by the respondents is dismissed. [para 24] [741-C-D]**

**Case Law Reference:**

| | | |
|---|---|---|
| **AIR 2001 Raj 19** | **stood overruled** | **para 6** |
| **2010 (13) SCR 1063** | **relied on** | **para 7** |
| **2007 (3) SCR 436** | **relied on** | **para 16** |
| **2010 (10) SCR 945** | **relied on** | **para 17** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7902 of 2013.

From the Judgment & Order dated 21.04.2006 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Civil Revision No. 419 of 2001.

B.D. Sharma, N. Vyas, S.C. Verma, Mukti D., Ved P. Arya for the Appellant.

S. Wasim A. Qadri, Zaid Ali, Tamim Qadri, Lakshmi Raman Singh for the Respondents.

The Judgment of the Court was delivered by

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

2. The question that needs determination in the present appeal is as to whether Civil Court lacks the jurisdiction to entertain the suit filed by the respondent herein or the subject matter of the suit lies within the exclusive jurisdiction of the Tribunal constituted under the Rajasthan Wakf Act, 1995 (hereinafter to be referred as the 'Act'), having regard to the provisions of Section 85 of the Act. Though the suit was filed by the Respondent in the Civil Court, it is on the application of the Respondent itself stating that the suit was not maintainable in view of the bar contained in Section 85 of the Act, the Civil Court returned the plaint accepting the said contention of the Respondent. The Petitioners herein, who were the Defendants in the suit, challenged the order of the Civil Court by filing Revision Petition under Section 115 of the Code of Civil Procedure in the High Court of Judicature for Rajasthan, at Jodhpur. The said Revision Petition is also dismissed by the impugned orders. It is how the present proceedings arise, questioning the validity of the orders of the High Court.

3. The facts around which the controversy is involved do not require big canvass and are re-capitulated herein below:

The property in dispute which is the subject matter of litigation, is situated in the town of Nagaur in the State of Rajasthan and is in the possession of the petitioners herein. Respondent No. 1 is the Rajasthan Board of Muslim Wakf and Respondent No. 2 is the Muslim Board Committee. Both the Respondents claimed that the subject property is the Wakf Property. These Respondents, filed the Civil Suit in the year 1980 for possession of the said property as well as for rendition of accounts against the petitioners herein claiming it to be a wakf property. On coming to know, after filing of the suit, that one trustee Mr. Naimuddin S/o Abdul Bari had sold the property to the petitioners vide sale deed dated 28.2.1983, the



Respondent Nos. 1 & 2 amended the plaint by adding the relief of declaration to the effect that the said sale deed dated 28.2.1983 was invalid.

4. The Petitioners filed the written statement and contested the suit raising number of defences. The Trial Court, i.e. the Additional District Judge, framed the following issues on 4.8.1984:

(i) Whether Haveli and the land of compound including the land underneath the measurements of which have been given in paragraph-3 of the plain, are Wakf Property?

(ii) Whether the sale deed executed by Defendant No. 1 in favour of Defendant No. 3 regarding the Haveli and the land of the compound dated 22.06.1960 for Rs. 400/- is invalid because the property is Wakf Property?

(iii) Whether the sale deeds in favour of Defendants No. 4 and 5 are invalid with respect to Haveli and the land of the compound because the property is Wakf Property?

(iv) Whether the sale deed executed by defendant Naimuddin in favour of defendant No. 5 on 28.2.1983 is invalid.

(v) Whether the plaintiffs are entitled to file the present suit?

(vi) Whether the suit is barred by limitation?

(vii) Whether Court Fee insufficient?

(viii) Relief.

5. The suit, thereafter, went on trial. All the parties led their

evidence, though it took considerable time. When the matter was ready for final hearing, on 2.12.2000, the Respondent Nos. 1 & 2 filed the application under Section 85 of the Act raising the contention that the suit in question could not be tried by the Civil Court as the jurisdiction of the Civil Court was barred. Prayer was made that the plaint filed by them may be returned to be presented before the Tribunal constituted under the Act, which alone had the jurisdiction to try the suit.

6. Their application was allowed by the learned Additional District Judge vide orders dated 4.1.2001 holding that the question whether the property in question was Wakf Property or not, could be decided only by the Tribunal and Section 85 of the Act specifically barred the jurisdiction of Civil Court. In the Revision Petition filed by the petitioners challenging the validity of the orders of the Additional District Judge, the High Court has concurred with this view, stating that the position in law in this behalf was settled by the judgment of the Rajasthan High Court in *Syed Inamul Haq Shah* vs. *State of Rajasthan and Anr*.; AIR 2001 Raj 19. In the short order of two paragraphs referring to the aforesaid judgment, the Revision Petition has been dismissed.

7. Learned Counsel for the appellant, at the outset, drew our attention to the judgment of this Court whereby the said judgment of the High Court has been overruled. The judgment in this Court is reported as **2007 (10) SCC 727** titled *Sardar Khan and Os. vs. Syed Nazmul Hasan (Seth) and Ors*. He, thus submitted that since the very foundation of the impugned judgment stood demolished in view of overruling of the said judgment by this Court, the order of the High Court needs to be set aside.

8. To this extent submission of the learned Counsel for the appellant is correct. As pointed above, without any discussion of its own, the High Court has simply relied upon its earlier judgment in Syed Inamul Haq (supra) and dismissed the



Revision Petition. Therefore, while setting aside the impugned order, we could have remitted the case back to the High Court to decide the Revision Petition afresh. However, learned Counsel for both the parties submitted that the question of jurisdiction be decided by this Court so that this aspect attains finality, more so when the lis is pending for quite some time. Conceding to this prayer of both the parties, we heard the matter on the aforesaid question in detail. We now propose to answer this question of jurisdiction, as formulated in the beginning.

9. We have already mentioned the subject matter of the suit filed by the Respondent Nos. 1 & 2 herein, which is predicated on the plea that the suit property is Wakf Property. On this basis it is pleaded in the suit that the sale deed in favour of the Petitioners is null and void as Mr. Naimuddin who purportedly executed sale deed dated 22.9.1983 in favour of the Petitioner No. 2 had no authority to do so. As a consequence, the Respondent Nos. 1 & 2 maintain that the petitioners are in unauthorized possession of the Property. Possession of the said property alongwith rendition of accounts are the other reliefs claims in the suit.

10. Rajasthan Wakf Act, 1995, governs the Wakf properties in the said State. The Tribunal is constituted under this Act and is *inter alia* empowered to determine suits regarding wakfs as laid down under Section 7 of the Act. Therefore, we would like to reproduce here Section 7 of the said Act.

**7. Power of Tribunal to determine disputes regarding wakfs –**

(1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the

mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that-

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs.

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provision of sub-section (5), no proceeding under this Section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be mad a party to any application under sub-section (1).

(4) The list of wakfs and where any such list is modified



in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced in a civil court under sub-section 91) of section 6, before the commencement of this Act or which is the subject matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be".

Section 85 of the Act barred the jurisdiction of the Civil Court to decide such issues. Section 85 reads as under:

**"85.** Bar of Jurisdiction of Civil Courts. – No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal".

11. As per Sub-section (1) and Section 7 of the Act, if any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, it is the Tribunal which has to decide such a question and the decision of the tribunal is made final. When such a question is covered under sub-section (1) of Section 7, then obviously the jurisdiction of the Civil Court stands concluded to decide such a question in view of specific bar contained in Section 85. It would be pertinent to mention that, as per sub-section (5) of Section 7, if a suit or proceeding is already pending in a Civil Court before the commencement of the Act in question, then such proceedings before the Civil Court would continue and the Tribunal would not have any jurisdiction.

12. On a conjoint reading of Section 7 and Section 85, legal position is summed up as under:

(i) In respect of the questions/ disputes mentioned in sub-section (1) of Section 7, exclusive jurisdiction vests with the tribunal, having jurisdiction in relation to such property.

(ii) Decision of the tribunal thereon is made final.

(iii) The jurisdiction of the Civil Court is barred in respect of any dispute/ question or other matter relating to any wakf, wakf property for other matter, which is required by or under this Act, to be determined by a tribunal,

(iv) There is however an exception made under Section 7(5) viz., those matters which are already pending before the Civil Court, even if the subject matter is covered under sub section (1) of section 6, the jurisdiction of Civil Court would continue and the tribunal shall have no jurisdiction to determine those matters.

13. Present suit was instituted in the year 1980, i.e. much before the Rajasthan Wakf Act, 1995 was enacted. Therefore, if the subject matter is covered by sub-section (1) of Section 6, the jurisdiction of Civil Court remains by virtue of Section 5 of the Act. To enable us to find an answer to this, the provisions of Section 5 and 6 also become relevant and need to be noticed at this juncture. Before that, we would like to state the scheme of chapter II of the Act which contains all these Sections including Section 7 Chapter II starts with Section 4.

14. Under Section 4 of the Act, power is given to the Survey Commissioner to conduct survey and make enquiries for discerning whether particular properties are wakf properties



or not. After making the enquiries, the Survey Commissioner, who is given the powers of Civil Court under the Code of Civil Procedure in respect of certain matters specified under Section 4 (4) of the Act, makes a report to the State Government. On receipt of such a report under sub-section (3) of section 4 of the Act, the State Government has to forward a copy of the same to Wakf Board as stipulated under Section 5(1) of the Act. The Wakf Board is required to examine this report, as provided under sub-section (2) of section 5 of the Act and is to publish in the official gazette a list of Sunni wakfs or Shia wakfs in the State, whether in existence at the commencement of this Act or coming into existence thereafter. If any dispute arises in respect of wakfs list which is published in the official gazette under section 5 of the Act, the Board or the mutawalli of the wakf or any person interested therein is given a right to institute a suit in a tribunal. This remedy is provided under Section 6 of the Act, Section 6 of the Act which reads as under:

Xxxxxx

**"6. Disputes regarding wakfs. –**

(1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a tribunal for the decision of the question and the decision of the tribunal in respect of such matter shall be final.

Provided that no such suit shall be entertained by the tribunal afer the expiry of one year from the date of the publication of the list of wakfs.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the

pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in sub-section (1)".

15. The subject matter of the suit which can be filed before the tribunal, relates to the list of Wakfs as published in Section 5. If any dispute arises in respect of the said list namely whether the property specified in the said list is Wakf property or not or it is Shia wakf or Sunni wakf, suit can be filed for decision on these questions. Sub-section (5) of section 7 saves the jurisdiction of those suits, subject matter whereof is covered by sub- section (1) of section 6, which were instituted before the commencement of said suit. Keeping in view this legal framework, we have to answer this issue that has arisen.

16. Before we deal with controversy at hand, we would like to discuss some judgments of this Court that may have bearing on the issue.

First case that needs mention is *Sardar Khan and Ors*. vs. *Syed Nazmul Hasan (Seth) and Ors*.; 2007 (4) Scale 81; 2007 (10) SCC 727. In that case Civil Suit was filed by the plaintiffs (Respondents in the Supreme Court) in the year 1976



in the Court of Additional District Judge, Jaipur which was dismissed. The plaintiffs filed the appeal before the High Court taking the plea that by virtue of Section 85 of the Act, the Civil Court failed to have any jurisdiction in the matter and, therefore, judgment and decree passed by the learned Additional District Judge was without jurisdiction. This appeal was allowed accepting the contention of the Respondents. Challenging the order of the High Court, the appellants had filed the Special Leave Petition in which leave was granted and the appeal was heard by this Court. The Court took into consideration the provisions of Sections 6, 7 and 85 of the Act and concluded that the said Act will not be applicable to the pending suits or proceedings or appeals or revisions which had commenced prior to 1.1.1996 as provided in sub-section (5) of Section 7 of the Act and allowed the appeal holding that Civil Court will continue to have the jurisdiction in respect of the cases filed before coming into force Wakf Act, 1995.

17. The provisions of Andhra Pradesh Wakf Act, 1995 which are identical in nature, came up for consideration again in the case of *Ramesh Gobindram (Dead) Through LRs v. Sugra Humayun Mirza Wakf*; 2010 (8) SCC 726. The question which was posed for determination was:

"Whether the Wakf Tribunal constituted under Section 83 of the Act, 1995 was competent to entertain and adjudicate upon disputes regarding eviction of the appellants who are occupying different items of what are admittedly wakf properties?"

18. Suits for eviction were filed before the Wakf Tribunal which had held that it had the jurisdiction to entertain those suits and after adjudication had decreed the suits filed by the Respondent – Sugra Humayun Mirza Wakf. The tenants/ appellant filed revision petitions against that order before the High Court of Andhra Pradesh which dismissed the revision petition, affirming the view of the Wakf Tribunal regarding its jurisdiction. Against the order of the High Court, the appellant

approached this Court. The Court noticed that in few judgments High Court of Andhra Pradesh had taken the view that the Tribunal established under Section 83 of the Wakf Act is competent to entertain and adjudicate upon all kinds of disputes so long as the same relate to any Wakf Property. Similar views were expressed by the High Court of Rajasthan, Madhya Pradesh, Kerala as well as Punjab and Haryana High Court. However, in the judgments rendered by the High Courts of Karnataka, Madras, Allahabad and Bombay a contrary view was taken. This Court, after detailed analysis of the provisions of the Act, affirmed the view taken by the High Court of Karnataka and other High Courts and held that the judgment of the High Court of Andhra Pradesh etc. was incorrect in law. It was categorically noted that the Tribunal established under Section 83 of the Act had the limited jurisdiction to deal only with those matters which had been provided for in Section 5, Section 6(5), Section 7 and 85 of the Act and the jurisdiction of Civil Court to deal with matters not covered by these Sections was not ousted in respect of other matters. The court exhaustively dealt with the provisions of Sections 6 and 7 of the Act in order to determine the scope of jurisdiction of the Tribunal. It noted that the plain reading of sub-section (5) of section 6 (supra) would show that the civil court's jurisdiction to entertain any suit or other proceedings stands specifically excluded in relation to any question referred to in sub-section(1). The exclusion, it is evident from the language employed, is not absolute or all pervasive. It is limited to the adjudication of the questions (a) whether a particular property specified as wakf property in the list of wakfs is or is not a wakf property, and (b) whether a wakf specified in such list is a shia wakf or sunni wakf. It was also expressed that from a conjoint reading of the provisions of Sections 6 and 7 of the Act, it is clear that the jurisdiction to determine whether or not a property is a wakf property or whether a wakf is a shia wakf or a sunni wakf rests entirely with the Tribunal and no suit or other proceeding can be instituted or commenced in a civil court in relation to any such question after the commencement of the Act. What is



noteworthy is that under Section 6 read with Section 7 of the Act, the institution of a suit in the civil court is barred only in regard to questions that are specifically enumerated therein. The bar is not complete so as to extend to other questions that may arise in relation to the wakf property. It further noted that under Section 85 of the Act, the civil court's jurisdiction is excluded only in cases where the matter in dispute is required under the Act to be determined by the Tribunal. The words "which is required by or under this Act to be determined by a Tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the civil court. The Court thus, concluded that the jurisdiction of civil courts to try eviction cases was not excluded. Rather, the aforesaid provisions of the Act did not include such disputes to fall within the jurisdiction of the Wakf Tribunal, and therefore the Wakf Tribunal did not have the jurisdiction to deal with eviction matters. For better appreciation of the issue decided in the said judgment, we reproduce hereunder the relevant discussion:

> "31. It is clear from sub-section (1) of Section 83 above that the State Government is empowered to establish as many Tribunals as it may deem fit for the determination of any dispute, question or other matter relating to a wakf or wakf property under the Act and define the local limits of their jurisdiction. Sub – section (2) of Section 83 permits any mutawalli or other person interested in a wakf or any person aggrieved of an order made under the Act or the Rules framed there under to approach the Tibunal for determination of any dispute, question or other mater relating to the wakf. What is important is that the Tribunal can be approached only if the person doing so is a mutawalli or a person interested in a wakf or aggrieved by an order made under the Act or the Rules. The remaining provisions of Section 83 provide for the

procedure that the Tribunal shall follow and the manner in which the decision of a Tribunal shall be executed. No appeal is, however, maintainable against any such order although the High Court may call for the records and decide about the correctness, legality or propriety of any determination made by the Tribunal.

32. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the civil courts extends (sic) beyond what has been provided for in Section 6(5), Section 7 and Section 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the civil courts stands completely excluded by reasons of such establishment.

33. It is noteworthy that the expression "for the determination of any dispute, question or to her matter relating to a wakf or wakf property " appearing in Section 83(1) also appears in Section 85 of the Act. Section 85 does not, however, exclude the jurisdiction of civil courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. Section 85 in terms provides that the jurisdiction of the civil court shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal.

34. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before



a civil court. If it is not, the jurisdiction of the civil court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the civil court would stand excluded.

35. In the cases at hand, the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the civil court and not before the Tribunal.

19. It would also be profitable to refer to that part of the judgment where the Court gave guidance and the need for a particular approach which is required to deal with such cases. In this behalf the Court specified the modalities as under:

"11. Before we take up the core issue whether the jurisdiction of a civil court to entertain and adjudicate upon disputes regarding eviction of (sic from) wakf property stands excluded under the Wakf Act, we may briefly outline the approach that the courts have to adopt while dealing with such questions.

12. The well-settled rule in this regard is that the civil courts have the jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of the civil courts to try suits of civil nature is very expansive. Any statute which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a civil court. Any such exception cannot be readily inferred by the courts. The court would lean in favour of a

construction that would uphold the retention of jurisdiction of the civil courts and shift the onus of proof to the party that asserts that the civil court's jurisdiction is ousted.

13. Even in cases where the statute accords finality to the orders passed by the Tribunals, the court will have to see whether the Tribunal has the power to grant the reliefs which the civil courts would normally grant in suits filed before them. If the answer is in the negative, exclusion of the civil court's jurisdiction would not be ordinarily inferred. In *Rajasthan SRTC v. Bal Mukund Bairwa*, a three-Judge Bench of this Court observed

"There is a presumption that a civil court has jurisdiction. Ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where the jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or tribunal acts without jurisdiction."

20. Another aspect of this Act came up for consideration in the case of *Board of Wakf, West Bengal & Anr. v. Anis Fatma Begum & Anr*. (2010) 14 SCC 588. The subject matter of the dispute in that case related to the demarcation of the wakf property in two distinctive parts, one for wakf-al-al-aulad and the remaining portion for pious and religious purposes. The demarcation was challenged on the ground that it was not in consonance with the provisions of the Wakf Deed. The Court held that it is the Tribunal constituted under Section 83 of the Act which will have exclusive jurisdiction to deal with these questions in as much as these questions pertained to determination of disputes relating to wakf property and the jurisdiction of Civil Court was ousted.

21. As per the ratio in *Ramesh Gobindram* (Supra) the



exclusive jurisdiction lies with the Tribunal to decide only those disputes which are referred to in section 6 and 7. Further, jurisdiction of Civil Courts is barred only in respect of such matters and the matters which are not covered by Section 6 and 7 of the Act. Moreover, in view of the judgment in *Sardar Khan's* case, the suits which are already pending before coming into force the Wakf Act, 1995 will remain in civil court which will continue to have jurisdiction.

22. On the basis of the aforesaid principles we proceed to discuss the present case. Interestingly, as per the Respondents themselves there is no dispute that the property in question is a wakf property. It is argued by the learned Counsel for the Respondents that even before the trial court, the appellant had accepted that the disputed property is wakf property (Though issues framed suggest otherwise). This is so recorded in para 3 of the orders passed by the trial court while deciding the application of the respondent for returning of the plaint.

23. The suit is for cancellation of sale deed, rent and for possession as well as rendition of accounts and for removal of trustees. However, pleading in the suit are not filed before us and, therefore, exact nature of relief claimed as well as averments made in the plaint or written statements are not known to us. We are making these remarks for the reason that some of the reliefs claimed in the suit appeared to be falling within the exclusive jurisdiction of the Tribunal whereas for other reliefs civil suit would be competent. Going by the ratio of *Ramesh Gobind Ram* (supra), suit for possession and rent is to be tried by the civil court. However, suit pertaining to removal of trustees and rendition of accounts would fall within the domain of the Tribunal. In so far as relief of cancellation of sale deed is concerned this is to be tried by the civil court for the reason that it is not covered by Section 6 or 7 of the Act whereby any jurisdiction is conferred upon the Tribunal to decided such an issue. Moreover, relief of possession, which can be given by

the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the issue of sale deed and possession and inextricably mixed with each other. We have made these observations to clarify the legal position. In so far as present case is concerned, since the suit was filed much before the Act came into force, going by the dicta laid down in Sardar Khan case, it is the civil court where the suit was filed will continue to have the jurisdiction over the issue and civil court would be competent to decide the same.

24. We, thus, allow the appeal and set aside the impugned judgment of the High Court thereby dismissing the application filed by the respondent under Order 7 Rule 10 of the C.P.C. with the direction to the civil court to decide the suit.

25. No costs.

R.P. Appeal allowed.



MAHARASHTRA EKTA HAWKERS UNION AND ANOTHER

*v.*

MUNICIPAL CORPORATION, GREATER MUMBAI AND OTHERS

(Civil Appeal Nos. 4156-4157 of 2002 etc.)

AND

I.A.Nos.266-285, 288-289, 294-299, 304-309, 312-321 & 324-335

SEPTEMBER 9, 2013.

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

*HAWKER MATTERS:*

*'Hawker' - Connotation of - Explained.*

*Street vendors - Held: -- Till an appropriate legislation is enacted by Parliament or any other competent legislature, and is brought into force, the salient provisions of National Policy on Urban Street Vendors, 2009, as enumerated in the Order, should be implemented throughout the country - Further directions issued for facilitating implementation of the 2009 Policy - As regards the order of Supreme Court staying the hearing of writ petitions pending before High Courts and directing to obtain any clarification/modification from the Court, the parties, whose applications have remained pending before Supreme Court, shall be free to institute appropriate proceedings including petition under Art. 226 of the Constitution, in the jurisdictional High Court.*

*Bombay Hawkers' Union vs. Bombay Municipal Corporation* **1985 (1) Suppl. SCR 849 = (1985) 3 SCC 528,** *Sodan Singh vs. New Delhi Municipal Committee* **1989 (3) SCR 1038 = (1989) 4 SCC 155,** *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai* **2003 (6) Suppl. SCR 581 = (2004) 1 SCC 625,** *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai* **2007 (2) SCR 448 = (2009) 17 SCC 151,** *Maharashtra Ekta*

*Hawkers Union vs. Municipal Corporation, Greater Mumbai* **(2009) 17 SCC 231;** *Saghir Ahmad vs. State of U.P.* **1955 SCR 707 = AIR 1954 SC 728 - referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1985 (1) Suppl. SCR 849** | **referred to** | **Para 5** |
| **1989 (3) SCR 1038** | **referred to** | **Para 5** |
| **2003 (6) Suppl. SCR 581** | **referred to** | **Para 5** |
| **2007 (2) SCR 448** | **referred to** | **Para 5** |
| **(2009) 17 SCC 231** | **referred to** | **Para 5** |
| **1955 SCR 707** | **referred to** | **Para 6** |

CIVIL APPEAL JURISDICTION : Civil Appeal Nos. 4156-4157 of 2002.

From the Judgment and Order dated 05.07.2000 and 02.08.2000 of the High Court of Judicature at Bombay, in Writ Petition No. 621 of 1999.

WITH

C. A. Nos. 4161-4162 of 2002.

C. A. Nos. 4175-4176 of 2002.

I.A. No. 266-285, 288-289, 294-299, 304-309, 3112-321 & 324-335.

In

C. A. Nos. 4156-4157 of 2002.

I.A.Nos.7-8 in Civil Appeal Nos. 4161-4162 of 2002.

I.A. Nos. 16-17 in Civil Appeal Nos. 4175-4176 of 2002.

G.E. Vahanvati, AG, Brijender Chahar, Shyam DIvan, Pallav Shishodia, Anand Grover, Sushil Kumar Jain, Puneet Jain, Ram Singh, Anjani Aiyagari, T.A. Khan, Harish Kaushik, Madhvi Divan, D. Bharat Kumar, J.J. Xavier, Bhargava V. Desai, Shreyas Mehrotra, Mihir Samson, Suraj Sanad, Prashant Bhushan, Ramesh K. Mishra, Sunita Sharma, Satya



Siddiqui, Shivaji M. Jadhav, Prity Kunwar, Ajay Marwah for the appearing parties.

The Order of the Court was delivered by

**G.S. SINGHVI, J.** 1. A street vendor / hawker is a person who offers goods for sale to the public at large without having a permanent structure / place for his activities. Some street vendors / hawkers are stationary in the sense that they occupy space on the pavements or other public / private places while others are mobile in the sense that they move from place to place carrying their wares on push carts or in baskets on their heads.

2. In last four decades, there has been manifold increase in the number of street vendors / hawkers in all major cities in the country. One of the many factors responsible for this phenomena is unabated growth of population without corresponding increase in employment opportunities. The other factor is the migration of rural population to the urban areas. A large section of the rural population has been forced to leave their habitat because of massive acquisition of land and substantial reduction in the number of cottage industries, which offered source of livelihood to many people in the rural areas and even those living in the peripheries of the urban areas. In recent past, many lakh youngsters have moved from the rural areas to the cities with the hope of getting permanent source of livelihood but a substantial number of them have become street vendors / hawkers because their expectations have been belied. One reason which has contributed to this scenario is that unlike other sections of the urban population, they neither have the capacity and strength to demand that the Government should create jobs for them nor do they engage in begging, stealing or extortion. They try to live with dignity and self-respect by doing the work as street vendors / hawkers.

3. The importance of street vendors and hawkers can be measured from the fact that millions of urban poor across the country procure their basic necessities mainly from street

vendors / hawkers because the goods, viz., cloths, hosiery items, plastic wares, household items, food items, etc., sold on pavements or through push carts, etc., are cheap. The lower income groups also spend a large proportion of their income in purchasing goods from street vendors / hawkers.

4. Unfortunately, the street vendors / hawkers have received raw treatment from the State apparatus before and even after the independence. They are a harassed lot and are constantly victimized by the officials of the local authorities, the police, etc., who regularly target them for extra income and treat them with extreme contempt. The goods and belongings of the street vendors / hawkers are thrown to the ground and destroyed at regular intervals if they are not able to meet the demands of the officials. Perhaps these minions in the administration have not understood meaning of the term "dignity" enshrined in the preamble of the Constitution.

5. The constant threat faced by the street vendors / hawkers of losing their source of livelihood has forced them to seek intervention of the Courts across the country from time to time. In last 28 years, this Court has struggled to find a workable solution of the problems of street vendors / hawkers on the one hand and other sections of society including residents of the localities / places where street vendors / hawkers operate and delivered several judgments including *Bombay Hawkers' Union vs. Bombay Municipal Corporation (1985) 3 SCC 528, Sodan Singh vs. New Delhi Municipal Committee* (1989) 4 SCC 155, *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai* (2004) 1 SCC 625, *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai* (2009) 17 SCC 151, *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai* (2009) 17 SCC 231 (this order was passed on 30.07.2004 but was printed in the journal only in 2009) and *Gainda Ram vs. Municipal Corporation of Delhi* (2010) 10 SCC 715, but the situation has not changed in last four decades. Rather, the problem has aggravated because of lackadaisical attitude of



the administration at various levels and the legislative instruments made many decades ago have become totally ineffective.

6. In *Sodan Singh vs. New Delhi Municipal Committee* (supra), L.M.Sharma, J., who authored the main judgment, referred to a number of precedents including *Saghir Ahmad vs. State of U.P.* AIR 1954 SC 728 and observed.

> "17. So far as right of a hawker to transact business while going from place to place is concerned, it has been admittedly recognised for a long period. Of course, that also is subject to proper regulation in the interest of general convenience of the public including health and security considerations. What about the right to squat on the roadside for engaging in trading business? As was stated by this Court in *Bombay Hawkers' Union v. Bombay Municipal Corporation* (1985) 3 SCC 528 the public streets by their nomenclature and definition are meant for the use of the general public: they are not laid to facilitate the carrying on of private business. If hawkers were to be conceded the right claimed by them, they could hold the society to ransom by squatting on the busy thoroughfares, thereby paralysing all civic life. This is one side of the picture. On the other hand, if properly regulated according to the exigency of the circumstances, the small traders on the sidewalks can considerably add to the comfort and convenience of general public, by making available ordinary articles of everyday use for a comparatively lesser price. An ordinary person, not very affluent, while hurrying towards his home after day's work can pick up these articles without going out of his way to find a regular market. If the circumstances are appropriate and a small trader can do some business for personal gain on the pavement to the advantage of the general public and without any discomfort or annoyance to the others, we do not see any objection to his carrying on the business. Appreciating this analogy the municipalities of different

cities and towns in the country have been allowing such traders. The right to carry on trade or business mentioned in Article 19(1)(g) of the Constitution, on street pavements, if properly regulated cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and for no other use. Proper regulation is, however, a necessary condition as otherwise the very object of laying out roads - to facilitate traffic - may be defeated. Allowing the right to trade without appropriate control is likely to lead to unhealthy competition and quarrel between traders and travelling public and sometimes amongst the traders themselves resulting in chaos. The right is subject to reasonable restrictions under clause (6) or Article 19. If the matter is examined in its light it will appear that the principle stated in Saghir Ahmad case (1955) 1 SCR 707:AIR 1954 SC 728 in connection with transport business applies to the hawkers' case also. The proposition that all public streets and roads in India vest in the State but that the State holds them as trustee on behalf of the public, and the members of the public are entitled as beneficiaries to use them as a matter of right, and that this right is limited only by the similar rights possessed by every other citizen to use the pathways, and further that the State as trustee is entitled to impose all necessary limitations on the character and extent of the user, should be treated as of universal application."

(Emphasis supplied)

In his concurring opinion, Kuldip Singh, J. made the following observations:

"33. In India there are large number of people who are engaged in the business of "street trading". There is hardly a household where hawkers do not reach. The housewives wait for a vegetable vendor or a fruit seller who conveniently delivers the daily needs at the doorstep. The petitioners before us are street traders of Delhi and New



Delhi areas. Some of them have licences/Tehbazari from Municipal Corporation of Delhi/New Delhi Municipal Committee but most of them are squatters. There is practically no law regulating street trading in Delhi/New Delhi. The skeletal provisions in the Delhi Municipal Corporation Act, 1957 and the Punjab Municipal Act, 1911 can hardly provide any regulatory measures to the enormous and complicated problem of street trading in these areas.

35. Street trading being a fundamental right has to be made available to the citizens subject to Article 19(6) of the Constitution. It is within the domain of the State to make any law imposing reasonable, restrictions in the interest of general public. This can be done by an enactment on the same lines as in England or by any other law permissible under Article 19(6) of the Constitution. In spite of repeated suggestions by this Court nothing has been done in this respect. Since a citizen has no right to choose a particular place in any street for trading, it is for the State to designate the streets and earmark the places from where street trading can be done. Inaction on the part of the State would result in negating the fundamental right of the citizens. It is expected that the State will do the needful in this respect within a reasonable time failing which it would be left to the courts to protect the rights of the citizens."

7. In *Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai* (supra), which was decided on 9.12.2003, a two Judge Bench referred to the judgments in *Olga Tellis vs. Bombay Municipal Corporation* (1985) 3 SCC 545, *Sodan Singh vs. New Delhi Municipal Committee* (supra), the recommendations made by the Committee constituted pursuant to an earlier judgment and observed:

"10. The above authorities make it clear that the hawkers have a right under Article 19(1)(g) of the Constitution of

India. This right, however, is subject to reasonable restrictions under Article 19(6). Thus hawking may not be permitted where, e.g. due to narrowness of road, free flow of traffic or movement of pedestrians is hindered or where for security reasons an area is required to be kept free or near hospitals, places of worship etc. There is no fundamental right under Article 21 to carry on any hawking business. There is also no right to do hawking at any particular place. The authorities also recognize the fact that if properly regulated, the small traders can considerably add to the convenience and comfort of the general public, by making available ordinary articles of everyday use for a comparatively lesser price. The scheme must keep in mind the above principles. So far as Mumbai is concerned, the scheme must comply with the conditions laid down in *Bombay Hawkers' Union* case (1985) 3 SCC 528. Those conditions have become final and there is no changed circumstance which necessitates any alteration."

The Court then enumerated the following restrictions and conditions subject to which the hawkers could do business in Mumbai:

"(1) An area of 1 m × 1 m on one side of the footpath wherever they exist or on an extreme side of the carriageway, in such a manner that the vehicular and pedestrian traffic is not obstructed and access to shops and residences is not blocked. We further clarify that even where hawking is permitted, it can only be on one side of the footpath or road and under no circumstances on both sides of the footpaths or roads. We, however, clarify that aarey/sarita stalls and sugarcane vendors would require and may be permitted an area of more than 1 m × 1 m but not more than 2 m × 1 m.

(2) Hawkers must not put up stalls or place any tables, stand or such other thing or erect any type of structure. They should also not use handcarts. However, they may protect



their goods from the sun, rain or wind. Obviously, this condition would not apply to aarey/sarita stalls.

(3) There should be no hawking within 100 metres from any place of worship, holy shrine, educational institutions and hospitals or within 150 metres from any municipal or other markets or from any railway station. There should be no hawking on footbridges and overbridges. Further, certain areas may be required to be kept free of hawkers for security reasons. However, outside places of worship hawkers can be permitted to sell items required by the devotees for offering to the deity or for placing in the place of worship e.g. flowers, sandalwood, candles, agarbattis, coconuts etc.

(4) The hawkers must not create any noise or play any instrument or music for attracting the public or the customers.

(5) They can only sell cooked foods, cut fruits, juices and the like. We are unable to accept the submission that cooking should be permitted. We direct that no cooking of any nature whatsoever shall be permitted. Even where cooked food or cut fruits or the like are sold, the food must not be adulterated or unhygienic. All Municipal Licensing Regulations and the provisions of the Prevention of Food Adulteration Act must be complied with.

(6) Hawking must be only between 7.00 a.m. and 10.00 p.m.

(7) Hawking will be on the basis of payment of a prescribed fee to be fixed by BMC. However, the payment of prescribed fee shall not be deemed to authorize the hawker to do his business beyond the prescribed hours and would not confer on the hawker the right to do business at any particular place.

(8) The hawkers must extend full cooperation to the municipal conservancy staff for cleaning the streets and footpaths and also to the other municipal staff for carrying on any municipal work. They must also cooperate with the other government and public agencies such as BEST Undertaking, Bombay Telephones, BSES Ltd. etc. if they require to lay any cable or any development work.

(9) No hawking would be permitted on any street which is less than 8 metres in width. Further, the hawkers also have to comply with the Development Control Rules, thus, there can be no hawking in areas which are exclusively residential and where trading and commercial activity is prohibited. Thus hawking cannot be permitted on roads and pavements which do not have a shopping line.

(10) BMC shall grant licences which will have photos of the hawkers on them. The licence must be displayed, at all times, by the hawkers on their person by clipping it on to their shirt or coat.

(11) Not more than one member of a family must be given a licence to hawk. For this purpose BMC will have to computerize its records.

(12) Vending of costly items e.g. electrical appliances, video and audio tapes and cassettes, cameras, phones etc. is to be prohibited. In the event of any hawker found to be selling such items his licence must be cancelled forthwith.

(13) In areas other than the non-hawking zones, licences must be granted to the hawkers to do their business on payment of the prescribed fee. The licences must be for a period of 1 year. That will be without prejudice to the right of the Committee to extend the limits of the non-hawking zones in the interests of public health, sanitation, safety, public convenience and the like. Hawking licences should



not be refused in the hawking zones except for good reasons. The discretion not to grant a hawking licence in the hawking zone should be exercised reasonably and in public interest.

(14) In future, before making any alteration in the scheme, the Commissioner should place the matter before the Committee who shall take a decision after considering views of all concerned including the hawkers, the Commissioner of Police and members of the public or an association representing the public.

(15) It is expected that citizens and shopkeepers shall participate in keeping non-hawking zones/areas free from hawkers. They shall do so by bringing to the notice of the ward officer concerned the presence of a hawker in a non-hawking zone/area. The ward officer concerned shall take immediate steps to remove such a hawker. In case the ward officer takes no action, a written complaint may be filed by the citizen/shopkeeper to the Committee. The Committee shall look into the complaint and if found correct, the Committee will with the help of police remove the hawker. The officer in charge of the police station concerned is directed to give prompt and immediate assistance to the Committee. In the event of the Committee finding the complaint to be correct it shall so record. On the Committee so recording an adverse remark re failure to perform his duty will be entered in the confidential record of the ward officer concerned. If more than three such entries are found in the record of an officer it would be a ground for withholding promotion. If more than six such entries are found in the records of an officer it shall be a ground for termination of service. For the work of attending to such complaints BMC shall pay to the Chairman a fixed honorarium of Rs 10,000 p.m.

(16) The scheme framed by us will have a binding effect on all concerned. Thus, apart from those to whom licences

will now be issued, no other person/body will have any right to squat or carry on any hawking or other business on the roads/streets. We direct that BMC shall bring this judgment to the notice of all courts in which matters are now pending. We are quite sure that the court(s) concerned shall then suitably vacate/modify its injunction/stay order."

8. By an order dated 30.07.2004, which is reported in (2009) 17 SCC 231 (*Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai*), the Court modified order dated 09.12.2003 and permitted handicapped persons who were granted licence for running PCOs/Aarey/Sarita stalls to continue to run those stalls even in non-hawking zones with the rider that no further or new licences be granted to any other person.

9. The matter did not stop there. The issue was again examined in the judgment reported in (2009) 17 SCC 151 (*Maharashtra Ekta Hawkers Union vs. Municipal Corporation, Greater Mumbai*). In that case, a two Judge Bench took cognizance of National Policy on Urban Street Vendors, 2004 and observed:

"41. After noticing the contents of the statements in the counter, we are happy to note that the State Government is initiating a process for implementation of National Policy on Urban Street Vendors by framing regulations as envisaged in Section 10.1 of the National Policy. We hope and trust that the State Government will pursue the matter with right earnest and bring it to logical conclusion within the time stipulated.

42. We clarify that the regulations so framed by the State would be in consonance with the aims and objects of the National Policy to render some sort of succour to the urban street vendors to eke out a living through hawking.

43. We also clarify that the State Government shall frame



regulations in order to solve the problem of hawkers independently without being influenced by any scheme framed by us or any direction issued by this Court in the interregnum. We further clarify that the schemes and directions issued by this Court are purely temporary in nature and subject to regulations framed by the State Government in terms of Section 10.1 of the National Policy on Urban Street Vendors. In other words, the schemes and directions issued by this Court shall be valid only till the regulations are framed and implemented."

The two Judge Bench also restrained all other Courts from interpreting its order or passing any order touching upon the subject matter dealt with by this Court. Simultaneously, hearing of the writ petitions pending before all the High Courts was stayed and it was ordained that if any clarification / modification is required then the same must be obtained from this Court.

10. In *Gainda Ram vs. Municipal Corporation of Delhi* (2010) 10 SCC 715, the problem was considered in the context of Delhi. After taking cognizance of the fact that various committees were set up by the administration to solve the problem of street vendors / hawkers, the Bench referred to the National Policy on Urban Street Vendors, 2009 (for short, 'the 2009 Policy'), the Master Plan of Delhi, 2012, the Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2009 prepared by the Government of India, Ministry of Housing and Urban Poverty Alleviation and observed:

"67. In the background of the provisions in the Bill and the 2009 Policy, it is clear that an attempt is made to regulate the fundamental right of street hawking and street vending by law, since it has been declared by this Court that the right to hawk on the streets or right to carry on street vending is part of fundamental right under Article 19(1)(g). However, till the law is made the attempt made by NDMC and MCD to regulate this right by framing schemes which are not statutory in nature is not exactly within the

contemplation of constitutional provisions discussed above. However, such schemes have been regulated from time to time by this Court for several years as pointed out above. Even, orders passed by this Court, in trying to regulate such hawking and street vending, is not law either. At the same time, there is no denying the fact that hawking and street vending should be regulated by law. Such a law is imminently necessary in public interest."

The Court also referred to the mechanism established by the Municipal Corporation of Delhi for redressing the grievance of the street vendors/hawkers and issued the following directions:

"77. In view of such schemes, the hawkers, squatters and vendors must abide by the dispute redressal mechanism mentioned above. There should not be any direct approach to this Court by way of fresh petitions or IAs, bypassing the dispute redressal mechanism provided in the schemes.

78. However, before 30-6-2011, the appropriate Government is to enact a law on the basis of the Bill mentioned above or on the basis of any amendment thereof so that the hawkers may precisely know the contours of their rights. This Court is giving this direction in exercise of its jurisdiction to protect the fundamental rights of the citizens.

79. The hawkers' and squatters' or vendors' right to carry on hawking has been recognised as a fundamental right under Article 19(1)(g). At the same time the right of the commuters to move freely and use the roads without any impediment is also a fundamental right under Article 19(1)(d). These two apparently conflicting rights must be harmonised and regulated by subjecting them to reasonable restrictions only under a law. The question is, therefore, vitally important to a very large section of people, mostly ordinary men and women. Such an issue cannot be left to be decided by schemes and which are monitored by this Court from time to time."



11. When these appeals and applications were taken up for hearing, Shri Prashant Bhushan, learned counsel representing some of the street vendors / hawkers produced Twenty Third Report of the Standing Committee on Urban Development (2012-2013) prepared in the context of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2012 and submitted that till Parliament enacts appropriate legislation for protecting the rights of the urban street vendors / hawkers, the Court may ordain implementation of the 2009 Policy with liberty to the parties to approach appropriate judicial forums for redressal of their grievance. They and learned counsel representing the municipal bodies / authorities, residents and others lamented that due to the restrictions imposed by this Court, no other Court is entertaining the grievance made by the street vendors / hawkers on the one hand and the residents of various colonies and other people on the other hand and this is the reason why dozens of interlocutory applications are being filed in this Court every year in the decided matters. They suggested that the embargo placed by this Court on the entertaining of writ petitions, etc., by the High Courts should be lifted and a direction be given that till the enactment of appropriate legislation by Parliament or any other competent legislature, the 2009 Policy should be implemented throughout the country. Shri Shyam Divan, learned senior counsel, extensively referred to some of the precedents and submitted that the Bombay High Court should be directed to specifically deal with the issue related to establishment of hawking and non-hawking zones so that the residents may not be adversely affected due to un-regulated street vending and hawking activities in different parts of the city of Mumbai.

12. Shri Pallav Shishodia, learned senior counsel appearing for the Municipal Corporation of Greater Mumbai argued that the street vendors / hawkers cannot be allowed to occupy public spaces at each and every place and the scheme

framed by the Corporation in compliance of the directions given by this Court does not require any modification. Shri Vijay Hansaria, Shri Anand Grover, learned Senior Advocates and Shri Sushil Kumar Jain and other learned counsel emphasized that this Court should direct the municipal authorities to accommodate all the street vendors / hawkers and stop their harassment, exploitation and victimization by the State agencies. Shri Prashant Bhushan emphasized that despite the directions given by this Court from time to time, including the interim order passed in relation to the street vendors / hawkers in Delhi, the concerned authorities are not allowing them to conduct their activities. He further argued that the street vendors / hawkers should be allowed to operate in accordance with the provisions of 2009 Policy and the concerned authorities should ensure that everybody is given licence for carrying out his / her activity. Learned counsel for the parties also suggested that the decision(s) of the Town Vending Committees should be published on regular intervals in print and electronic media and the internet and the High Courts should be asked to monitor implementation of various provisions of the 2009 Policy.

13. At the conclusion of hearing, the Court had given time to the parties to file written submissions / suggestions. On 7th August, 2013, Shri Prashant Bhushan, learned counsel for the applicants in IA Nos. 322-323 of 2013 and 324-325 of 2013 filed written suggestions. On 8th August, 2013, a written note was filed on behalf of Citizen Forum for Protection of Public Spaces (CitiSpace), which was allowed to act as intervenor in the special leave petitions filed by Maharashtra Ekta Hawkers Union.

14. We have considered the respective arguments / submissions. Learned counsel for the parties are ad-idem that the orders passed by this Court from time to time have not solved the problems of the street vendors / hawkers and the residents of the cities of Delhi and Mumbai and almost every year they have been seeking intervention of this Court by filing



interlocutory applications. The experience has, however, shown that it is virtually impossible for this Court to monitor day to day implementation of the provisions of different enactments and the directions contained in the judgments noted hereinabove. Therefore, it will be appropriate to lift the embargo placed on the entertaining of matters by the High Courts and we order accordingly. Paragraph 45 of the judgment reported in (2009) 17 SCC 151 shall stand modified and the street vendors / hawkers, the residents and others adversely affected by street vending / hawking shall henceforth be entitled to invoke the jurisdiction of the concerned High Courts for redressal of their grievance.

15. In *Gainda Ram's* case (paragraph 78), this Court had directed that appropriate Government should enact a law on or before 30th June, 2011. Once the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2012 becomes law, the livelihood of millions would be saved and they will get protection against constant harassment and victimization which has so far been an order of the day. However, till the needful is done, it will be apposite for the Court to step in and direct that the 2009 Policy, of which the salient provisions are extracted below, should be implemented throughout the country:

> "1.8 A centre piece of this Policy is the role of Town Vending Committee (henceforth referred to as TVC) to be constituted at City/Town level. A TVC shall be coordinated by a convener who should be nominated by the urban local body concerned. The Chairman of TVC will be the Commissioner/Chief Executive Officer of the concerned urban local body. The TVC will adopt a participatory approach and supervise the entire process of planning, organisation and regulation of street vending activities, thereby facilitating the implementation of this Policy. Further, it will provide an institutional mechanism for due appreciation of the ground realities and harnessing of local

knowledge for arriving at a consensus on critical issues of management of street vending activities. The TVC may constitute, in collaboration with the local authority, Ward Vending Committee to assist in the discharge of its functions.

1.9 This Policy adopts the considered opinion that there should not be any cut off date or limit imposed on the number of vendors who should be permitted to vend in any city/town, subject to registration of such vendors and regulation through the TVC. At any time, an urban poor person can decide that he or she would like to go to a wholesale market, purchase some items and sell these in vending zones during permitted hours to make an honest living. The vendor may not be subject to undue restrictions if he/she wishes to change the trade. In order to make this conceptual right a practically feasible right, the following would be necessary:

i) Vendor markets/outlets should be developed in which space could be made available to hawkers/vendors on a time-sharing model on the basis of a roster. Let us say that there are 500 such vending places in about a 100 new vendors' markets/push cart markets/motorized vending outlets. Let us also assume that there are 5,000 vendors who want to apply for a vending site on a time-sharing basis. Then by a simple process of mathematical analysis, a certain number of days or hours on particular days could be fixed for each vendor in a vending place on a roster basis through the concerned TVC.

ii) In addition to vendors' markets/outlets, it would be desirable to promote week-end markets in public maidans, parade grounds or areas meant for religious festivals. The week-end markets can be run on a first-come-first-serve basis depending on the number of vending sites that can be accommodated in the designated area and the number of vendors seeking



vending places. However, in order to be equitable, in case there is a heavy demand from vendors the number of week-ends a given vendor can be allocated a site on the first-come-first-serve basis can be restricted to one or two in a month depending on demand.

iii) A registered vendor can be permitted to vend in designated vending zones without restrictions, especially during non-rush hours. Again in places like verandahs or parking lots in areas such as central business districts, e.g. Connaught Place in New Delhi, vendors' markets can be organized after the closing of the regular markets. Such markets, for example, can be run from 7.30 PM to 10.30 PM as night bazaars on a roster basis or a first-come-first-serve basis, with suitable restrictions determined by the concerned TVC and authorities.

iv) It is desirable that all City/Town Master Plans make specific provisions for creating new vending markets at the time of finalization/revision of Master Plans, Zonal Plans and Local Area Plans. The space reserved in such plans should be commensurate with the current number of vendors and their rate of growth on perspective basis (say 10-20 years) based on rate of growth over a preceding 5-year period.

This Policy attempts to address some of the above concerns, keeping the interests of street vendors in view vis-à-vis conflicting public interests.

3. Objectives

3.1 Overarching Objective

The overarching objective to be achieved through this Policy is:

To provide for and promote a supportive environment for the vast mass of urban street vendors to carry out their

vocation while at the same time ensuring that their vending activities do not lead to overcrowding and unsanitary conditions in public spaces and streets.

3.2 Specific Objectives

This Policy aims to develop a legal framework through a model law on street vending which can be adopted by States/Union Territories with suitable modifications to take into account their geographical/local conditions. The specific objectives of this Policy are elaborated as follows:

a) Legal Status:

To give street vendors a legal status by formulating an appropriate law and thereby providing for legitimate vending/hawking zones in city/town master or development plans including zonal, local and layout plans and ensuring their enforcement;

b) Civic Facilities:

To provide civic facilities for appropriate use of identified spaces as vending/hawking zones, vendors' markets or vending areas in accordance with city/town master plans including zonal, local and layout plans;

c) Transparent Regulation:

To eschew imposing numerical limits on access to public spaces by discretionary licenses, and instead moving to nominal fee-based regulation of access, where previous occupancy of space by the street vendors determines the allocation of space or creating new informal sector markets where space access is on a temporary turn-by-turn basis. All allotments of space, whether permanent or temporary should be based on payment of a prescribed fee fixed by the local authority on the recommendations of the Town Vending Committee to be constituted under this



Policy;

d) Organization of Vendors:

To promote, where necessary, organizations of street vendors e.g. unions / co-operatives / associations and other forms of organizations to facilitate their collective empowerment;

e) Participative Processes:

To set up participatory processes that involve firstly, local authority, planning authority and police; secondly, associations of street vendors; thirdly, resident welfare associations and fourthly, other civil society organizations such as NGOs, representatives of professional groups (such as lawyers, doctors, town planners, architects etc.), representatives of trade and commerce, representatives of scheduled banks and eminent citizens;

f) Self-Regulation:

To promote norms of civic discipline by institutionalizing mechanisms of self-management and self-regulation in matters relating to hygiene, including waste disposal etc. amongst street vendors both in the individually allotted areas as well as vending zones/clusters with collective responsibility for the entire vending zone/cluster; and

g) Promotional Measures:

To promote access of street vendors to such services as credit, skill development, housing, social security and capacity building. For such promotion, the services of Self Help Groups (SHGs)/Co-operatives/ Federations/Micro Finance Institutions (MFIs), Training Institutes etc. should be encouraged.

4.2 Demarcation of Vending Zones

The demarcation of 'Restriction-free Vending Zones', 'Restricted Vending Zones' and 'No-vending Zones' should be city/town specific. In order to ensure that the city/town master/ development plans provide for adequate space for street vendors to run their activities, the following guidelines would need to be adhered to:

a) Spatial planning should take into account the natural propensity of street vendors to locate in certain places at certain times in response to the patterns of demand for their goods/services. For this purpose, photographic digitalized surveys of street vendors and their locations should be conducted by competent professional institutions/agencies. This is to be sponsored by the concerned Department of State Government/Urban Development Authority/Local Authority.

b) Municipal Authorities should frame necessary rules for regulating entry of street vendors on a time sharing basis in designated vending zones keeping in view three broad categories - registered vendors who have secured a license for a specified site/stall; registered street vendors in a zone on a time sharing basis; and registered mobile street vendors visiting one or the other vending zone;

c) Municipal Authorities should allocate sufficient space for temporary 'Vendors' Markets' (e.g. Weekly Haats, Rehri Markets, Night Bazaars, Festival Bazaars, Food Streets/ Street Food Marts etc.) whose use at other times may be different (e.g. public park, exhibition ground, parking lot etc.). These 'Vendors Markets' may be established at suitable locations keeping in view demand for the wares/ services of street vendors. Timing restrictions on vending should be in accordance with the need for ensuring non-congestion of public spaces/maintaining public hygiene without being ad hoc, arbitrary or discriminatory. Rationing of space should be resorted to if the number of street vendors exceeds the number of spaces available.



Attempts should also be made to provide ample parking areas for mobile vendors for security of their vehicles and wares at night on payment of suitable fees.

d) Mobile vending should be permitted in all areas even outside the 'Vendors Markets', unless designated as 'No-vending Zone' in the zonal, local area or layout plans under the master/development plan of each city/town. 'Restricted Vending' and 'No Vending Zones' may be determined in a participatory manner. 'Restricted Vending Zones' may be notified in terms of both location and time. Accordingly, a particular location may be notified as 'No-vending Zone' only at particular times of the day or days of the week. Locations should not be designated as 'No-vending Zones' without full justification; the public benefits of declaring an area/spot as 'No-vending Zone' should clearly outweigh the potential loss of livelihoods and non-availability of 'affordable' and 'convenient' access of the general public to street vendors.

e) With the growth of cities/towns in response to urbanization, the statutory plans of every new area should have adequate provision for 'Vending/hawking Zones' and 'Vendors Markets.'

4.5.1 Town Vending Committee

a) Designation or demarcation of 'Restriction-free Vending Zones'/ 'Restricted Vending Zones'/No-vending Zones' and Vendors' Markets should be carried out in a participatory manner by the Town Vending Committee, to be established at town/city level. A TVC should consist of the Municipal Commissioner/ Chief Executive Officer of the urban local body as Chairperson and such number of members as may be prescribed by the appropriate Government, representing firstly, local authority; planning authority and police and such other interests as it deems proper; secondly, associations of street vendors; thirdly,

resident welfare associations and Community Based Organisations (CBOs); and fourthly, other civil society organizations such as NGOs, representatives of professional groups (such as lawyers, doctors, town planners, architects etc.), representatives of trade and commerce, representatives of scheduled banks and eminent citizens. This Policy suggests that the representatives of street vendors' associations may constitute forty per cent of the number of the members of the TVC and the other three categories may be represented in equal proportion of twenty per cent each. At least one third of the representatives of categories of street vendors, resident welfare associations and other civil society organizations should be women to provide a gender focus in the TVC. Adequate/reasonable representation should also be provided to the physically challenged in the TVC. The process for selection of street vendors' representatives should be based on the following criteria:

- "Participation in membership-based organisations; and
- "Demonstration of financial accountability and civic discipline.

b) The TVC should ensure that the provision of space for vendors' markets are pragmatic, consistent with formation of natural markets, sufficient for existing demand for the street vendors' goods and services as well as likely increase in accordance with anticipated population growth.

c) The TVC should monitor the provision of civic facilities and their functioning in Vending Zones and Vendors' Markets and bring shortcomings, if any to the notice of the concerned authorities of the urban local body. The TVC should also promote the organisation of weekly markets, festival bazaars, night bazaars, vending festivals on



important holidays etc. as well as take up necessary improvement of infrastructure facilities and municipal services with the urban local body concerned.

4.5.2 The TVC shall perform the following functions:

a) Undertake periodic survey/census to assess the increase or decrease in the number of street vendors in the city/town/wards/localities;

b) Register the street vendors and ensure the issuance of Identity Cards to the street vendors after their preparation by the Municipal Authority;

c) Monitor the civic facilities to be provided to the street vendors in vending zones/vendors' markets by the Municipal Authority;

d) Assess and determine maximum holding capacity of each vending zone;

e) Work out a non-discretionary system and based on the same, identify areas for hawking with no restriction, areas with restriction with regard to the dates, days and time, and, areas which would be marked as 'No Vending Zones';

f) Set the terms and conditions for hawking and take corrective action against defaulters;

g) Collect fees or other charges as authorized by the competent civic authority;

h) Monitor to ensure that those allotted stalls/vending spots are actually using them and take necessary action to ensure that these are not rented out or sold to others;

i) Facilitate the organization of weekly markets, festival bazaars, night bazaars, vending festivals such as food festivals to celebrate important occasions/holidays

including city/town formation days etc; and

j) Ensure that the quality of products and services provided to the public is as per standards of public health, hygiene and safety laid down by the local authority.

4.5.4 Registration System for Street Vending

A system of registration of vendors/hawkers and non-discretionary regulation of their access to public spaces in accordance with the standards of planning and the nature of trade/service should be adopted. This system is described in greater detail below.

a) Photo Census of Vendors:

The Municipal Authority, in consultation with the TVC should undertake a comprehensive, digitalized photo census / survey / GIS Mapping of the existing stationary vendors with the assistance of professional organisations/experts for the purpose of granting them lease to vend from specific places within the holding capacity of the vending zones concerned.

b) Registration of Vendors:

The power to register vendors would be vested with the TVC. Only those who give an undertaking that they will personally run the vending stall/spot and have no other means of livelihood will be entitled for registration. A person will be entitled to receive a registration document for only one vending spot for him/her (and family). He/she will not have the right to either rent or lease out or sell that spot to another person.

c) New Entrants:

Those left out in the photo census or wishes to take up street vending for the first time will also have a right to apply



for registration as vendors provided they give a statement on oath that they do not have any other means of livelihood and will be personally operating from the vending spot, with help from family members.

d) Identity Cards:

Upon registration, the concerned Municipal Authority would issue an Identity Card with Vendor Code Number, Vendor Name, Category of Vendor etc. in writing to the street vendor, through the TVC concerned containing the following information:

(i) Vendor Code No.

(ii) Name, Address and photograph of the Vendor;

(iii) Name of any one Nominee from the family/and/or a family helper;

(iv) Nature of Business;

(v) Category (Stationary /Mobile); and

(vi) If Stationary, the Vending Location.

Children below 14 years would not be included in the Identity Card for conduct of business.

e) Registration Fee:

All vendors in each city/town should be registered at a nominal fee to be decided by the Municipal Authority concerned based on the photo census or any other reliable means of identification such as the use of biometric techniques.

f) Registration Process:

i) The registration process must be simple and

expeditious. All declarations, oath, etc. may be on the basis of self-declaration.

ii) There should preferably be no numerical restriction or quotas for registration, or prior residential status requirements of any kind.

iii) Registration should be renewed after every three years. However, a vendor who has rented out or sold his spot to another person will not be entitled to seek re-registration.

iv) There may be a "on the spot" temporary registration process on renewable basis, in order to allow the street vendors to immediately start their earnings as the registration process and issue of I-card etc. may take time.

5.1 If authorities come to the conclusion in any given instance that genuine public obstruction of a street, side walk etc. is being caused by street vending, there should be a mechanism of due notice to the street vendors. The vendors should be informed/warned by way of notice as the first step before starting the clearing up or relocation process. In the second step, if the space is not cleared within the notified time, a fine should be imposed. If the space is not cleared even after the notice and imposition of fine, physical eviction may be resorted to. In the case of vending in a 'No-vending Zone', a notice of at least a few hours should be given to a street vendor in order to enable him or her clear the space occupied. In case of relocation, adequate compensation or reservation in allotment of new vending site should be provided to the registered vendors.

5.2 With regard to confiscation of goods (which should happen only as a last resort rather than routinely), the street vendors shall be entitled to get their goods back within a reasonable time on payment of prescribed fee, determined by TVC.



6.6 Allotment of Space/Stationary Stalls

Stationary vendors should be allowed space/stalls, whether open or covered, on license basis after photo census/ survey and due enquiry in this regard, initially for a period of 10 years with the provision that only one extension of ten years shall be provided thereafter. After 20 years, the vendor will be required to exit the stationary stall (whether open or covered) as it is reasonably expected that the licensee would have suitably enhanced his/her income, thereby making the said stall available for being licensed to a person belonging to the weaker sections of society. Wherever vending stall/vending space is provided to a vendor on a lease basis for a certain number of years, care should be taken that adequate reservation is made for the SCs/STs in accordance with their share in the total population of the city. Similarly, priority should be given to physically challenged/disabled persons in the allocation of vending stalls/vending spaces as vending space can be a useful medium for rehabilitating physically challenged/ disabled persons. Further, a suitable monitoring system should be put in place by the TVC to ensure that the licensees of the stationary stalls do not sell/ let out their stalls.

6.7 Rehabilitation of Child Vendors

To prevent vending by children and seek their rehabilitation wherever such practice exists, in conformity with the Child Labour (Prohibition & Regulation) Act,1986, the State Government and Municipal Authorities should undertake measures such as sending the children to regular or bridge schools, imparting them skills training etc.

6.8 Promoting Vendors' Organisations

To enable street vendors to access the benefits of social security schemes and other promotional measures in an

effective manner, it is essential that the street vendors are assisted to form their own organizations. The TVC should take steps to facilitate the formation and smooth functioning of such organizations of street vendors. Trade Unions and other Voluntary Organisations should play an active role and help the street vendors to organise themselves by providing counseling and guidance services wherever required."

16. For facilitating implementation of the 2009 Policy, we issue the following directions:

(i) Within one month from the date of receipt of copy of this order, the Chief Secretaries of the State Governments and Administrators of the Union Territories shall issue necessary instructions/ directions to the concerned department(s) to ensure that the Town Vending Committee is constituted at city / town level in accordance with the provisions contained in the 2009 Policy. For the cities and towns having large municipal areas, more than one Town Vending Committee may be constituted.

(ii) Each Town Vending Committee shall consist of representatives of various organizations and street vendors / hawkers. 30% of the representatives from the category of street vendors / hawkers shall be women.

(iii) The representatives of various organizations and street vendors / hawkers shall be chosen by the Town Vending Committee by adopting a fair and transparent mechanism.

(iv) The task of constituting the Town Vending Committees shall be completed within two months of the issue of instructions by the Chief Secretaries



of the State and the Administrators of the Union Territories.

(v) The Town Vending Committees shall function strictly in accordance with the 2009 Policy and the decisions taken by it shall be notified in the print and electronic media within next one week.

(vi) The Town Vending Committees shall be free to divide the municipal areas in vending / hawking zones and sub-zones and for this purpose they may take assistance of experts in the field. While undertaking this exercise, the Town Vending Committees constituted for the cities of Delhi and Mumbai shall take into consideration the work already undertaken by the municipal authorities in furtherance of the directions given by this Court. The municipal authorities shall also take action in terms of Paragraph 4.2(b) and (c).

(vii) All street vendors / hawkers shall be registered in accordance with paragraph 4.5.4 of the 2009 Policy. Once registered, the street vendor / hawker, shall be entitled to operate in the area specified by the Town Vending Committee.

(viii) The process of registration must be completed by the municipal authorities across the country within four months of the receipt of the direction by the Chief Secretaries of the States and Administrators of the Union Territories.

(ix) The State Governments / Administration of the Union Territories and municipal and local authorities shall take all the steps necessary for achieving the objectives set out in the 2009 Policy.

(x) The Town Vending Committee shall meet every month and ensure implementation of the relevant

provisions of the 2009 Policy and, in particular, paragraph 4.5.1 (b) and (c).

(xi) Physically challenged who were allowed to operate PCO's in terms of the judgment reported in (2009) 17 SCC 231 shall be allowed to continue to run their stalls and sell other goods because running of PCOs. is no longer viable. Those who were allowed to run Aarey/Sarita shall be allowed to continue to operate their stalls.

(xii) The State Governments, the Administration of the Union Territories and municipal authorities shall be free to amend the legislative provisions and/or delegated legislation to bring them in tune with the 2009 Policy. If there remains any conflict between the 2009 Policy and the municipal laws, insofar as they relate to street vendors/hawkers, then the 2009 Policy shall prevail.

(xiii) Henceforth, the parties shall be free to approach the jurisdictional High Courts for redressal of their grievance and the direction, if any, given by this Court in the earlier judgments / orders shall not impede disposal of the cases which may be filed by the aggrieved parties.

(xiv) The Chief Justices of the High Courts are requested to nominate a Bench to deal with the cases filed for implementation of the 2009 Policy and disputes arising out of its implementation. The concerned Bench shall regularly monitor implementation of the 2009 Policy and the law which may be enacted by the Parliament.

(xv) All the existing street vendors / hawkers operating across the country shall be allowed to operate till the exercise of registration and creation of vending



/ hawking zones is completed in terms of the 2009 Policy. Once that exercise is completed, they shall be entitled to operate only in accordance with the orders/directions of the concerned Town Vending Committee.

(xvi) The provisions of the 2009 Policy and the directions contained hereinabove shall apply to all the municipal areas in the country.

17. The aforesaid directions shall remain operative till an appropriate legislation is enacted by Parliament or any other competent legislature and is brought into force.

18. The parties, whose applications have remained pending before this Court, shall be free to institute appropriate proceedings in the jurisdictional High Court. If so advised, the aggrieved person shall be free to file petition under Article 226 of the Constitution.

19. All the appeals and I.As are disposed of in the manner indicated above.

20. The Registry is directed to send copies of this order to the Chief Secretaries of all the States, Administrators of the Union Territories and Registrar Generals / Registrars (Judicial) of all the High Courts, who shall place the order before the Chief Justice for consideration and necessary directions.

R.P. Appeals and I.As. disposed of.

LONDHE PRAKASH BHAGWAN
*v.*
DATTATRAYA EKNATH MANE & ORS.
(Civil Appeal No. 7921 of 2013)

SEPTEMBER 10, 2013.

**[K.S. RADHAKRISHNAN AND PINAKI CHANDRA GHOSE, JJ.]**

*Delay/Laches:*

*Delay in filing appeal before School Tribunal – Appointment of Headmaster challenged belatedly – Held: If no time-limit has been prescribed in a statute to apply before appropriate forum, court has to be approached within a reasonable time – In the instant case, appointment of appellant was within the knowledge of respondent from day one, but he did not take any steps for a long time — Period of 9 years and 11 months, is an inordinate delay to pursue the remedy and that too without submitting any cogent reason therefor — Court has no power to condone the same in such a case — Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 – s. 9 – Appeal.*

**The appointment of the appellant as the Headmaster was approved in a meeting held on August 14, 1996, which was presided over by respondent No.1 as Officiating Headmaster. On August 16, 1996 the appellant was appointed on the said post. On July 11, 2007, respondent No.1 challenged the appointment of the appellant and filed an application for condonation of delay before the School Tribunal. By order dated 14-3-2007, the said application was dismissed by the School Tribunal, observing that respondent No.1 had denied himself the claim to the said post of Headmaster. The writ petition filed by respondent No. 1 was dismissed by the High**





**Court, but in the review petition it recalled the order and remanded the matter to the School Tribunal, holding that the provisions of limitation do not apply to appeals filed u/s 9(1)(b) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977.**

**Allowing the appeal, the Court**

**HELD: Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 gives a right to an employee of a private school who is aggrieved by an order of the Management in respect of dismissal, removal, termination, reduction in rank or supersession to prefer an appeal before the School Tribunal. If no time-limit has been prescribed in a statute to apply before the appropriate forum, in that case, he has to come before the court within a reasonable time. The period of 9 years and 11 months, is an inordinate delay to pursue the remedy of a person and without submitting any cogent reason therefor. The court has no power to condone the same in such a case. Furthermore, it is to be noted that appointment of the appellant was within the knowledge of respondent No.1 from day one but he did not take any steps for such a long time. In these circumstances, the order passed by the High Court is set aside and that of the Tribunal is affirmed. [para 7-8] [780-G-H; 781-B-D-G]**

*Cicily Kallarackal v. Vehicle Factory* **2012 (8) SCR 95 = 2012 (8) SCC 524,** *State of Orissa v. Mamata Mohanty* **2011 (2) SCR 704 =2011 (3) SCC 436 and** *K.R. Mudgal v. R.P. Singh* **1986 (3) SCR 993 =1986 (4) SCC 531, relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2012 (8) SCR 95** | **relied on** | **para 7** |
| **2011 (2) SCR 704** | **relied on** | **para 7** |
| **1986 (3) SCR 993** | **relied on** | **para 7** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7921 of 2013.

From the Judgment and Order dated 01.07.2010 of the High Court of Judicature of Bombay in Writ Petition No. 2462 of 2007.

Sudhanshu S. Choudhari for the Appellant.

Anil Kumar, Shankar Chillarge (for Asha Gopalan Nair) for the Respondents.

The Judgment of the Court was delivered by

**PINAKI CHANDRA GHOSE, J.** 1. Leave granted.

2. This appeal is directed against the order dated July 1, 2010 passed by the High Court of Judicature at Bombay whereby the High Court remanded the matter to the School Tribunal directing it to register the appeal and hear the same in accordance with law. The High Court felt that if an appeal is preferred against an order of supersession before the School Tribunal under Section 9(1)(b) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act (hereinafter referred to as 'the MEPS Act'), the provisions of limitation do not apply to such appeals and accordingly remanded the matter before the School Tribunal.

3. The appellant being aggrieved by the said order has preferred this appeal.

4. The facts of the case are as follows :

4.1. On August 16, 1996 the appellant was appointed as the Headmaster of Shri Chatrapati Shivaji Vidhyalaya run by Jijamata Shikshan Prasarak Mandal. Then respondent No.1 was acting as the in-charge Headmaster of the said School. The appointment of the appellant was approved in a meeting held on August 14, 1996 and the respondent



No.1 presided over the said meeting. On August 21,1996 such appointment of the appellant was duly approved by the Education Officer, after following due procedure. It appears from the facts that on July 11, 2007, respondent No.1, after a delay of 9 years and 11 months, filed an application for condonation of delay before the School Tribunal (being Misc. Appeal No. 78/2006) challenging the appointment of the appellant. By an order dated 14th March, 2007, the said application was dismissed by the School Tribunal. It is recorded in the said order that respondent No.1 claiming himself to be the senior most teacher in the School, having been appointed as an Assistant Teacher in the year 1991 and the Management has denied his claim to the said post of Headmaster.

4.2. The School Tribunal, after hearing the parties, found that respondent No.1 herein on August 9, 1995 voluntarily resigned from the post of the In-charge Headmaster of the said School. Such resignation was duly accepted by the Management. It also noticed that the Management thereafter applied before the Deputy Director of Education and sought permission to appoint a Headmaster after publication of an advertisement in accordance with the MEPS Rules. Such permission was granted to the Management. After following the due procedure, the post of Headmaster was filled up by the Management on August 14, 1996.

4.3. The School Tribunal duly considered the matter on merits and noticed that respondent No.1 himself presided over the meeting of the Managing Committee and approved the appointment of the present appellant as Headmaster of the said School. Admittedly, the appellant was working since then and the said fact was known to the respondent No.1. Admittedly, he did not apply before the appropriate authority for appropriate remedy, save and except he filed representations addressed to R/M. In these

circumstances, the School Tribunal refused to condone the delay and dismissed the application.

5. Being aggrieved, a writ petition was filed by respondent No.1 before the High Court and the High Court remanded the matter to the School Tribunal, holding that the provisions of limitation do not apply to appeals filed under Section 9(1)(b) of the said Act. It is to be noted that respondent No. 1 filed writ petition before the High Court and on August 2, 2007, the High Court was pleased to dismiss the same, observing that the Presiding Officer was right in rejecting the application for condonation of delay of about 10 years in preferring the application. Subsequently, it further appears that in 2009, respondent No.1 filed a review petition before the High Court when the High Court was pleased to recall the order dated August 2, 2007 and restored the same on the file and thereafter on July 1, 2010, it allowed the writ petition.

6. In these circumstances, the only question that arises is, whether an application can be filed by an aggrieved party even long after 10 years. It is necessary for us to quote Section 9 of the said Act for our consideration, which is set out hereunder :

***"9. Right of appeal to Tribunal to employees of a private school.***

*(1) Notwithstanding anything contained in any law or contract for the time being in force, [any employee in a private school,-*

*(a) Who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management; or*

*(b) Who is superseded by the Management while making an appointment to any post by promotion, and who is aggrieved, shall have a right to appeal*



*and may appeal against any such order or supersession to the Tribunal constituted under section 8:]*

*Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time before the 1st July, 1976.*

*(2) Such appeal shall be made by the employee to the Tribunal, within thirty days from the date of receipt by him of the order of dismissal, removal otherwise termination of service or reduction in rank, as the case may be.*

*Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.*

*(3) Notwithstanding anything contained in sub-section (2), the Tribunal may entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.*

*(4) Every appeal shall be accompanied by a fee of [Five hundred] rupees, which shall not be refunded and shall be credited to the Consolidated Fund of the State.*"

7. We have noticed from the language of the said Section that the right of appeal is given to an employee of a private school who is aggrieved by an order of the Management in respect of dismissal, removal, termination, reduction in rank or supersession. In all these cases, the aggrieved person shall have a right to approach the Tribunal. Now, the sole question which falls for our consideration is : when an aggrieved person

can apply before the Court, if no limitation is prescribed in the statute for filing an appeal before the appropriate forum. We have duly considered the said question. Even if we assume that no limitation is prescribed in any statute to file an application before the court in that case, can an aggrieved person come before the court at his sweet will at any point of time ? The answer must be in the negative. If no time-limit has been prescribed in a statute to apply before the appropriate forum, in that case, he has to come before the court within a reasonable time. This Court on a number of occasions, while dealing with the matter of similar nature held that where even no limitation has been prescribed, the petition must be filed within a reasonable time. In our considered opinion, the period of 9 years and 11 months, is nothing but an inordinate delay to pursue the remedy of a person and without submitting any cogent reason therefor. The court has no power to condone the same in such case. (See: *Cicily Kallarackal v. Vehicle Factory* [2012 (8) SCC 524], *State of Orissa v. Mamata Mohanty* [2011 (3) SCC 436] and *K.R. Mudgal v. R.P. Singh* [1986 (4) SCC 531]. In these cases, it has been held that the application should be rejected on the ground of inordinate delay. Furthermore, it is to be noted that appointment of the appellant was within the knowledge of respondent No.1 from day one but he did not take any steps for such a long time.

8. In these circumstances, we find it is difficult for us to uphold the decision of the High Court. We are sure that the said question of inordinate delay missed out from the mind of the court at the time of sending back the matter before the Tribunal. Accordingly, we set aside the order passed by the High Court, allow the appeal and affirm the order of the Tribunal.

R.P. Appeal allowed.



ESHA BHATTACHARJEE

*v.*

MANAGING COMMITTEE OF RAGHUNATHPUR NAFAR ACADEMY AND OTHERS

(Civil Appeal No. 8183-8184 of 2013)

SEPTEMBER 13, 2013.

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

*Delay/Laches:*

*Appeal against interim order filed belatedly – Prayer to condone 2449 days delay – Allowed by Division Bench of High Court – Principles as regards condonation of delay culled out – Additional guidelines laid down – Held: Rules of limitation are not meant to destroy the rights of the parties -- They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly -- Every legal remedy must be kept alive for a legislatively fixed period of time -- Order passed by Division Bench of High Court condoning the delay is set aside – Appeal.*

*Education/Educational Institutions:*

*Managing committee of school – Non-compliance of court's order – Inordinate delay in filing appeal – Held: The persons who are nominated or inducted as members or chosen as Secretaries of the managing committees of schools are required to behave with responsibility and not to adopt a casual approach -- A statutory committee cannot remain totally indifferent to an order passed by court.*

**The appellant, an Assistant Teacher in language group (Bengali), filed a writ petition seeking approval of her appointment and for certain other reliefs. The single Judge of the High Court, on 25.2.2004, issued a direction**

**that during the pendency of the application, the services of the petitioner as Assistant Teacher in Bengali should not be disturbed. As the said order was not complied with, the appellant filed a contempt application. An undertaking was given before the single Judge and accordingly the contempt petition was disposed of. However, as the appellant was not allowed to join her duty, she preferred another contempt petition. Consequent upon the High Court's direction, she was allowed to join, but was neither permitted to sign the daily attendance register, nor allotted any work nor was she paid the salary. She filed yet another contempt petition and on 24.12.2010 the single Judge directed for personal presence of the Secretary and teacher-in-charge of the school. The Managing Committee and the Secretary of the school then preferred an appeal along with an application for condonation of delay, challenging the interim order dated 25.2.2004; and the Division Bench of the High Court condoned the delay and also passed an interim order of stay.**

**In the instant appeals, the question for consideration before the Court was: whether the Division Bench of the High Court was justified in entertaining the application for condoning of 2449 days delay in filing the appeal against the interim order dated 25.2.2004; passed by the single Judge in the writ petition.**

**Allowing the appeals, the Court**

**HELD: 1.1. As regards condonation of delay, from the enunciation of law in the judgments of this Court, the principles that can broadly be culled out are:**

**(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise**



**injustice but are obliged to remove injustice.**

**(ii) The term "sufficient cause" should be understood in its proper spirit, philosophy and purpose regard being had to the fact that the term is basically elastic and is to be applied in proper perspective to the obtaining fact-situation.**

**(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.**

**(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.**

**(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.**

**(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.**

**(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.**

**(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict**

**approach whereas the second calls for a liberal delineation.**

**(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so, as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.**

**(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.**

**(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.**

**(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.**

**(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude. [para 15] [797-D-H; 798-A-H; 799-A-C]**

*Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and Others* **1987 (2) SCR 387 = 1987 (2) SCC 107,** *G. Ramegowda, Major and Others v. Special Land Acquisition Officer, Bangalore* **1988 (3) SCR 198 = 1988 (2) SCC 142;** *O.P. Kathpalia v. Lakhmir Singh (dead) and*



*Others (1984) 4 SCC 66, State of Nagaland v. Lipok AO and Others* **2005 (3 ) SCR 108 = 2005 (3 ) SCC 752, the Court, after referring to** *New India Insurance Co. Ltd. V. Shanti Misra* **1976 (2) SCR 266 = 1975 (2) SCC 840,** *N. State of Haryana v. Chandra Mani* **1996 (1) SCR 1060 = 1996 (3) SCC 132 and** *Special Tehsildar, Land Acquisition v. K.V. Ayisumma* **1996 (3) Suppl. SCR 848 = 1996 (10) SCC 634 ,** *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and Another* **2010 (2) SCR 1172 = 2010 (5) SCC 459,** *Improvement Trust, Ludhiana v. Ujagar Singh and Others* **2010 (7) SCR 376 = 2010 (6) SCC 786;** *Balwant Singh (dead) v. Jagdish Singh and Others* **2010 (8) SCR 597 = 2010 (8) SCC 685 Union of India v. Ram Charan 1964 SCR 467 = AIR 1964 SC 215,** *P.K. Ramachandran v. State of Kerala* **1997 (4) Suppl. SCR 204 =1997 (7) SCC 556; and** *Katari Suryanarayana v. Koppisetti Subba Rao* **2009 (5) SCR 672 = 2009 (11) SCC 183;** *Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai* **(2012) 5 SCC 157,** *Vedabai v. Shantaram Baburao Patil* **2001 (3) SCR 1053 = 2001(9) SCC 106;** *B. Madhuri Goud v. B. Damodar Reddy* **2012 (12) SCC 693 – referred to.**

**1.2. Taking note of the present day scenario the following guidelines may also be added:**

**(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.**

**(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.**

**(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.**

**(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters. [para 16] [799-C-H]**

**1.3. In the instant case, the Division Bench of the High Court has misdirected itself by not considering certain facts, namely, (a) that the notice of the writ petition was served on the earlier managing committee; (b) that the earlier committee had appeared in the writ court and was aware of the proceedings and the order; (c) that the District Inspector of Schools had communicated to the managing committee to comply with the order of the single Judge; (d) that the earlier managing committee had undertaken before the single Judge to comply with the order; (e) that the new managing committee had taken over charge from the earlier managing committee; (f) that nothing has been indicated in the affidavit that under what circumstances the new managing committee, despite taking over charge, was not aware of the pending litigation or for that matter the communication from the District Inspector of Schools; (g) that the writ court was still in seisin of the matter and no final verdict had come and, therefore, it would not be a case where there will be failure of justice if the appeal against the interim order is not entertained on the ground of limitation inasmuch as the final order was subject to assail in appeal; (h) that the managing committee had exhibited gross negligence and, in any way, recklessness; (i) that the conduct and attitude of the members of the committee before the writ court deserved to be decried since they should not have taken recourse to maladroit effort in complying with the order of the court; and (j) that it was obvious that the managing committee was really taking resort to dilatory tactics by not seeking necessitous legal remedy in quite promptitude. [para 21] [802-G-H; 803-A-E]**



**1.4. Plea of lack of knowledge, in the instant case, really lacks bona fide. The Division Bench of the High Court has failed to keep itself alive to the concept of exercise of judicial discretion that is governed by rules of reason and justice. Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. Every legal remedy must be kept alive for a legislatively fixed period of time. [para 22] [804-A, D-E]**

*Balakrishnan v. M. Krishnamurthy* **1998 (1) Suppl. SCR 403 = AIR 1998 SC 3222- relied on.**

**1.5. The persons who are nominated or inducted as members or chosen as Secretaries of the managing committees of schools are required to behave with responsibility and not to adopt a casual approach. It is a public responsibility and anyone who is desirous of taking such responsibility has to devote time and act with due care and requisite caution. A statutory committee cannot remain totally indifferent to an order passed by the court. [para 22] [803-E-G]**

**1.6. The order passed by the Division Bench of the High Court condoning the delay is set aside. The writ petition shall be disposed of expeditiously. [para 23] [804-F]**

**Case Law Reference:**

| | | |
|---|---|---|
| **1987 (2) SCR 387** | **referred to** | **para 6** |
| **1988 (3) SCR 198** | **referred to** | **para 7** |

| | | |
|---|---|---|
| **(1984) 4 SCC 66** | **referred to** | **para 8** |
| **2005 (3) SCR 108** | **referred to** | **para 9** |
| **1976 (2) SCR 266** | **referred to** | **para 9** |
| **1998 (1) Suppl. SCR 403** | **relied on** | **para 9** |
| **1996 (1) SCR 1060** | **referred to** | **para 9** |
| **1996 (3) Suppl. SCR 848** | **referred to** | **para 9** |
| **2010 (2) SCR 1172** | **referred to** | **para 10** |
| **2010 (7) SCR 376** | **referred to** | **para 11** |
| **2010 (8) SCR 597** | **referred to** | **para 12** |
| **1964 SCR 467** | **referred to** | **para 12** |
| **1997 (4) Suppl. SCR 204** | **referred to** | **para 12** |
| **2009 (5) SCR 672** | **referred to** | **para 12** |
| **(2012) 5 SCC 157** | **referred to** | **para 13** |
| **2001 (3) SCR 1053** | **referred to** | **para 13** |
| **2012 (12) SCC 693** | **referred to** | **para 14** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8183-8184 of 2013.

From the Judgment & Order dated 21.02.2011 of the High Court at Calcutta in CAN No. 365 of 2011 with ASTA 10 of 2011 in AST 13 of 2011.

Kunal Chatterji, Maitrayee Banerjee for the Appellant

Anip Sachthey, Sarad Kumar Singhania for the Respondents.

The Judgment of the Court was delivered by



**DIPAK MISRA, J.** 1. Leave granted in both the special leave petitions.

2. The singular question that we intend to address in these appeals, by special leave, is whether the Division Bench of the High Court of Calcutta is justified in entertaining the CAN No. 365 of 2011 for condoning the delay of 2449 days in A.S.T.A. No. 10 of 2011 preferred against the interim order dated 25.2.2004 passed by the learned single Judge in W.P. No. 6124(W) of 2004. It is also worthy to note that the Division Bench in A.S.T.A No. 10 of 2011 in A.S.T. No. 13 of 2011 had directed stay of further proceedings in connection with A.S.T. No. 346 of 2004. Needless to say, the said order is consequential as whole thing would depend upon the issue pertaining to condonation of delay.

3. Sans unnecessary details, the facts which are essential to be stated for the purpose of disposal of the present appeals are that the appellant, an Assistant Teacher in language group (Bengali), invoked the jurisdiction of the High Court under Article 226 of the Constitution by preferring a writ petition seeking approval of her appointment and for certain other reliefs. The learned single Judge on 25.2.2004 taking note of the submissions of the learned counsel for the petitioner therein and further noticing the fact that in spite of notice none had appeared on behalf of the concerned respondents, issued a direction that during the pendency of the application the services of the petitioner as Assistant Teacher in Bengali in Raghunathpur Nafar Academy (HS) at Abhoynagar in the district of Howrah shall not be disturbed until further orders. As the said order was not complied with, the appellant filed the contempt application being C.P.A.N. No. 1016 of 2004. Be it noted, learned counsel for the petitioner communicated the order to the school authorities but the said communication was not paid heed to. On 24.1.2006 the District Inspector of Schools (SE), Howrah, directed the said school authorities to comply with the direction issued by the learned single Judge. Despite

the said direction the order was not complied with. It may be mentioned here that an undertaking was given before the learned single Judge and on that basis C.P.A.N. No. 1016 of 2004 was disposed of. As the factual matrix would further unfurl a new managing committee was constituted in place of the erstwhile managing committee of the school on 21.11.2009 and the appellant was not allowed to join her duty. Being constrained, she preferred another contempt petition No. C.P.A.N. No. 1506 of 2010 wherein the learned single Judge vide order dated 13.5.2010 referred to his earlier order and directed that the District Inspector of Schools (SE) would ensure due compliance of the order. That apart, a direction was issued that the concerned police authority should see to it that the Secretary and the teacher-in-charge of the concerned school implement the order in allowing the petitioner to join her duties. After the said order came to be passed, the appellant herein joined her duties as Assistant Teacher with effect from 14.6.2010. Though the appellant was allowed to join, yet she was neither permitted to sign the daily attendance register, nor allotted any work nor paid her salary. Being impelled, she filed an application for contempt, C.P.A.N. No. 1506 of 2010, and on 24.12.2010 the learned single Judge directed for personal presence of the Secretary and teacher-in-charge of the school. At this juncture, the Managing Committee and the Secretary of the school preferred an appeal along with an application for condonation of delay. The said application was seriously resisted by the appellant by filing an affidavit and, eventually, by the impugned order the Division Bench condoned the delay. Be it noted, the Division Bench has also passed an interim order of stay. The said orders are the subject-matter of assail in these appeals by special leave.

4. We have heard Mr. Kunal Chatterjee, learned counsel for the appellant, Mr. Anip Sachthey, learned counsel for respondent No. 1 and Mr. Sarad Kumar Singhania, learned counsel for the respondent Nos. 3 to 5.



5. Before we delve into the factual scenario and the defensibility of the order condoning delay, it is seemly to state the obligation of the court while dealing with an application for condonation of delay and the approach to be adopted while considering the grounds for condonation of such colossal delay.

6. In *Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and Others*[1], a two-Judge Bench observed that the legislature has conferred power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice, for that is the life-purpose for the existence of the institution of courts. The learned Judges emphasized on adoption of a liberal approach while dealing with the applications for condonation of delay as ordinarily a litigant does not stand to benefit by lodging an appeal late and refusal to condone delay can result in an meritorious matter being thrown out at the very threshold and the cause of justice being defeated. It was stressed that there should not be a pedantic approach but the doctrine that is to be kept in mind is that the matter has to be dealt with in a rational commonsense pragmatic manner and cause of substantial justice deserves to be preferred over the technical considerations. It was also ruled that there is no presumption that delay is occasioned deliberately or on account of culpable negligence and that the courts are not supposed to legalise injustice on technical grounds as it is the duty of the court to remove injustice. In the said case the Division Bench observed that the State which represents the collective cause of the community does not deserve a litigant-non-grata status and the courts are required to be informed with the spirit and philosophy of the provision in the course of interpretation of the expression "sufficient cause"z.

1. (1987) 2 SCC 107.

7. In *G. Ramegowda, Major and others v. Special Land Acquisition Officer, Bangalore*[2], Venkatachaliah, J. (as his Lordship then was), speaking for the Court, has opined thus:-

> *"The contours of the area of discretion of the courts in the matter of condonation of delays in filing appeals are set out in a number of pronouncements of this Court. See : Ramlal, Motilal and Chhotelal v. Rewa Coalfield Ltd.*[3] *; Shakuntala Devi Jain v. Kuntal Kumari*[4] *; Concord of India Insurance Co. Ltd. V. Nirmala Devi*[5]*; Lala Mata Din v. A. Narayanan*[6]*; Collector, Land Acquisition v. Katiji etc. There is, it is true, no general principle saving the party from all mistakes of its counsel. If there is negligence, deliberate or gross inaction or lack of bona fide on the part of the party or its counsel there is no reason why the opposite side should be exposed to a time-barred appeal. Each case will have to be considered on the particularities of its own special facts. However, the expression 'sufficient cause' in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay."*

8. In *O.P. Kathpalia v. Lakhmir Singh (dead) and Others*[7], the court was dealing with a fact-situation where the interim order passed by the court of first instance was an interpolated order and it was not ascertainable as to when the order was made. The said order was under appeal before the District

2. (1988) 2 SCC 142.
3. (1962) 2 SCR 762.
4. (1969) 1 SCR 1006.
5. (1979) 3 SCR 694.
6. (1970) 2 SCR 90.
7. (1984) 4 SCC 66.



Judge who declined to condone the delay and the said view was concurred with by the High Court. The Court, taking stock of the facts, came to hold that if such an interpolated order is allowed to stand, there would be failure of justice and, accordingly, set aside the orders impugned therein observing that the appeal before the District Judge deserved to be heard on merits.

9. In *State of Nagaland v. Lipok AO and Others*[8], the Court, after referring to *New India Insurance Co. Ltd. V. Shanti Misra*[9], *N. Balakrishnan v. M. Krishnamurthy*[10], *State of Haryana v. Chandra Mani*[11] and *Special Tehsildar, Land Acquisition v. K.V. Ayisumma*[12], came to hold that adoption of strict standard of proof sometimes fails to protect public justice and it may result in public mischief.

10. In this context, we may refer with profit to the authority in *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another*[13], where a two-Judge Bench of this Court has observed that the law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. Thereafter, the learned Judges proceeded to state that this Court has justifiably

8. (2005) 3 SCC 752.
9. (1975) 2 SCC 840.
10. AIR 1998 SC 3222.
11. (1996) 3 SCC 132.
12. (1996) 10 SCC 634.
13. (2010) 5 SCC 459.

advocated adoption of liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate.

11. In *Improvement Trust, Ludhiana v. Ujagar Singh and Others*[14], it has been held that while considering an application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. It has been further stated therein that each case has to be weighed from its facts and the circumstances in which the party acts and behaves.

12. *A reference to the principle stated in Balwant Singh (dead) v. Jagdish Singh and Others*[15] would be quite fruitful. In the said case the Court referred to the pronouncements in *Union of India v. Ram Charan*[16], *P.K. Ramachandran v. State of Kerala*[17] and *Katari Suryanarayana v. Koppisetti Subba Rao*[18] and stated thus:-

> "**25.** We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.
>
> **26.** The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has

14. (2010) 6 SCC 786.
15. (2010) 8 SCC 685.
16. AIR 1964 SC 215.
17. (1997) 7 SCC 556.
18. (2009) 11 SCC 183.



> accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

13. Recently in *Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai*[19], the learned Judges referred to the pronouncement in *Vedabai v. Shantaram Baburao Patil*[20] wherein it has been opined that a distinction must be made between a case where the delay is inordinate and a case where the delay is of few days and whereas in the former case the consideration of prejudice to the other side will be a relevant factor, in the latter case no such consideration arises. Thereafter, the two-Judge Bench ruled thus: -

> **"23.** What needs to be emphasized is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.
>
> **24.** What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant

19. (2012) 5 SCC 157.
20. (2001) 9 SCC 106.

and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

Eventually, the Bench upon perusal of the application for condonation of delay and the affidavit on record came to hold that certain necessary facts were conspicuously silent and, accordingly, reversed the decision of the High Court which had condoned the delay of more than seven years.

14. In *B. Madhuri Goud v. B. Damodar Reddy*[21], the Court referring to earlier decisions reversed the decision of the learned single Judge who had condoned delay of 1236 days as the explanation given in the application for condonation of delay was absolutely fanciful.

15. From the aforesaid authorities the principles that can broadly be culled out are:

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21. (2012) 12 SCC 693.



(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with

fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.



17. Presently to the assertions made in the application for condonation of delay and the asseverations in oppugnation of the same. It may be stated here that the Division Bench while dealing with the application for condonation of delay has also adverted to the legal tenability of the interim order in a matter of appointment and approval of a teacher, and condoned the delay. It does not require Solomon's wisdom to perceive that the delay was colossal. In the application for condonation of delay the appellant before the High Court had stated about the circumstances in which the order came to be passed by the learned single Judge, the order in the earlier contempt petition and the second petition for contempt, the extinction of right of the respondent employee to continue in the post and thereafter proceeded to state the grounds for condonation of delay. We think it apposite to reproduce the grounds: -

"14. That from the record it appears that the order impugned was communicated to the then managing committee including the head master in question and the said fact is totally unknown to the newly elected managing committee as they have been elected on 20.9.2009 and they have been handed over charge on 21.11.09 and to the teacher in charge who has been handed over charge on 1.3.10. It is pertinent to mention in this context that after having received the notice and the contempt application the applicants entrusted the Ld. Advocate for taking appropriate steps and they have been advised to defend the case but due to miscommunication the applicant herein again handed over the brief from Mr. Banik, Ld. Advocate to Mr. Baidya, Ld. Advocate. After having received the said papers and after perusing all the records he opined to prefer an appeal before the appeal court or to prefer an application for vacating the interim order and ultimately the same was filed on 07.06.2010 after several pursuance in spite of taking the application for vacating the interim order the court below day to day is proceeding with the contempt application.

15. Having got no other alternative applicant have been advised to prefer an appeal without certified copy and the leave has been prayed for and the same was allowed.

The photocopy of the receipt for application of Xerox certified copy is annexed herewith and marked with letter "A".

16. That the delay occasioned in presenting the said mandamus appeal has taken place due to the aforesaid reasons which was beyond the control of the applicants and was completely unintentional."

18. Thereafter, the applicant therein stated about the duty of the court while dealing with the application for condonation of delay and in that context, proceeded to state as follows: -

"Nonetheless adoption of strict standard of proof may lead to grave miscarriage of public justice apart from resulting in public mischief by skilful management of delay in the process of filing the appeal, the appellants/applicants do not stand to benefit from the delay of about 2449 days occasioned in preferring the said Mandamus Appeal, nor it is a fact that the writ petitioners/ respondents will be immense/prejudiced if such non-deliberate delay is not condoned. There has not been deliberate delay as would be evidenced from the foregoing paragraphs. Refusing to condone such non-deliberate delay may result in meritorious matters like the instant case, being thrown out at the very threshold and the cause of justice being defeated. As against this when delay is condoned the highest that can happen in the instant case is that a cause would be decided on merits after hearing the parties."

19. The said grounds were opposed by the contesting respondent therein by stating, inter alia, that the school authorities were very much aware of the order dated 25.2.2004 as the same was communicated to them by her counsel as well as by the District Inspector of school. That apart, an undertaking was given before the learned single Judge by the managing



committee. Quite apart from above, in any case, the new managing committee that had come into being in 2009 was aware of the order but it chose not to assail the order till there was a direction for personal appearance of the Secretary and the teacher-in-charge. It was further put forth that the grounds urged did not justify condonation of such enormous delay and the plea of prejudice was not at all tenable.

20. On a perusal of the grounds urged in the affidavit and the stand put forth by the respondents herein for condonation of delay are that they were not aware of the order passed by the learned single Judge till they received the notice of the contempt application and thereafter because of miscommunication between the counsel and the parties no steps could be taken and, eventually, an application for vacation of stay was filed and thereafter, the appeal was preferred. That apart, it has been urged that if delay is not condoned there will be great miscarriage of public justice resulting in public mischief and cause of justice would be defeated if the meritorious matter like the present one is thrown at the threshold. The Division Bench of the High Court took note of the averments made in paragraph 14 of the application and thereafter, noted the submission of learned counsel for the parties, referred to the decision in *Oriental Aroma Chemical Industries Limited* (supra) and came to hold as follows: -

"Now upon a close look at the prayer made for condonation of delay we find that although the delay is substantial, the same has been sought to be explained in a manner even if it may not be full proof but is quite convincing."

21. Barring the aforesaid, most of the discussion pertains to the merits of the case. We are of the convinced opinion that the High Court has misdirected itself by not considering certain facts, namely, (a) that the notice of the writ petition was served on the earlier managing committee; (b) that the earlier committee had appeared in the writ court and was aware of the proceedings and the order; (c) that the District Inspector of

schools had communicated to the managing committee to comply with the order of the learned single Judge; (d) that the earlier managing committee had undertaken before the learned single Judge to comply with the order; (e) that the new managing committee had taken over charge from the earlier managing committee; (f) that nothing has been indicated in the affidavit that under what circumstances the new managing committee, despite taking over charge, was not aware of the pending litigation or for that matter the communication from the District Inspector; (g) that the writ court was still in seisin of the matter and no final verdict had come and hence, it would not be a case where there will be failure of justice if the appeal against the interim order is not entertained on the ground of limitation inasmuch as the final order was subject to assail in appeal; (h) that the managing committee had exhibited gross negligence and, in any way, recklessness; (i) that the conduct and attitude of the members of the committee before the writ court deserved to be decried since they should not have taken recourse to maladroit effort in complying with the order of the court; and (j) and that it was obvious that the managing committee was really taking resort to dilatory tactics by not seeking necessitous legal remedy in quite promptitude.

22. At this juncture, we are obliged to state that the persons who are nominated or inducted as members or chosen as Secretaries of the managing committees of schools are required to behave with responsibility and not to adopt a casual approach. It is a public responsibility and anyone who is desirous of taking such responsibility has to devote time and act with due care and requisite caution. Becoming a member of the committee should not become a local status syndrome. A statutory committee cannot remain totally indifferent to an order passed by the court and sleep like "Kumbhakarna". The persons chosen to act on behalf of the Managing Committee cannot take recourse to fancy and rise like a phoenix and move the court. Neither leisure nor pleasure has any room while one moves an application seeking condonation of delay of almost



seven years on the ground of lack of knowledge or failure of justice. Plea of lack of knowledge in the present case really lacks bona fide. The Division Bench of the High Court has failed to keep itself alive to the concept of exercise of judicial discretion that is governed by rules of reason and justice. It should have kept itself alive to the following passage from *N. Balakrishnan* (supra): -

> "The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."

We have painfully re-stated the same.

23. Ex consequenti, the appeals are allowed and the order passed by the Division Bench condoning delay is set aside. As a result of such extinction the appeal before the Division Bench of the High Court shall also stand dismissed. The learned single Judge is requested to dispose of Writ Petition No. 6124(W) of 2003 as expeditiously as possible, preferably, within a period of six months as the lis involved is not likely to consume much time. In the facts and circumstances of the case, there shall be no order as to costs.

R.P. Appeals allowed.

U.P. POWER CORPORATION LTD.
*v.*
N.T.P.C. LTD. & ORS.
(Civil Appeal No. 4117 of 2006)

SEPTEMBER 18, 2013

**[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]**

*CENTRAL ELECTRICITY REGULATORY COMMISSION (TERMS AND CONDITIONS FOR DETERMINATION OF TARIFF) REGULATIONS, 2001:*

*Regulation 2.5 read with Regulation 1.9 - Taking over of Thermal Power Station - Excess expenditure - Fixation of tariff - Relevant period being 1.4.2001 to 31.3.2004 - Held: Basis for fixation of tariff has to be the "actual capital expenditure" incurred on the completion of the project -- But where the actual expenditure exceeds the approved expenditure, the excess so incurred can be taken into consideration to the extent the same is allowed by Central Electricity Authority or an appropriate independent agency nominated for the purpose - This implies that the excess expenditure must go through a process of scrutiny either by CEA or the independent agency before it can constitute an input for determination of tariff - Scrutiny of the excess would in turn primarily involve examination of two distinct aspects: (a) Whether the excess expenditure has been actually incurred or is a make believe or an exaggeration by the generating company; and (b) Whether the expenditure was capital in nature - In the instant case, CERC had on a prudent check disallowed a substantial part of the excess that was claimed by respondent-NTPC and the claim allowed had been conceded by appellant-Corporation to have been actually spent by respondent for completion of project.*

*Regulation 2.5 - Fixation of tariff - Reference to CEA or*





*independent agency - Held: In the instant case, prayer for additional capitalisation was made by respondent-Corporation and considered by CERC after Electricity Act 2003 had come into force, repealing the earlier enactments - The new legislation did not set out any role for CEA, in the matter of approval of schemes for generating companies or the capital expenditure for the completion of such projects - CERC was, therefore, right in holding that Central Electricity Authority had no part to play in the matter of approval for purposes of capitalisation of the extra expenditure incurred on a project - However, on facts, since the issue of actual expenditure had been concluded by the admission of appellant, and in the absence of any question relating to the nature of the expenditure, the absence of a reference to CEA cannot be said to have caused any miscarriage of justice for the appellant or vitiated the tariff fixation by the CERC.*

*ELECTRICITY ACT, 2003:*

*s. 70 and s.73 read with s.61 proviso, and Regulation 2.5 of Regulations of 2001 - Fixation of tariff - Capital expenditure - Excess expenditure - Determination - Reference to CEA - Held: The far reaching changes that came about in the legal framework with the enactment of the 2003 Act, made Regulation 2.5 redundant in so far as the same envisaged a reference to CEA or an Independent Agency for approval of the additional capitalisation - Insistence on a reference, to CEA for such approval, despite the sea change in the legal framework would have been both unnecessary as well as opposed to the spirit of new law that reduced the role of CEA to what has been specified in s.73.*

**The respondent-National Thermal Power Corporation (NTPC) took over the Thermal Power Station in question from the erstwhile U.P. State Electricity Board on 13.02.1992, on an approved project cost of Rs.927.85 crores. On a petition filed by NTPC for approval of tariff for the tariff period 01.04.2001 to 31.03.2004 in respect of**

**the generating plant in question, the Central Electricity Regulatory Commission (CERC) by an Order dated 24.10.2003 approved the tariff taking into consideration the capital cost at Rs.940.70 crores as on 01.04.2001 but did not consider the additional capitalisation claimed by the respondent since the same was based only on an estimated capital expenditure and was unsupported by an auditor's certificate. The respondent-NTPC then moved a petition before the CERC seeking approval of the revised fixed charges in respect of the generating plant for the relevant tariff period taking into account the additional capital expenditure incurred during the said period which was estimated at Rs.6.101 crores. The CERC disposed of the said petition approving an amount of Rs.4.521 crores towards capital expenditure, but holding that the respondent would not be entitled to tariff revision during the relevant period. It, however, held respondent-NTPC entitled to the return on equity and interest on loan on the said amount payable along with the tariff for the period 2004-2009. Both the CERC and the Appellate Tribunal rejected the contention of the appellant-Corporation that the additional capital expenditure incurred by the respondent-NTPC could not be taken into consideration for tariff fixation without the same having been approved by the Central Electricity Authority (CEA) as required under Regulation 2.5 of the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2001. Aggrieved, the U. P. Power Corporation Ltd. filed the appeal.**

**The questions for consideration before the Court were: (1) "What is the true scope and ambit of Regulation 2.5 of CERC (Terms and Conditions for Determination of Tariff) Regulations, 2001"; and (2) "Whether the CERC could have allowed the additional capitalization which was not approved by the concerned authority i.e. Central Electricity Authority".**



**Dismissing the appeals, the Court**

**HELD: 1.1 A plain reading of Regulation 2.5 read with Regulation 1.9 of the Central Electricity Regulatory Commission (Terms And Conditions For Determination Of Tariff) Regulations, 2001 makes it manifest that the basis for fixation has to be the "actual capital expenditure" incurred on the completion of the project. But where the actual expenditure exceeds the approved expenditure the excess so incurred can be taken into consideration to the extent the same is allowed by the Central Electricity Authority or an appropriate independent agency nominated for the purpose. This implies that the excess expenditure must go through a process of scrutiny either by the CEA or the independent agency before it can constitute an input for determination of the tariff. Scrutiny of the excess would in turn primarily involve examination of two distinct aspects viz: (a) Whether the excess expenditure has been actually incurred or is a make believe or an exaggeration by the generating company; and (b) Whether the expenditure was capital in nature. In cases where the answers to these two questions is in the affirmative, the CEA or the independent agency would have no reason to disallow such expenditure, nor would its consideration for tariff fixation present any difficulty. In case a lesser amount is allowed by the CEA or the independent agency either because the generating company fails to substantiate its claim of having incurred the expenditure as claimed or even if the amount is incurred, only a part of the same was in the nature of capital expenditure, the lesser amount alone will constitute an input for tariff determination. [Paras 13 and 14] [817-G-H; 818-A-E]**

**1.2 In the instant case, the appellant-Corporation had fairly conceded that an amount of Rs.4.521 crores was indeed spent by the respondent for the completion of the**

**project. This Court, therefore, holds that the first of the two aspects that may have engaged the attention of the CEA or the independent agency was concluded by the admission of the appellant, which was the best evidence, in the matter apart from the fact that the figure arrived at by the CERC was based on a fair and prudent check of the extent of admissible expenditure said to have been incurred. [Para 14-15] [818-H; 819-A, E-F]**

**1.3 As regards the second aspect viz. whether the expenditure was capital or revenue in nature, which, any scrutiny or examination by the CEA may have involved, the CERC has found the expenditure to be capital in nature which finding has been affirmed by the Appellate Tribunal. There is nothing perverse about that finding nor has the appeal been admitted on the question whether the expenditure was capital or revenue. [para 16] [819-G-H; 820-A]**

**2.1 Absence of a reference under Regulation 2.5 to the CEA or independent agency would make little or no difference having regard to the facts of the case at hand. This is because, although the respondent-NTPC had claimed an excess expenditure of Rs.6.101 crores, the amount actually taken into consideration for fixation of the tariff was Rs.4.521 crores only. The CERC had on a prudent check disallowed a substantial part of the excess that was claimed by the respondent-NTPC. In the absence of any question relating to the nature of the expenditure, the absence of a reference to CEA cannot be said to have caused any miscarriage of justice for the appellant or vitiated the tariff fixation by the CERC. It follows that even if a reference to CEA was in the facts of the case required to be made, the absence of any failure of justice or prejudice would render it unnecessary for this Court to interfere with the orders passed by the CERC and the Appellate Tribunal. [Para 14 and 16] [818-F-G; 819-A-C]**



**2.2 So far as the question whether or not a reference to CEA was necessary under Regulation 2.5, is concerned, the prayer for additional capitalisation was made by the respondent-Corporation and considered by CERC after the Electricity Act 2003 had come into force, repealing the earlier enactments. The new legislation did not set out any role for the CEA, in the matter of approval of the schemes for the generating companies or the capital expenditure for the completion of such projects. The entire exercise touching the regulation of the tariff of generating companies owned or controlled by the Central Government, like the respondent was entrusted to the Central Commission. The role of the Central Electricity Authority established u/s. 7 of the 2003 Act, was limited to matters enumerated u/s. 73 of the Act, approval of the scheme for generating companies or the capital expenditure for the completion of such projects or capitalisation of the additional expenditure not being one such function. The CERC was, therefore, right in holding that the Central Electricity Authority had no part to play in the matter of approval for purposes of capitalisation of the extra expenditure incurred on a project. That was so notwithstanding the continuance of Regulation 2.5 of the regulations framed by the CERC providing for such an approval by the CEA. [Paras 17 and 22] [820-C; 824-A-E]**

**2.3 The far reaching changes that came about in the legal framework with the enactment of the 2003 Act, made Regulation 2.5 redundant in so far as the same envisaged a reference to the CEA or an Independent Agency for approval of the additional capitalisation. Insistence on a reference, to the CEA for such approval, despite the sea change in the legal framework would have been both unnecessary as well as opposed to the spirit of new law that reduced the role of CEA to what has been specified in s.73 of the Act. The CERC and the Tribunal were in that view justified in holding that a reference to the CEA was**

**not indicated nor did the absence of such a reference denude the CERC of its authority to fix the tariff after the 2003 Act had come into force. That was so notwithstanding the fact that proviso to s. 61 of the Electricity Act, 2003 continued the terms and conditions for determination of tariff under the enactments mentioned therein and those specified in the Schedule for a period of one year or till such terms were specified under that section whichever was earlier. [Para 22] [824-E-H; 825-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4117 of 2006.

From the Judgment and Order dated 07.07.2006 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 36 of 2006.

WITH

C.A. Nos. 5361-5362 of 2007.

Pradeep Misra, Suraj Singh for the Appellant.

M.G. Ramachandran, K.V. Mohan, Rakesh K. Sharma for the Respondents.

The Judgment of the Court was delivered by

**T.S. THAKUR, J.** 1. This appeal under Section 125 of the Electricity Act, 2003 calls in question the correctness of a Judgment and Order dated 7th July, 2006 passed by the Appellate Tribunal for Electricity whereby the Tribunal has while partially modifying the Order passed by the Central Electricity Regulatory Commission ('CERC' for short) dismissed Appeal No.36 of 2006 filed by the appellant.

2. The CERC had by the Order impugned before the Tribunal allowed Petition No.139 of 2004 filed by the respondent-Corporation and permitted capitalisation of Rs.4.521 crores over the approved cost for the completion of



Feroz Gandhi Unchahar Thermal Power Station Stage-I for the period 1st April, 2001 to 31st March, 2004. While doing so the CERC had in Para 37 of its Order held respondent No.1 entitled to return on equity and interest on loan on the said amount payable along with the tariff for the period 2004-2009. What is significant is that both the CERC and the Appellate Tribunal rejected the contention urged on behalf of the appellant-Corporation that the additional capital expenditure incurred by the respondent-Corporation could not be taken into consideration for tariff fixation without the same having been approved by the Central Electricity Authority ("CEA" for short) as required under Regulation 2.5 of the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2001. The primary question that therefore falls for consideration in this appeal is whether the CERC and the Tribunal have correctly interpreted Regulation 2.5 of the said regulations while permitting capitalisation of the additional expenditure for purposes of determining the tariff. That question arises in the following factual backdrop:

3. Feroz Gandhi Unchahar Thermal Power Station Stage-I was taken over by the respondent-National Thermal Power Corporation from the erstwhile U.P. State Electricity Board on 13th February, 1992. The Central Government had approved the takeover cost of Rs.925 crores in terms of a communication dated 2nd May, 1993 issued by the Ministry of Power. By a subsequent letter dated 5th August, 1996 the CEA accorded approval for an additional Rs.2.85 crores for R&M under Environment Action Plan, thereby taking the total approved project cost to Rs.927.85 crores.

4. The CERC (Terms & Conditions for Determination of Tariff) Regulations, 2001 for the period 1st April, 2001 to 31st March, 2004 came to be notified on 26th March, 2001, pursuant whereto the respondent-Corporation filed Petition No.41 of 2001 for approval of tariff for the relevant tariff period in respect of the generating plant in question. By an Order dated 24th

October, 2003, the CERC approved the tariff taking into consideration the capital cost at Rs.940.70 crores as on 1st April, 2001 but did not consider the additional capitalisation claimed by the respondent since the latter was based only on an estimated capital expenditure and was unsupported by an auditor's certificate. Respondent-Corporation then moved petition No.139 of 2004 before the CERC on 5th October, 2004 seeking approval of the revised fixed charges in respect of the generating plant for the relevant tariff period taking into account the additional capital expenditure incurred during the said period which was estimated at Rs.6.101 crores. By an order dated 31st March, 2005, the CERC disposed of the said petition approving an amount of Rs.4.521 crores towards capital expenditure while disallowing the rest.

5. The CERC held that the respondent would not be entitled to tariff revision during the relevant period in the light of Regulation 1.10 of the CERC Regulations which prohibited allowance of an additional capital expenditure, if such expenditure happened to be less than 20 per cent of the approved project cost. It all the same held in Para 37 of its Order that the respondent was entitled to relief in the form of return on equity at the rate of 16% and interest on loan on the approved additional capital expenditure for the period 2004-2009. The CERC observed :

> "37. As there is nothing in the notification dated 26.3.2001 to deny the petitioner the reasonable return to service the capital expenditure incurred by the petitioner and found to be justified by us, we direct that the petitioner shall earn return on equity @ 16% on the equity portion of the additional capitalization approved by us. Similarly, the petitioner shall also be entitled to the interest on loan as applicable during the relevant period. Return on equity and interest shall be worked out on the additional capitalization of Rs.4.521 crore approved by us from 1st April of the financial year following the financial year to which additional capital expenditure relates up to 31.3.2004. The lump sum of the amount of return on equity and interest on loan so arrived at shall be payable by the respondents along with the tariff for the period 2004-09 to be approved by the Commission. The exact entitlement of the petitioner on this account shall be considered by the Commission while approving tariff for the period 2004-09."



6. Aggrieved by the order passed by the CERC the appellant-Corporation approached the Appellate Tribunal for Electricity in Appeal No.36 of 2006. The appellant thereby questioned the CERC's authority to approve the additional capital expenditure of Rs.4.521 crores as also the power to award relief in the nature specified in para 37 supra. It was contended on behalf of the Corporation that in the absence of approval of the expenditure by CEA as required under Regulation 2.5 of the CERC Regulations, the CERC had no authority to hold that the respondent-NTPC was entitled to additional capitalisation. The Appellate Tribunal for Electricity, however, repelled that contention and dismissed the appeal filed by the appellant on the ground that CERC's approval of additional capitalisation to the tune of Rs.4.521 crores did not call for any interference and that the respondent-Corporation had placed sufficient material before the CERC to substantiate its claim. The Tribunal declared that the CERC was empowered to undertake a prudent check and approve additional capitalisation after the deletion of Section 43-A(2) of the Electricity (Supply) Act, 1948 because of which deletion CEA ceased to have any role in such matters. The Tribunal further held that the project had been originally approved by CEA as far back as on 5th August, 1986 and was taken over while still incomplete by the respondent-NTPC in 1992. The incomplete items were then completed by the respondent NTPC after the takeover which required investment of additional capital. The Tribunal was, therefore, of the view that the additional capital was well within the approved cost of the project which remained unexecuted on the date of vesting. The Appellate Tribunal,

however, accepted the appellant's contention that the relief regarding the return on equity and interest on loan could not be granted until the next tariff period. Consequently the Tribunal directed deletion of Para 37 of the CERC's order giving liberty to the CERC to take the said relief into consideration while determining the tariff for the next period. The present appeal assails the correctness of the view taken by the CERC and the Appellate Tribunal.

7. When this appeal came up for admission on 29th September, 2006, this Court admitted the same only to examine the following two questions:

"a. What is the true scope and ambit of Regulation 2.5 of CERC (Terms and Conditions for Determination of Tariff) Regulations, 2001?

b. xxxxxxx

c. xxxxxxx

d. Whether the CERC could have allowed the additional capitalization which was not approved by the concerned authority i.e. Central Electricity Authority?

e. xxxxxxx"

8. Appearing for the appellant Mr. Pradeep Misra strenuously contended that the CERC and so also the Appellate Tribunal had failed to correctly interpret Regulation 2.5 of the Regulations in question. He submitted that Regulation 2.5 of the Regulations was much too clear to admit of any equivocation. A plain reading of the Regulation, argued Mr. Misra, left no manner of doubt that any additional capital expenditure incurred on the completion of the project could be taken into consideration for fixation of tariff only if such excess was allowed by the CEA or an appropriate independent agency constituted under the said Regulations. So long as the capital expenditure incurred in excess of the approved expenditure did



not have the sanction of the CEA or the independent agency nominated by the CERC, the same could not, according to the learned Counsel, constitute a valid input for fixing the tariff. No such approval having been sought or granted either by the CEA or any independent agency in this case, the CERC could not have taken the additional capital expenditure into consideration for purposes of fixing the tariff. It was also contended that the CERC as also the Appellate Tribunal had fallen in error in holding that deletion of Section 43A(2) of the Electricity (Supply) Act, 1948 made a reference to the CEA in terms of Regulation 2.5 of the Regulations unnecessary. The deletion of Section 43A(2) notwithstanding, the CEA continued to exercise powers in terms of Sections 28 to 32 of the Act. The statutory requirement of an approval from the CEA of the additional cost had not, therefore, been rendered a surplusage by reason of the removal of Section 43A(2) from the statute book.

9. On behalf of the respondent it was contended by Mr. Ramachandran that the CERC as also the Tribunal were perfectly justified in taking into consideration the additional expenditure incurred on the completion of the project, not only because there was no dispute that such an expenditure had in fact been incurred but also because the said expenditure was found to be capital in nature. The question of an approval from the CEA or the independent agency was, therefore, rendered academic in the facts and circumstances of the case.

10. It was further argued that since the appellant itself accepted the expenditure to have been incurred and the nature of the expenditure having been found to be capital in character, the CEA or the independent agency could not have, even if a reference was made, declined approval to the same. It was also argued that the deletion of Section 43A(2) of the Electricity (Supply) Act, 1948 from the statute book made a material difference and that the CERC and the Tribunal had correctly held that a reference to the CEA or independent agency was on that count unnecessary.

11. Regulation 2.5 of the Regulations reads as under:

"2.5 **Capital Expenditure**

The capital expenditure of the project shall be financed as per the approved financial package set out in the techno-economic clearance of the Authority or as approved by an appropriate independent agency as the case may be. The project cost shall include reasonable amount of capitalized initial spares.

The actual capital expenditure incurred on completion of the project shall form the basis for fixation of tariff. Where the actual expenditure exceeds the approved project cost, the excess expenditure as allowed by the Authority or an appropriate independent agency shall be considered for the purpose of fixation of tariff.

Provided that such excess expenditure is not attributable to the Generating Company or its suppliers or contractors;

Provided further that where a Power Purchase Agreement entered into between the Generating Company and the beneficiary provides a ceiling on capital expenditure, the capital expenditure shall not exceed such ceiling for computation of tariff."

12. The term "independent agency" referred to in the above Regulation is defined in regulation 1.9 as under:

"1.9 'Independent agency' means the agency approved by the Commission by a separate notification."

13. A plain reading of the above makes it manifest that the basis for fixation has to be the "actual capital expenditure" incurred on the completion of the project. But where the actual expenditure exceeds the approved expenditure the excess so incurred can be taken into consideration to the extent the same is allowed by the Central Electricity Authority or an appropriate



independent agency nominated for the purpose. This implies that the excess expenditure must go through a process of scrutiny either by the CEA or the independent agency before it can constitute an input for determination of the tariff. Scrutiny of the excess would in turn primarily involve examination of two distinct aspects viz.

(a) Whether the excess expenditure has been actually incurred or is a make believe or an exaggeration by the generating company; and

(b) Whether the expenditure was capital in nature.

14. In cases where the answers to these two questions is in the affirmative, the CEA or the Independent Agency would have no reason to disallow such expenditure, nor would its consideration for tariff fixation present any difficulty. In case a lesser amount is allowed by the CEA or the Independent Agency either because the generating company fails to substantiate its claim of having incurred the expenditure as claimed or even if the amount is incurred, only a part of the same was in the nature of capital expenditure, the lesser amount alone will constitute an input for tariff determination. To that extent, there is no difficulty nor was Mr. Misra, Counsel for the appellant, able to suggest any other dimension which the CEA or the Independent Agency would be entitled to consider while examining the question of allowing or disallowing the excess expenditure incurred by the generating unit. If that be so, absence of a reference under Regulation 2.5 (supra) to the CEA or Independent Agency would make little or no difference having regard to the facts of the case at hand. We say so because although the respondent-Corporation had claimed an excess expenditure of Rs.6.101 crores the amount actually taken into consideration for fixation of the tariff was Rs.4.521 crores only. The CERC had on a prudent check disallowed a substantial part of the excess that was claimed by the respondent-Corporation. What is significant is that the appellant-Corporation had fairly conceded that an amount of Rs.4.521

crores was indeed spent by the respondent for the completion of the project. That is evident from the following observation of the Electricity Appellate Tribunal, where Mr. Misra learned counsel for the appellant made a candid admission as to the extent of the expenditure incurred over and above the approved Project cost:

> "Mr. Pradeep Misra, learned counsel for the appellant, while relying on Regulation 1.10 which provides that there shall be no tariff revision if the capital expenditure is less than 20% of the approved cost of the project contended that there could be no tariff revision at all much less the appellant shall be made liable to pay 16% ROE as well as interest as directed in Para 37 of the Impugned Order under challenge. Mr. Pradeep Misra also contended that the claim of this additional expenditure, under five Heads, are not disputed but they are only maintenance expenditure. It was also contended by the learned counsel that in the absence of approval of expenditure by CEA and there being no proof of such approval, CERC has no authority to hold that NTPC had incurred additional capital expenditure and entitled to additional capitalisation."
>
> (emphasis supplied)

15. From the above, we have no difficulty in holding that the first of the two aspects that may have engaged the attention of the CEA or the Independent Agency was concluded by the admission of the appellant, which was the best evidence, in the matter apart from the fact that the figure arrived at by the Commission was based on a fair and prudent check of the extent of admissible expenditure said to have been incurred.

16. That leaves us with the second aspect which, any scrutiny or examination by the CEA may have involved viz. whether the expenditure was capital or revenue in nature. The CERC has found the expenditure to be capital in nature which finding has been affirmed by the Appellate Tribunal. There is



nothing perverse about that finding in our opinion nor has this appeal been admitted on the question whether the expenditure was capital or revenue. In the absence of any question relating to the nature of the expenditure, we find it difficult to appreciate how the absence of a reference to CEA has caused any miscarriage of justice for the appellant or vitiated the tariff fixation by the CERC. It follows that even if a reference to CEA was in the facts of the case required to be made, the absence of any failure of justice or prejudice would render it unnecessary for us to interfere with the orders passed by the CERC and the Appellate Tribunal.

17. Since the question whether or not a reference to CEA was necessary under Regulation 2.5 was argued before us at some length we may as well deal with the same before parting. A reference to the backdrop in which the question arises becomes necessary and may be summarised as under:

18. The Electricity (Supply) Act, 1948 inter alia dealt with the generation and supply of electricity by generating companies. Chapter V comprising Sections 28 to 58 of the said Act dealt with the preparation of schemes by generating companies and concurrence of the CEA for such schemes including the capital cost to be incurred by these generating companies. Section 43A of the Act dealt with sale of electricity by the generating companies and provided norms and parameters to be determined by the CEA and notified by the Government of India. Since much of the debate at the Bar was around the said provision and the effect of deletion of sub-section (2) thereof, it would be useful to reproduce the same at this stage.

> "43A. **Terms, conditions and tariff for sale of electricity by Generating Company.**- (1) A Generating Company may enter into a contract for the sale of electricity generated by it-
>
> (a) with the Board constituted for the State or any

of the States in which a generating station owned or operated by the company is located;

(b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15A; and

(c) with any other person with consent of the competent government or governments.

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned."

19. In the year 1998, came the Electricity Regulatory Commissions Act, 1998, which established the Central Electricity Regulatory Commission (hereinafter referred to as "the Central Commission"). The Central Commission was *inter alia* charged with the function of determining tariffs of Central Units such as those owned and controlled by the respondent-Corporation. Significantly enough Section 51 of this Act empowered the Central Government to delete sub-section (2)



of Section 43A with effect from such date as the Central Government may decide. The Central Government, invoked that power and by a notification dated 11th September, 2000, directed the deletion of Section 43A (2) of the Electricity Supply Act, 1948 in respect of generating companies regulated by the Central Commission retrospectively w.e.f. 24th July, 1998. Shortly thereafter the Central Commission issued an order in regard to operational norms applicable to generating stations owned among others by respondent-NTPC. The order was to the following effect:

"As regards capital costs, the situation is somewhat difficult. As the law stands today in respect to PSUs, the required approvals from the Government and clearance from CEA have to be obtained before the commencement of the project, subject to certain limits for which no clearance is required. After the completion of the project, if the actual expenditure or the scope of the project vary beyond certain limits, they are required to be further approved. This process of approval is time consuming, resulting in a provisional clearance, making a subsequent retrospective revision inevitable. Changes in legislation are being contemplated by which the clearance from CEA for projects might be done away with. However, as the law stands today, approvals are inevitable. Still it is possible to bring about stability in tariff in case a time schedule is worked out by which utilities may submit data of CEA at least 6 months prior to the completion of a project, so that clearance could be obtained sufficiently in time before the tariff for the station/lines is determined. It is hoped that any variations on actual finalization of accounts thereafter should be minor in nature which could be absorbed by the utility and if substantial, can be taken care of in the next revision. In view of the above, all utilities seeking determination of tariff in respect of new projects, shall submit their applications to us at least 3 months in advance of the anticipated date of completion, along with

the project cost as approved by the appropriate independent authorities, other than the Board of Directors of the Company. This project cost will constitute the basis for tariff fixation, and no revision would be entertained till the next tariff period. This direction presupposes that CEA may hereafter, unlike the past, clear capital cost escalations on factors other than the change in scope as well. We would urge upon CEA to consider and deal with the approval of additional capital costs other than those due to change in the scope of the project as well, in the interest of avoidance of tariff shocks down stream. In case the projects exempted from CEA clearance, the Commission would consider accepting a due diligence clearance from any recognised agency."

20. The above was followed by the Central Commission framing Tariff Regulations 2001, in which Regulation 2.5 extracted earlier dealt with capital expenditure. It was in the above background that the Central Commission determined the Tariff for the generating unit in question for the period 1st April, 1997 to 31st March, 2001 by an order dated 30th October, 2002. Shortly after that order the Parliament enacted the Electricity Act, 2003 which came into force w.e.f. 10th June, 2003. The new legislation repealed the Electricity (Supply) Act, 1948. The effect of this repeal was that all provisions of the 1948 Act including those requiring approval by the CEA of the scheme of the generating stations and capital cost which the repealed Act provided for became inapplicable and irrelevant under the new Act. The new law aimed at deregulating electricity generation. In the case of Thermal Power Stations the capital cost was not required to be approved by the CEA, as was the position under the earlier law.

21. In Petition No.139 of 2004, the respondent-Corporation sought additional capitalisation of the expenditure on the project in question relevant to the period 2001-2004. The Central Commission determined the additional capitalisation and



allowed the same to the respondent, which determination was upheld by the Tribunal with the modification to which we have adverted in the beginning of this order.

22. There is no gainsaying that the prayer for additional capitalisation was made by the respondent-Corporation and considered by CERC after the Electricity Act 2003 had come into force, repealing the earlier enactments. The new legislation did not set out any role for the CEA, in the matter of approval of the schemes for the generating companies or the capital expenditure for the completion of such projects. The entire exercise touching the regulation of the tariff of generating companies owned or controlled by the Central Government, like the respondent was entrusted to the Central Commission. The role of the Central Electricity Authority established under Section 7 of the 2003 Act, was limited to matters enumerated under Section 73 of the Act, approval of the scheme for generating companies or the capital expenditure for the completion of such projects or capitalisation of the additional expenditure not being one such function. The CERC was, therefore, right when it said that the Central Electricity Authority had no part to play in the matter of approval for purposes of capitalisation of the extra expenditure incurred on a project. That was so notwithstanding the continuance of Regulation 2.5 of the regulations framed by the CERC providing for such an approval by the CEA. The far reaching changes that came about in the legal framework with the enactment of the 2003 Act, made Regulation 2.5 redundant in so far as the same envisaged a reference to the CEA or an Independent Agency for approval of the additional capitalisation. Insistence on a reference, to the CEA for such approval, despite the sea change in the legal framework would have been both unnecessary as well as opposed to the spirit of new law that reduced the role of CEA to what was specified in Section 73 of the Act. The CERC and the Tribunal were in that view justified in holding that a reference to the CEA was not indicated nor did the absence of such a reference denude the CERC of its

authority to fix the tariff after the 2003 Act had come into force. That was so notwithstanding the fact that proviso to Section 61 of the Electricity Act, 2003 continued the terms and conditions for determination of tariff under the enactments mentioned therein and those specified in the Schedule for a period of one year or till such terms were specified under that section whichever was earlier. In the result this appeal fails and is hereby dismissed with costs assessed at Rs.50,000/-.

**Civil Appeal Nos.5361-5362 of 2007**

23. In these appeals the order impugned by the appellant places reliance upon the order passed by the Tribunal, in Appeal No.36 of 2006 against which order we have in the foregoing part of this judgment dismissed the appeal preferred by the appellant. On a parity of reasoning these appeals are also destined to be dismissed and are, accordingly, dismissed with costs assessed at Rs.50,000/-.

R.P. Appeals dismissed.



DAVALSAB HUSAINSAB MULLA

*v.*

NORTH WEST KARNATAKA ROAD TRANSPORT CORPORATION

(Civil Appeal No. 8487 of 2013)

SEPTEMBER 24, 2013

**[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]**

*Labour Law:*

*Dismissal of workman – Misconduct – Workman travelling in Corporation Bus without ticket – On being caught, misbehaving with the checking squad and threatening the Checking Inspector of his life – In disciplinary inquiry charges found proved – Past conduct also considered – Order of dismissal – Labour Court held the order fully justified – Held: Having regard to the gravity of the misconduct found proved against the appellant in an enquiry held for that purpose by way of disciplinary procedure prescribed in the relevant rules, the conclusion of Labour Court on this aspect cannot be assailed.*

*Industrial Disputes Act, 1947:*

*s.11-A – Power of Labour Court to give appropriate relief in case of discharge of dismissal of workman – Exercise of discretion – Explained – Held: In the instant case, Labour Court examined the scope of exercising its discretion u/s. 11A in order to interfere with punishment imposed on appellant — Having regard to the factors, referred by Labour Court, it rightly declined to exercise its discretionary jurisdiction u/s. 11A to interfere with the punishment of dismissal – However, it is open to appellant or his dependants to approach the authorities concerned for settlement of any benefits payable*

*under the provisions of the Act as well as under Employees' Pension Scheme, 1995 – Employees' Provident Fund and Miscellaneous Provisions Act, 1952 – s.6A.*

**The appellant, while working as a driver in the employment of the respondent Corporation, was found to have been travelling in the Corporation bus without ticket. The checking squad imposed the usual penalty on him, whereupon he abused the Checking Inspector and also threatened to do away with his life. He misbehaved with other officials also. On the following day, he entered the checking section and threatened the Checking Inspector to burn him in the presence of the staff. A joint report was submitted by the employees leading to disciplinary proceedings which culminated in the order of his dismissal from service. The appellant raised an industrial dispute and the Labour Court passed the award holding the dismissal as fully justified. In the writ petition filed by the appellant, the single Judge of the High Court modified the award of dismissal and ordered withholding of two increments with cumulative effect with continuity of service but without back wages. The Division Bench, however, set aside the order of single Judge and restored the award of dismissal as was passed by the Labour Court.**

**Dismissing the appeal, the Court**

**HELD: 1.1. The Labour Court, while considering the issues raised before it as regards the validity of the enquiry, examined the procedure followed in the domestic enquiry and found no flaw in the same. There is also no flaw in the conclusion of the Labour Court, and the enquiry held against the appellant was fair and proper. [Para 5] [832-E-G]**

**1.2. As regards as the misconduct alleged against the appellant, apart from his admission that he travelled on**



**30.11.1995 without a valid ticket, his conduct of misbehaviour towards his superiors and other employees on 30.11.1995 as well as on 01.12.1995 was fully established by the evidence placed before the enquiry officer and the Labour Court. He also threatened the Checking Inspector of his life. The Labour Court found that the evidence conclusively proved the misconduct alleged against the appellant. The Labour Court also made a specific reference to the past conduct of the appellant wherein he was involved in 27 other default cases, and on a number of earlier occasions also he misbehaved with superior officers and refused to perform his duties, apart from disobeying the orders of his superiors, and his involvement in a case of assault on other employees. The cumulative effect of the said facts resulted in the Corporation passing the order of dismissal against the appellant. Having regard to the gravity of the misconduct found proved against the appellant in an enquiry held for that purpose by way of disciplinary procedure prescribed in the relevant rules, the conclusion of the Labour Court on this aspect cannot be assailed. [para 5-7] [832-G; 833-A-B, C-D; 834-A-B, G]**

**2.1. As far as the discretionary power of the Labour Court u/s. 11A of the Industrial Disputes Act, 1947 is concerned, the exercise of such power will always have to be made judicially and judiciously. Under the said provision, wide powers have been vested with the Labour Court to set aside the punishment of discharge or dismissal and in its place award any lesser punishment. Therefore, high amount of care and caution should be exercised by the Labour Court while invoking the said discretionary jurisdiction for replacing the punishment of discharge or dismissal. Before exercising the said discretion, the Labour Court has to necessarily reach a finding that the order of discharge or dismissal was not justified. The satisfaction to be arrived at by the Labour**

**Court while exercising its discretionary jurisdiction u/s. 11A of the Act must be based on sound reasoning and cannot be arrived at in a casual fashion. In this context, it will be appropriate for the Labour Court to assess the gravity and magnitude of the misconduct found proved against the employee concerned, the past conduct of the employee, the repercussion it will have in the event of interference with the order of discharge or dismissal in the day to day functioning of the establishment which will have far reaching effects on the other workmen etc. It should always be remembered that any misplaced sympathy would cause more harm to the establishment, which provides source of livelihood for a large number of employees, than any good for the employee concerned. [Para 8-9] [834-H; 835-A-E; 836-A-C]**

*Royal Printing Works v. Industrial Tribunal and Another* **1959 (2) LLJ 619 – relied on.**

**2.2. In the instant case, Labour Court examined the scope of exercising its discretion u/s. 11A of the Act in order to interfere with the punishment imposed on the appellant. Having regard to the factors referred by the Labour Court, it rightly declined to exercise its discretionary jurisdiction u/s. 11A of the Act. The single Judge of the High Court by merely stating that the Labour Court had only considered the interest of the Corporation and not the interest of the employee, set aside the said award which was correctly rectified by the Division Bench. The Division Bench was, therefore, well in order in having set aside the order of the Single Judge and restored the order of dismissal passed against the appellant. It leaves no scope to interfere with the order impugned in the appeal. [Para 5,7 and 10] [833-B-C; 834-G-H; 837-F-G]**

**3. Having regard to the gravity of the misconduct found proved against the appellant and his past record**



**of service, he deserves no sympathy. However, in the light of the provisions prevailing under Employees' Pension Scheme, 1995, formulated u/s. 6A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, it is open to the appellant or his dependants to approach the authorities concerned for settlement of any benefits payable under the provisions of the said Act as well as under the Employees' Pension Scheme, 1995. [Para 11 and 13] [838-B; 839-B-C]**

**Case Law Reference:**

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|---|---|---|
| **1959 (2) LLJ 619** | **Relied on** | **Para 9** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8487 of 2013.

From the Judgment & Order dated 13.08.2009 of the High Court of Karnataka Circuit Bench at Dharwad in Writ Appeal No. 2499 of 2007 (LK).

Shankar Divate for the Appellant.

V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

**FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. Leave granted.

2. This appeal is directed against the judgment of the Division Bench of Karnataka High Court dated 13.08.2009 passed in Writ Appeal No.5040 of 2008 and Writ Appeal No. 2499 of 2007. By the common judgment, the Division Bench, while setting aside the order of the Learned Single Judge reducing the quantum of punishment imposed on the appellant, upheld the order of dismissal passed by the respondent-Corporation. In this appeal the challenge is to the order passed in Writ Appeal No.2499 of 2007.

3. Shorn of unnecessary details, the case of the appellant was that he was working as a driver in the respondent Corporation and that on 30.11.1995, he was travelling in the Corporation bus without ticket which was detected by the checking squad. The checking squad imposed the usual penalty on the appellant. It is stated that enraged by the action of the checking squad, the appellant abused the Checking Inspector by using filthy language and also threatened to do away with his life. The appellant also stated to have attempted to assault the Checking Inspector. Subsequently, he is stated to have approached the coordinator in the Divisional Office Belgaum and behaved in an arrogant manner with the said officer. Apart from abusing the officials of the checking squad in filthy language in the presence of other employees, he is also stated to have thrown a challenge that he would close the gate of the office and indulge in *Satyagraha*. Again on the next day i.e. on 01.12.1995, he is sated to have entered the Divisional Line checking section and threatened the Checking Inspector by stating that he would burn him in the presence of other officials and the employees. A joint report was submitted by those employees based on which a charge sheet was issued to the appellant calling for his explanation. The appellant while denying the charges replied that penalty was collected from him by Checking Inspector and that he went to the office of the coordinator only to report about what had happened when the checking squad intercepted him when he was travelling in the bus.

4. The disciplinary authority ordered for an enquiry to be held by appointing an enquiry officer. The appellant fully participated in the enquiry and the enquiry officer recorded a finding that the charges levelled against the appellant were proved. After issuing a second show cause notice along with a copy of the findings, the order of dismissal came to be issued against the appellant. The appellant raised an industrial dispute which was adjudicated by the Labour Court wherein an award came to be passed holding that the order of dismissal was fully



justified and there was no scope to invoke Section 11A of the Industrial Disputes Act (hereinafter called 'the Act') to interfere with thes punishment imposed on the appellant. When the appellant preferred a writ petition challenging the said award of the Labour Court, Hubli on 20.12.2005 in KID 20/2003, the Learned Single Judge allowed the Writ Petition, set aside the award of the Labour Court, modified the order of dismissal by ordering withholding of two increments with cumulative effect without consequential benefits and without back wages but with continuity of service. There was a further direction to the respondent Corporation to reinstate the appellant within four weeks from the date of the order of the Learned Single Judge. The Division Bench, however, set aside the order of the Learned Single Judge and upheld the order of dismissal.

5. We heard Mr. Shankar Divate, learned counsel appearing for the appellant and Mr. B. Subramanya Prasad, learned counsel appearing for the respondent-Corporation. We have also perused the orders of the Labour Court,the Learned Single Judge as well as that of the Division Bench of the High Court. Having bestowed our serious consideration, we find that the act of the appellant in having travelled in the Corporation bus on 30.11.1995 without valid ticket was not in dispute. The Labour Court, while considering the issue raised before it as regards the validity of the enquiry, examined the procedure followed in the domestic enquiry and found that there was no flaw in the manner in which the enquiry was held against the appellant. We also do not find any flaw in the said conclusion of the Labour Court and that the enquiry held against the appellant was fair and proper. As regards the misconduct alleged against the appellant, apart from his conduct of travelling in the bus without a valid ticket, the further allegation was that on that day, namely, 30.11.1995 as well as on the subsequent date i.e. 01.12.1995, he threw a challenge towards the checking squad, and in particular, the concerned Inspector who demanded the ticket from him, namely, one Shri D.R. Hiremath, and also behaved in a rude manner towards other

officers in the Divisional Office. The rude behaviour of the appellant was explained by those employees in the enquiry and the Labour Court found that there was no defect in the enquiry apart from the fact that the evidence placed before the enquiry officer conclusively established the misconduct alleged against the appellant as found proved by the enquiry officer. The Labour Court also examined the scope of exercising its discretion under Section 11A of the Act in order to interfere with the punishment imposed on the appellant and stated in detail as to how and why it was not in a position to exercise its discretion in his favour.

6. In the light of the gravity of the misconduct found proved against him as well as the past conduct wherein he was involved in 27 other default cases, where on number of earlier occasions also he misbehaved against superior officers and refused to perform his duties, apart from disobeying the orders of his superior, his involvement in a case of assault against other employees, the Labour Court by making specific reference to Exhibit M14 which contained the past record of the appellant stated that he was involved in nefarious activities and was highly indisciplined. When the said award of the Labour Court was subject matter of challenge, the same came to be interfered with by the Learned Single Judge by stating that the Labour Court was not justified in not invoking its discretionary power under Section 11A of the Act on the ground of interest of Corporation and without considering the interest of the appellant. Without assigning any reason, the Learned Single Judge held that the punishment was disproportionate and while setting aside the award of the Labour Court modified the award by withholding of two increments with cumulative effect and without back wages and consequential benefits. The Division Bench, however, on finding no flaw in the order of the Labour Court set aside the order of the Learned Single Judge and restored the punishment of dismissal.

7. Having considered the above factors, we are also



convinced that there were no good grounds to interfere with the impugned judgment of the Division Bench. Having regard to the act of misconduct found proved against the appellant in an enquiry held for that purpose by way of disciplinary procedure prescribed in the relevant rules, the conclusion of the Labour Court on this aspect cannot be assailed. As far as the misconduct alleged against the appellant apart from his admission that he travelled on 30.11.1995 without a valid ticket, the evidence placed before the enquiry officer and the Labour Court fully established his other conduct of misbehaviour towards his superiors and other employees on 30.11.1995 as well as on 01.12.1995. Such misbehaviour was by way of abusing his superior officers for the simple reason that the checking squad questioned his conduct of travelling in the Corporation bus without a valid ticket. They were not mere abuses of simple nature. The exact wording used by the appellant which has been recorded by the trial Court in its award discloses that in the course of such abuse he also threatened Mr. Hiremath, the Checking Inspector by alleging that he will be done away with. Such a conduct of the appellant towards his superiors and other employees was rightly condemned by the respondent-Corporation while proceeding against him by way of disciplinary action and by passing the order of dismissal. Apart from the conduct which took place on 30.11.1995 and 01.12.1995 and for which he was proceeded against, the appellant's past record was also demonstrated to be very bad. He was proceeded against on 27 occasions earlier also for his different acts of misconduct in which on one occasion he indulged in the conduct of threatening a co-employee. The cumulative effect of the above resulted in the Corporation passing the order of dismissal against the appellant. Having regard to the above factors, the Labour Court rightly declined to exercise its discretionary jurisdiction under Section 11A of the Act to interfere with the punishment of dismissal imposed on the appellant.

8. As far as the discretionary power of the Labour Court

under Section 11A of the Act is concerned, the exercise of such power will always have to be made judicially and judiciously. Under the said provision, wide powers have been vested with the Labour Court to set aside the punishment of discharge or dismissal and in its place award any lesser punishment. Therefore, high amount of care and caution should be exercised by the Labour Court while invoking the said discretionary jurisdiction for replacing the punishment of discharge or dismissal. Such exercise of discretion will have to depend upon the facts and circumstances of each case. Before exercising the said discretion, the Labour Court has to necessarily reach a finding that the order of discharge or dismissal was not justified. A reading of Section 11A of the Act makes it clear that before reaching the said conclusion, the Labour Court should express its satisfaction for holding so. It has to be remembered that the question of exercise of the said discretion will depend upon the conclusion as regards the proof of misconduct as held proved by the management and only if it finds that the discharge or dismissal was not justified. Therefore, the satisfaction to be arrived at by the Labour Court while exercising its discretionary jurisdiction under Section 11A of the Act must be based on sound reasoning and cannot be arrived at in a casual fashion, inasmuch as, on the one hand the interference with the capital punishment imposed on the workman would deprive him and his family members of the source of livelihood, while on the other hand the employer having provided the opportunity of employment to the concerned workman would be equally entitled to be ensured that the employee concerned maintains utmost discipline in the establishment and duly complies with the rules and regulations applicable to the establishment. In that sense, since the relationship as between both is reciprocal in equal proportion, when the employer had chosen to exercise its power of discharge and dismissal for stated reasons and proven misconduct, the interference with such order of punishment cannot be made in a casual manner or for any flimsy reasons.



9. In this context, it will be appropriate for the Labour Court to assess the gravity and magnitude of the misconduct found proved against the employee concerned, the past conduct of the employee, the repercussion it will have in the event of interference with the order of discharge or dismissal in the day to day functioning of the establishment which will have far reaching effects on the other workmen and so on and so forth. It should always be remembered that any misplaced sympathy would cause more harm to the establishment which provides source of livelihood for many number of employees than any good for the employee concerned. It will be worthwhile to refer to the repercussions that would result in the event of any misplaced sympathy shown to an employee who indulges in certain acts of misconduct which has been lucidly explained in a decision of the Madras High Court reported as *Royal Printing Works v. Industrial Tribunal and Another* – 1959 (2) LLJ 619 - wherein Hon. Balakrishna Ayyar, J. (as he then was) stated the position as under:

> "There are certain passages in the order of the tribunal which as I understand them suggest that carelessness on the part of an employee in relation to his work would not justify serious punishment. With this view I definitely disagree. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. I shall not refer to the classic example of the sentry who sleeps at his post and allows the enemy to slip through. There are more familiar instances. A compositor who carelessly places a plus sign instead of a minus sign in a question paper may cause numerous examinees to fail. A compounder in a Hospital or chemists' shop who makes up the mixtures or other medicines carelessly may cause quite a few deaths. The man at an airport who does not carefully filter the petrol poured into a plane may cause it to crash. The railway employee who does not set the point carefully may cause a head-on collision. Misplaced sympathy can be of great evil. Carelessness and

indifference to duty are not the high roads to individual or national prosperity."

(emphasis supplied)

10. We feel it appropriate to add one more instance such as the present one where an employee by violating the rules of the Corporation travelled without a valid ticket had the audacity to question the authority of the checking squad and posed a serious threat of taking away the life of the concerned Checking Inspector. Not stopping with that he went to the office of the higher official and created a ruckus in the office by throwing a challenge that he would indulge in a *Satyagraha* apart from abusing the concerned Checking Inspector in the presence of all other employees once again threatening to take away his life by burning him. Such an extreme misbehaviour towards the higher officials and fellow employees cannot be dealt with lightly and any sympathy shown to a person of such mindset while working in an establishment will definitely cause more harm than good for the establishment and all others working therein. Therefore, in the case on hand, the conduct of the employee towards the establishment as well as its fellow employees and higher authorities was highly condemnable and, therefore, there was absolutely no scope for exercising the discretionary power vested in the Labour Court under Section 11A of the Act. The Labour Court, therefore, rightly declined to exercise the said jurisdiction vested in it in his favour. Unfortunately, the learned Judge by merely stating that the Labour Court had only considered the interest of the Corporation and not the interest of the employee set aside the said award which was correctly rectified by the Division Bench. The Division Bench was, therefore, well in order in having set aside the order of the Learned Single Judge and restoring the order of dismissal passed against the appellant. We too, therefore, do not find any scope to interfere with the order impugned in this appeal.

11. Learned counsel for the appellant made a fervent



prayer that the appellant had rendered service of more than 23 years and that such service should not go without any terminal benefits inasmuch as he has got a family to support and, therefore, a lenient view should be taken. Having regard to the gravity of the misconduct found proved against the appellant and his past record of service, we have no sympathy for the appellant. However, on instructions, the respondent has filed an affidavit sworn to by the Deputy Chief Law Officer of the respondent Corporation to a specific query posed to the Corporation as to whether the appellant would be entitled to claim pension on the basis of the prevalent Rules/ Scheme for payment of pension even if the dismissal of an employee from service is sustained. The said affidavit is dated 2nd May, 2013. The Deputy Chief Law Officer has referred to para 12(8) of the Employees' Pension Scheme, 1995 formulated under Section 6A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (Act 19 of 1952) which specifically states that if a member ceases to be in employment by way of RETIREMENT OR OTHERWISE earlier than the date of superannuation from which pension can be drawn, the member may on his option either be paid pension as admissible under that Scheme on attaining the age exceeding 50 years or he may be issued a Scheme certificate by the Commissioner indicating the pension of his service, the pensionable salary and the amount of pension due on the date of exit from the employment.

12. Paragraph 4 of the said affidavit of the Deputy Chief Law Officer reads as under:

> "4. In view of Para 12(8) of the Scheme, if a member ceased to be in employment by way of retirement or otherwise, he is eligible for pension as admissible in law to the extent of contribution made by the employer. It is submitted that as the word used in Para 12(8) of the Scheme as regards eligibility is "by way of retirement or otherwise". As the word used under Para 12(8) of the

Scheme is "otherwise" and as there is no specific provision under the Scheme as regards the employees who are dismissed from service, it can be included the dismissed employees also if he has put pensionable service. Hence this affidavit."

13. In the light of the provisions prevailing under Employees' Pension Scheme, 1995 governed by the provisions of Act, 19 of 1952, we only wish to state that it is open to the appellant or his dependants (if any) to approach the concerned authorities for settlement of any benefits payable under the provisions of Act 19 of 1952, as well as under the Employees' Pension Scheme, 1995. In the event any such application is made by the appellant or by any of his dependants or nominee, the authorities of the respondent Corporation, as well as the authorities constituted under the provisions of Act 19 of 1952 shall consider the same in accordance with the provisions of the said Act and the Scheme and pass appropriate orders expeditiously, preferably within one month from the date of filing of such application. The appeal, however, fails and the same is dismissed.

R.P. Appeal dismissed.



TAMIL NADU RURAL DEVELOPMENT ENGINEERS ASSOCIATION

*v.*

THE SECRETARY TO GOVERNMENT RURAL DEVELOPMENT DEPARTMENT & ORS.

(Civil Appeal No. 8758 OF 2013 etc.)

SEPTEMBER 27, 2013

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

*SERVICE LAW:*

*Seniority between direct recruits and promotee Assistant Engineers – Held: Appellants were absorbed in RD Department as Overseers — Their previous service in Highways Department was also on the post of Overseers – Their claim for benefit of previous service on lower post of Overseer for determining seniority on higher post of Assistant Engineer cannot be accepted — Appellants were promoted as Assistant Engineers much later than respondents-Assistant Engineers (direct recruits) had started discharging their functions as Assistant Engineers in RD Department — Respondents had completed five years service as Assistant Engineers and under the relevant rules were eligible to be promoted as Assistant Executive Engineers — Consequently, they were duly promoted as Assistant Executive Engineer — Thus, the action taken by State Government cannot be said to be either arbitrary or violative of Art. 14 or 16 of the Constitution of India.*

*Quota for promotion to post of Assistant Executive Engineer – Held: For promotion to the post of Assistant Executive Engineer (RD), more than one mode of recruitment i.e. promotion from Assistant Engineer (RD) and recruitment by transfer from the feeder category of Junior Engineer and Senior Draughting Officer have been recognised and*

*stipulated — Further, on the post of Assistant Engineer (RD) there is more than one mode of recruitment i.e. direct recruitment and recruitment by transfer from the feeder category of Overseers – Therefore, rules providing ratio of 6:2:1 cannot be said to be violative of Art.14 or 16 of the Constitution – Further, fixation of quota/ratio is the prerogative of the executive and in the instant case, the ratio was fixed in the service rules framed under Art.309 of the Constitution – Constitution of India, 1950 – Arts. 14, 16 and 309.*

**The members of the appellant-Association (appellants) were initially appointed as 'Overseers' in the then Highways and Rural Works Department, where, even after putting in 20 years service as such, they did not have any promotional avenues. By G.O. Ms No. 263 Rural Department dated 27.12.1996, the Government of Tamil Nadu decided to set up a separate Engineering Wing for the RD Department and the posts created, namely, Assistant Engineers (AE), Assistant Executive Engineers (AEE), Executive Engineers (EE) and Superintending Engineers (SE), in the RD Department were filled up by drawing personnel from other technical Departments of the State Government on deputation basis as an interim arrangement. On 25.5.1998, the date on which the absorption and recruitment of engineering personnel belonging to other Departments were notified, the appellants were occupying the posts of Overseer in the Highways Department. On 8.3.1999, the appellants gave their consent to be absorbed as Overseers in the RD Department. On 26.9.1997, the State Public Service Commission invited applications for the posts of Assistant Engineers in the RD Department. The respondents-Assistant Engineers were directly recruited from 24.11.1998 to November, 1999. The appellants were promoted as Assistant Engineers on 2.9.2002, having been given the benefit of service as Overseers in the RD Department from the year 1997. The representations of**



**the appellants to effect promotions to the post of Assistant Executive Engineers (AEE), RD Department from the post of Assistant Engineer on 1:1 ratio between Assistant Engineer-direct recruits and Assistant Engineers-promotees by transfer of service in the RD department, did not yield fruits. They filed a writ petition seeking issuance of a writ declaring Rule 3(2) of Notification-III of G.O.Ms. No. 15, RD Department dated 25.1.2000, as *ultra vires* in the absence of fixation of quota between AE-direct recruits and promotees on the post of AEE. The High Court dismissed the writ petition.**

**In the instant appeals, the grievance of the appellants was (i) that they could not be deprived of their past service; and (ii) there ought to be a ratio of 1:1 between direct recruits and promotees for promotion to the post of AEE.**

**Dismissing the appeals, the Court**

**HELD: 1.1. The Appellants having voluntarily opted to be absorbed in the RD Department, without any protection of their previous service in the Highways Department, cannot be permitted to make a grievance that they have not been treated at par with the direct recruits. The direct recruits joined on the post of AE. The appellants were working on the post of Overseer in the Highways Department, the parent Department, even though they were degree holders. Having given the option to be absorbed in RD Department on the post of Overseer, their claim for absorption as AE is without any legal or factual justification. [Para 27] [857-G-H; 858-A-B, C]**

**1.2. On 25.5.1998, when the State Government issued orders for absorption and recruitment of the Engineering Staff through GO Ms. No.102 RD Department, the appellants were occupying the posts of Overseer in the Highways Department, but on temporary service in the**

**RD Department. On the basis of the exercise of option, they appellants were absorbed in the RD Department on 8.3.1999. Thereafter, the Government issued Notifications I to IV with ad hoc rules for the Engineering Wing for the RD Department by notification GO Ms. No.15 dated 25.1.2000. These notifications were given effect from 25.5.1998, the date on which the absorption and recruitment of engineering personnel belonging to other Departments were notified. The seniority of the respondents has been reckoned with reference to the date of appointment on the post. This is a well recognised general principle of computing seniority and no exception can be taken to it. In fact, the service of the appellants has been counted form 1997 i.e. from the time when they started serving as Overseers in the RD Department on deputation from the Highways Department under GO Ms. No. 263 dated 27.12.1996. [Para 25-26] [856-B-C, F-H; 857-A, C, F-G]**

**1.3. The appellants were promoted as Assistant Engineers on 2.9.2002, having been given the benefit of service as Overseers in the RD Department from the year 1997. They did not question their appointment as Assistant Engineers since they were well aware that they had been so appointed on completion of five years service as Overseers in the RD Department by virtue of GO Ms. No.15 dated 25.1.2000 as amended by GO Ms. No.295 dated 14.12.2001. On the other hand, the respondents-Assistant Engineers (direct recruits) had started discharging their functions as Assistant Engineers in RD Department between 24-11-1998 to November, 1999. They were duly promoted under the rules as Assistant Executive Engineer after they had completed five years service as Assistant Engineers. Thus, the action taken by the State cannot be said to be either arbitrary or violative of Art. 14 or 16 of the Constitution of India. [Para 28] [858-D-G]**



**1.4. The appellants were absorbed in the RD Department as Overseers. Their previous service in Highways Department was also on the post of Overseers. The appellants claimed the benefit of the previous service on the lower post of Overseer for determining the seniority on the higher post of Assistant Engineer, which cannot be accepted for the simple reason that the appellants had voluntarily accepted and given the option to be absorbed in the RD Department on the post of Overseer. No claim was made at that stage to be either absorbed or promoted as Assistant Engineer or to be given the benefit of the service already rendered by them in the Highways Department. Further, their claim that the degree holder Overseers ought to be exempted from having rendered five years service in the RD Department, before they can be eligible to be considered for promotion as Assistant Executive Engineer cannot be accepted. [Para 31] [860-H; 861-A-B, F-G]**

*Sub-Inspector Rooplal and Another v. Lt. Governor through Chief Secretary, Delhi and Others* **1999 (5) Suppl. SCR 310 – distinguished.**

**2.1. It cannot be disputed that for promotion to the post of Assistant Executive Engineer (RD) Notification No. III GO Ms. No.15, more than one mode of recruitment i.e. promotion from Assistant Engineer (RD) and recruitment by transfer from the feeder category of Junior Engineer and Senior Draughting Officer have been recognised and stipulated. Further, it is also a matter of record that on the post of Assistant Engineer (RD) there is more than one mode of recruitment i.e. direct recruitment and recruitment by transfer from the feeder category of Overseers only. Therefore, the rules have provided a ratio on appointment to the post of Assistant Executive Engineer (RD) as 6:2:1 (promotion from AE (RD); JE; SDO). Prior to the absorption of the appellants**

**in the RD Department, they had no chance of being promoted on the post of Assistant Executive Engineer, Executive Engineer or Superintending Engineer. It is only upon their absorption that they have got a chance of being promoted on the higher posts. The ratio of 6:2:1 cannot, in any manner, be said to be violative of Art. 14 or 16 of the Constitution. [Para 29] [859-D-H; 860-A]**

**2.2. Even otherwise, the fixation of the quota/ratio is the prerogative of the executive. Further, the ratio of 6:2:1 has been fixed in the service rules in exercise of the powers of the governor under proviso to Art. 309 of the Constitution. In the absence of the appellants placing on the record material to establish that fixation of such a ratio is patently arbitrary, the action of the Government cannot be nullified. Fixation of rota/quota on the basis of qualification is well accepted in service jurisprudence. Therefore, it cannot be said that the ratio of 6:2:1 ought to be replaced with the ratio by 1:1. [Para 30] [860-B-C]**

**Case Law Reference:**

**1999 (5) Suppl. SCR 310 distinguished para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8758 of 2013.

From the Judgment & Order dated 29.01.2007 of the High Court of Judicature at Madras in Writ Petition No. 26990 of 2005.

WITH

C.A. Nos. 8759, 8762, 8763, 8764, 8765 of 2013.

P.S. Patwalia, Indu Malhotra, Nisha Bagchi, Vivek Jain, Nishtha Kumar, Pooja Sharma, Vikas Mehta for the Appellant.

Subramonium Prasad, AAG, B. Balaji, K.V. Rathee, M. Yogesh Kanna, A. Santha Kumaran, N. Shoba, Sri Ram J. Thalapathy, V. Adhimoolam, S. Thananjayan for the Respondents.



The Judgment of the Court was delivered by

**SURINDER SINGH NIJJAR, J.** 1.Leave granted in all the Special Leave Petitions.

2. These appeals are directed against the common judgment and final order dated 29th January, 2007 passed by the High Court of Judicature at Madras in Writ Petition Nos. 26990 and 26973 of 2005; 36096 of 2004, Writ Appeal No.500 of 2005, Writ Petition Nos. 31416 of 2004 and 9460 of 2005. By this order, the High Court dismissed the Writ Petitions and the Writ Appeal filed by the Appellant-Association.

3. Since the facts involved in the controversy in all the appeals are common, we shall make a reference to the facts as narrated by the High Court. This shall be supplemented by any additions made by the parties in this Court.

4. The facts noticed by the High Court are that the members of the Tamil Nadu Rural Development Engineers' Association (hereinafter referred to as 'Appellants') were initially appointed as 'Overseers' by the then Highways and Rural Works Department and posted exclusively to various Panchayat Unions for executing all the Civil works / Rural works in the Panchayat Unions of Tamil Nadu. Since they were earlier under the administrative control of the erstwhile Highways and Rural Works Department, they had no proper avenues of promotion especially for the post of Assistant Engineer (for short 'AE') and many of them were languishing in the same post, i.e., as Overseers, for nearly two decades.

5. By virtue of G.O. Ms. No. 263, Rural Development Department (in short 'RD Department'), dated 27th December, 1996, the Government of Tamil Nadu decided to set up a separate 'Engineering Wing' for the RD Department itself so as to exercise adequate control over various Central and State sponsored Schemes and accordingly several new posts such as Assistant Engineers (AE). Assistant Executive Engineers (AEE), Executive Engineers (EE) and Superintending Engineers (SE), were created.

6. By virtue of G.O. Ms. No. 102, RD Department, dated 25th May, 1998, the Government directed that the then Highways and Rural Works Department should cease forthwith from exercising control over the promotions and appointments in the RD Department. The Government Order also recognised the rights of the Overseers, whose entire service is only in the RD Department, for promotion to the posts of AEs and Junior Engineers (JEs). Finally, the Government framed Service Rules for various technical posts in the RD Department and notified the same in G.O. Ms. No. 15, dated 25th January, 2000, by invoking the powers under proviso to Article 309 of the Constitution of India. On 14th December, 2001 G.O. M.S. No. 295 (RD) Department was issued to amend the service rules with effect from 25th May, 1998

7. As soon as the Engineering Wing was created in the RD Department, the posts were filled up by drawing personnel from other technical Departments of Government of Tamil Nadu on 'deputation basis' as an interim arrangement. However, the Tamil Nadu Highway Engineers Association opposed the creation of a separate Engineering Wing under the RD Department and filed Original Application in O.A. No. 253 of 1997 before the Tamil Nadu Administrative Tribunal (in short 'Tribunal'). This Application was dismissed by the Tribunal by order dated 12th November, 1997. Aggrieved by the order of the Tribunal, the Association filed W.P. No. 6513 of 1998 before the Madras High Court. By order dated 2nd April, 2002, the Madras High Court upheld the order of the Tribunal.

8. The constitutional Validity of G.O. Ms. No. 15, dated 25th January, 2000, and G.O. Ms. No. 102, dated 25th May, 1998, was challenged before the Tribunal by a group of individuals and by the Association of Tamil Nadu Engineering Graduates in O.A. Nos. 5338 and 7766 of 2000. Both the Government Orders were upheld by the Tribunal by order dated 3rd June, 2002.

9. A group of AE - Direct Recruits, on completion of five



years of service in the RD Department, filed O.A. Nos.1068 to 1081 of 2004 before the Tribunal, praying that they be considered for promotion to the post of AEE in the RD Department under Rule 39 of General Rules of the Government of Tamil Nadu. The Tribunal, by Order dated 16th March, 2004, directed the Government and the Director, RD Department, to consider and grant promotion to the applicants under Rule 39 of the General Rules. It was also held that regular promotion and selection can be done after preparing a Panel. This order was challenged by the Appellants in Writ Petition Nos. 34029 and 34040 of 2004 and 1174 of 2005.

10. Appellant-Association made representations to the respondent to fix a ratio of 1:1 among AE- direct recruits and AE- Promotees, for promotion to the post of AEE. The above ratio was requested to be fixed based on the cadres strength in category of AEs, between AE- direct recruits and AE- promotees, which is 1:1. The same ratio was sought to be maintained for the promotional post of AEE as well.

11. It is stated that without reference to the ratio envisaged in G.O. Ms. No. 15, respondent No.2 sought to make a common Seniority List for direct recruits and promotees. The Appellant-Association challenged the common Seniority List in W.P.No.26276 of 2004. An interim stay was granted in the said W.P. on 2nd September, 2004. Later, the Writ Petition was withdrawn by the Appellant-Association with liberty to file a fresh Writ Petition.

12. Shortly thereafter respondent No.1 effected promotions of a group of direct recruits who had completed 5 years of service as AEE by issuing G.O.(2D) NO.116 on 29th October, 2004. This was followed by G.O. (D) No. 966 (RD) (E1) dated 16th November, 2004 issuing posting orders of these promotees. Appellant-Association then filed W.P. No. 36096 of 2004 challenging the promotions and posting of the direct recruits as AEE.

13. Appellant-Association also filed W.P. No. 31416 of 2004 seeking a writ of Mandamus directing the respondents to effect promotions to the post of Assistant Executive Engineers, RD Department, from the post of Assistant Engineer on 1:1 ratio between 'Assistant Engineer-Direct Recruits' and 'Assistant Engineers -Promoted by transfer of service' in the RD Department.

14. In the meantime, the High Court passed an order dated 2nd December, 2004 in Writ Petition 35315 of 2004 directing the Government to implement the order of the Tribunal in O.A. No. 1799 of 2004 and to consider the case of the Promotees who had been absorbed from the Highways Department, if there were no other impediments. Appellant-Association filed Writ Appeal No. 500 of 2005 against the order of the Single Judge.

15. The Government vide letter dated 29th December, 2004 rejected the request of the Appellant-Association to fix a ratio of 1:1, on the ground that the promotions of both the categories have to be made on the basis of the date of joining as Assistant Engineer, irrespective of the source. This led the Appellant-Association to file W.P. No. 9460 of 2005 praying for quashing of the rejection letter issued by the Government on 29th December, 2004.

16. Appellant-Association also filed W.P. No. 26973 of 2005 seeking issuance of a writ of Mandamus directing the respondents to give retrospective effect to the promotions given to Overseers as Assistant Engineers from 25th May, 1998, i.e., the date from which the Service Rules for 'AE-Promotees' as notified in G.O. M.S. No.295 Rural Development (E1) Department dated 14th December, 2001, came into effect.

17. Aggrieved by the non-fixation of ratio for 'AE - Promotees' inspite of various representations, the members of the Appellant-Association, filed a Writ Petition No. 26990 of 2005 seeking issuance of writ declaring Rule 3(2) of Notification-III of G.O. Ms. No. 15, RD Department, dated 25th



January, 2000, as ultra vires in the absence of fixation of quota between AE- Direct Recruits and Promotees to the post of AEE.

18. By the impugned judgment, the Division Bench of the High Court has held that Service of the Appellants in the RD Department before absorption and immediately after the absorption was in a lower post, i.e., Overseer. Therefore, they could not be equated with the direct recruits who joined the RD Department as Assistant Engineers. The post of Overseer was a feeder post for promotion on the post of Assistant Engineer. It was further noticed that admittedly, the Appellants had voluntarily given the option to be absorbed as Overseers. Hence, they cannot claim to be equated with the Assistant Engineers. Further, the Appellants, after absorption, were given benevolent treatment by way of being considered for promotion and, in fact, promoted as AEs. The High Court opined that it cannot lightly ignore the specific stand of the Government that the minimum qualifying service of 5 years in the post of AE for promotion to the post of AEE has been prescribed for the reason that the incumbents should acquire the needed practical experience before taking up 'higher responsibilities' so as to achieve administrative efficiency in the Engineering services. The Appellants cannot claim that the services rendered by them in the Highways Department as Overseers for 20 years be taken into account for promotion in the RD Department. They cannot make use of the currency that is extinct and not in vogue. Already, they were rewarded well inasmuch as their past services had been taken into account much prior to their absorption, i.e., from 1997 onwards; whereas, the services of the direct recruits were counted from the date on which they entered Government Service; therefore, benefit in fact has been extended only to the Appellants and not to the direct recruits. In equity also, the claim of the Appellants was without any merit as after being absorbed in the RD Department, they have been given promotion and made to stand on par with the direct recruits. Therefore, there is no justification at all in asking for

further classification in the integrated cadre and relaxation of five years experience for the purpose of promotion. It was made clear that once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be further classified for the purpose of promotion. It is not the case of the Appellants that the requisite experience as provided in the Rules is applied only in respect of their case and the direct recruits are let free to climb the ladder to reach the zenith. In fact, though the Appellants' voice that retrospective promotions should have been given to them, admittedly, they are not qualified for promotion till date, in that, their absorption in the RD Department with their consent as overseers was on 8th March, 1999; their promotion as AEs was on 2nd September, 2002; and they would be completing the 5 years of service as AEs. only on 2nd September, 2007. As on date, they are all juniors to the direct recruits, hence, they cannot unfairly ask for a relief contrary to the procedure and statutory provisions so as to destroy the right accrued to their seniors/direct recruits. It is reiterated that rules having been made in exercise of the power under proviso to Article 309 of the Constitution, being statutory, cannot be impeached for whimsical and flimsy reasons. In service law, it is settled principle that fixation of quota between various feeder categories is prerogative of the employer/authority. No valid ground was raised or invincible argument made before the High Court to sustain the claim that the orders of the Tribunal suffer from infirmities warranting interference. With these reasons, the High Court has held that the impugned part of the Government Order does not in any way offend Articles 14 and 16 of the Constitution and no Mandamus can be issued as prayed for. Resultantly, the Writ Petitions and the Writ Appeal were dismissed.

19. We have heard the learned counsel for the parties at length.

20. The submissions made by the Appellants are as follows :

It is submitted that the State Government has proceeded



arbitrarily in filling up the post of Assistant Engineer created in 1996 by initiating the process of direct recruitment in 1997 when the Appellants (Overseers) being more qualified and experienced as well as being available for recruitment by transfer in terms of G.O. Ms. No.15 dated 25th January, 2000. It is further submitted that the recruitment rules in respect of direct recruit Assistant Engineers were notified with effect from 26th September, 1997 retrospectively, facilitating the en-masse promotion of direct recruits to Assistant Executive Engineer. The Appellants further claimed that the provisions of G.O. Ms. No. 15 dated 25th January, 2000 have been wrongly interpreted to impose the condition that even the Overseers who possessed the degree in Civil Engineering need to have 5 years service for being promoted as Assistant Engineers. Imposing such a condition has deprived the members of the Appellant-Association and their previous service as Overseers over the last two decades. The Appellants also claimed that G.O. Ms. No.295 dated 14th December, 2001 would not be applicable to them, it would result in depriving them of their best at rights retrospectively. The Appellants claimed that they are entitled to be transferred as Assistant Engineers with effect from 25th May, 1998 the date on which the service rules for the Assistant Engineers were notified. It is further submitted that the ratio of 1:1 which is provided between the direct recruits and the Appellants for recruitment on the post of Assistant Engineer has also to be maintained for the next promotional post of Assistant Executive Engineers.

21. The respondents on the other hand submitted that the Appellants have no legal cause to challenge the direct recruitment which was initiated in 1997. They were not even eligible for absorption in the RD Department till the issuance of G.O. Ms.No.102 dated 25th May, 1998. According to the respondents, various posts were filled under G.O. Ms. No. 263 dated 27th December, 1996 on deputation and transfer from other Departments. But this was a temporary arrangement which was made for a period of 3 years. There was no scheme

providing for the absorption and recruitment of the Engineering Personnel drawn from other Departments in the RD Department till the issuance of G.O. Ms. No. 102 dated 25th May, 1998. There was no impediment to the post being filled by the direct recruitment of the post created under G.O. Ms. No. 263 dated 27th December, 1996. It is further submitted that the Appellants are wrongly claiming that the direct recruits have been given any undue benefit with retrospective effect from 26th September, 1997. The aforesaid date was given only for regularising the recruitment of the Assistant Engineer direct recruits. For all other purposes, the services rendered by the Assistant Engineer direct recruit have been taken into account from 1998. The respondents claimed that in fact the Appellants have been given benefit of the service from the date much prior to their absorption, their services have been taken into account from 1997 onwards whereas they were not absorbed in the RD Department in 1998. Learned counsel for the respondents then submitted that the Appellants did not raise before the High Court the issue that G.O. Ms. No.15 dated 25th January, 2000 should not be interpreted to impose the condition of 5 years service as Overseers for the holders of degree in Civil Engineering for being promoted as Assistant Engineers. The only submission before the High Court was that the appointment on the post of Assistant Executive Engineer should also be made in the ratio of 1:1 and not in the ratio of 6:2:1 as mentioned in notification of G.O. Ms. No.15 dated 25th January, 2000. It is also pointed out by the respondents that even otherwise G.O. Ms. No. 15 was amended by G.O. Ms. No.295 dated 14th December, 2001 which amended the qualification for recruitment by transfers and provided that the candidate "must possess a BE degree in Civil Engineering" or "must have passed AIME" and (ii) "must have rendered service as Overseer for not less than 5 years." G.O. Ms. No. 295 was never challenged by the Appellants.

22. Learned counsel for the respondents further submitted that the Appellants cannot claim any benefit on the basis of the previous service as Overseers for 20 years. They were well aware that their services in the Highways Department would not



be counted for the purpose of seniority in the RD Department as early as on 8th March, 1999 when they had given their consent to be absorbed as Overseers in the RD Department. Having given the option, they cannot now make the grievance that they have lost the benefit of 20 years service. With regard to the submission of the Appellants that G.O. Ms. No. 295 dated 14th December, 2001 cannot affect the vested rights of the Appellants. It is submitted by the respondents that this submission of the petitioner is contrary to the prayer made by them in W.P. No. 26973 of 2005 wherein the Appellants had relied on the aforesaid notification. In the aforesaid writ petition, the Appellants had specifically prayed to be given retrospective promotion on the basis of G.O. Ms. No. 295. The respondents claimed that the submission of the Appellants that they are entitled to be transferred as Assistant Engineers with effect from 25th May, 1998 cannot be accepted as on that date they were working on the lower post of Overseer and further they were members of the Highways Department. It was only on the basis of their option that they were absorbed as Overseers in the RD Department in 1998. On the other hand, Assistant Engineers direct recruit had entered into service in 1998 itself. The respondents further submitted that the claim of the Appellants with regard to maintaining the ratio 1:1 for the promotional post of Executive Engineer cannot be considered as it was given up by the Appellants before the High Court.

23. We have considered the submissions made by the learned counsel for the parties.

24. In essence, the grievance of the appellant is two fold:-

(i) They can not be deprived of their past service.

(ii) Their ought to be a ratio of 1:1 between Direct Recruits / Promotees for promotion on the post of A.E.E.

25. In our opinion, the Appellants can not now claim that the past service in the Highways Department should be recognised in the RD Department. It has been noticed earlier

that the members of the Appellant-Association were initially appointed as Overseers by the then Highways and Rural Works Department and posted exclusively to various Panchayat Unions for executing all the Civil works/Rural works in the Panchayat Unions of Tamil Nadu. Since they were earlier under the administrative control of the erstwhile Highways and Rural Works Department, they had no proper avenues of promotions especially for the post of A.E. Many of them were languishing in the same post i.e., as Overseers, for nearly two decades. On 27th December, 1996, the Government set up a separate Engineering Wing (GOMs.No.263; RD Department dated 27th December, 1996) for the RD Department itself. This was necessary to exercise adequate control over the various Central and State sponsored scheme. 384 posts of Assistant Engineers were created for a period of three years. These posts were filled up on a purely temporary basis on deputation/ transfer of service basis by drawing engineering personnel from other Departments like Highways and Rural Works, Public Works Department, Agricultural Engineering, Tamil Nadu Water Supply and Drainage Board etc. The Appellants although belonging to the Highways Department were already discharging the functions of Overseers in the Rural Development Department for a number of years. On 26th September, 1997, Tamil Nadu Public Service Commission invited application for the posts of Assistant Engineers in the RD Department. The respondents-Assistant Engineers were directly recruited from 24th November, 1998 to November, 1999. Drawing of technical staff on deputation basis from different Departments was causing administrative difficulties in implementing various pivotal schemes of the State as well as the Centre. It was noticed that the implementing authority did not have adequate powers to exercise control over the engineering staff of other departments. Therefore, it had become imperative need from a purely administrative point of view that RD Department should have an Engineering Wing of its own. It was further noticed that as a first step GO Ms. No.263 RD Department dated 27th December, 1996 had been issued.



Government had created 384 additional posts of Union Engineers i.e. one Assistant Engineer for each block, 15 additional posts of Assistant Executive Engineers, and 28 posts of Executive Engineers. The Engineers required for these posts were drawn from Highways and Rural Works Department, Public Works Department, Agricultural Engineering, Tamil Nadu Water Supply and Drainage Board and other technical Departments. On 25th May, 1998, the State issued orders for absorption and recruitment of the Engineering Staff through GO Ms. No.102 RD Department, which provided as follows :

> "III. Although the posts of overseers are found only in the panchayat unions, the incumbents cannot be promoted against a part of the posts of Block Engineers/Assistant Engineers (RD) because they are presently staff of Highways Departments. They need to be permanently absorbed into RD Department by getting individual options and only thereafter can the question of their promotions be taken up. …the Chief Engineer (H&RW) may be requested to obtain options from all those personnel and place them at the disposal of Rural Development Department.
>
> IV. 209 posts in the category of Block Engineers/Assistant Engineer (RD) will be earmarked to be filled up by promotion from the feeder categories of Overseers and Junior Draughtsman. But this route would be open to them only after they exercise their option and are permanently absorbed in RD Department……"

26. It also deserves to be noted here that on 25th May, 1998, the Appellants were occupying the posts of Overseer in the Highways Department, but on temporary service in the RD Department under the GO Ms. No.263 dated 27th December, 1996. The Appellants were given an opportunity to be permanently absorbed in the RD Department, by seeking their option as to whether they were willing to be absorbed. On the basis of the above exercise of option, the Appellants were absorbed in the RD Department on 8th March, 1999.

Thereafter, the Government issued ad hoc rules for the Engineering Wing for the RD Department by notification GO Ms. No.15 dated 25th January, 2000. The four notifications (I to IV) in the GO Ms.No.15 providing the qualification and mode of recruitment on the post of Superintending Engineer, Executive Engineer, Assistant Executive Engineer and Assistant Engineer respectively. The first three categories of Superintending Engineer, Executive Engineer and Assistant Executive Engineer did not admit of any direct recruitment. Therefore, these notifications were given effect from 25th May, 1998, the date on which the absorption and recruitment of engineering personnel belonging to other Departments were notified. It was only under Notification IV in respect of Assistant Engineers that provided for direct recruitment. Since the process of direct recruitment to the post of Assistant Engineer in RD Department was initiated by TNPSC vide notification dated 26th September, 1997, the rules under notification IV in respect of Assistant Engineer were declared to be deemed to have come into force on 26th September, 1997. This was necessary to regularise the action taken to recruit Assistant Engineer for RD Department, directly through TNPSC on the basis of the executive order. It is, however necessary to clarify that such retrospective operation of the rules did not confer any benefit whatsoever on the direct recruits in the matter of seniority. The seniority of the respondents has been reckoned with reference to the date of appointment on the post. This is a well recognised general principle of computing seniority and no exception can be taken to it. In fact, the service of the Appellants has been counted form 1997 i.e. from the time when they started serving as Overseers in the RD Department on deputation from the Highways Department under GO Ms. No. 263 dated 27th December,1996.

27. The Appellants having voluntarily opted to be absorbed in the RD Department, without any protection of their previous service, can not now be permitted to make a grievance that they have not been treated at par with the Direct Recruits. We have



noticed above that the Direct Recruits joined on the post of AE. Appellants, even though some of them possessed the degree qualification, were absorbed on the post of Overseer. They were working on the post of Overseer in the Highways Department, the parent Department, even though they were degree holders. As noticed earlier, they were stagnating in the Highways Department without any prospect of career advancement. They, therefore, willing gave the option to be absorbed in the RD Department as Overseers, even though they possessed the degree qualification. Having given the option to be absorbed in RD Department on the post of Overseer, their claim for absorption as AE is without any legal or factual justification.

28. It would also be relevant to notice here that the Appellants were promoted as Assistant Engineers on 2nd September, 2002, having been given the benefit of service as Overseers in the RD Department from the year 1997. The Appellants did not question their appointment as Assistant Engineers since they were well aware that they had been so appointed on completion of five years service as Overseers in the RD Department by virtue of GO Ms. No.15 dated 25th January, 2000 as amended by GO Ms. No.295 dated 14th December, 2001. On the other hand, the respondents-Assistant Engineers (Direct Recruits) had started discharging their functions as Assistant Engineers in RD Department from 24th November, 1998 to November, 1999. Therefore, they had completed five years service as Assistant Engineers for the period between November, 2003 to November, 2004 under the relevant rules (Notification III in GO Ms. No.15 dated 25th January, 2000) eligible under the rules to be promoted as Assistant Executive Engineers. Consequently, they were duly promoted as Assistant Executive Engineer. In our opinion, the action taken by the State cannot be said to be either arbitrary or violative of Article 14 or 16 of the Constitution of India.

29. The claim of the Appellants that the promotion on the post of Assistant Executive Engineer ought to be made in the ratio of 1:1 is also wholly devoid of any merit. The Appellants

claimed such ratio on the basis that the direct recruits-respondents are much younger in age. The Appellants had already spent over 20 years in the Highways Department before their absorption in the RD Department. Therefore, in case the promotions are to be based purely on the basis of seniority, the Appellants would never get a change to be promoted on the higher ranks. They would have to retire as Assistant Engineer only as their promotional avenues to the post of AEE and above will be completely choked by AE-Direct Recruits who are atleast 8 years younger than the Assistant Engineer Promotees. It is also the case of the Appellants that the ratio of 1:1 which is fixed for appointment on the post of Assistant Engineer ought to be maintained for the next promotional post of Assistant Executive Engineer. It cannot be disputed that for promotion to the post of Assistant Executive Engineer (RD) Notification No. III GO Ms. No.15, more than one mode of recruitment i.e. promotion from Assistant Engineer (RD) and recruitment by transfer from the feeder category of Junior Engineer and Senior Draughting Officer have been recognised and stipulated. Further more, it is also a matter of record that on the post of Assistant Engineer (RD) there is more than one mode of recruitment i.e. direct recruitment and recruitment by transfer from the feeder category of Overseers only. Therefore, the rules have provided a ratio on appointment to the post of Assistant Executive Engineer (RD) as 6:2:1 (promotion from AE (RD); JE; SDO). The Appellants, however, claimed that this ratio ought to be 1:1, on the ground that otherwise they would stagnate on the position of Junior Engineer. We are unable to accept the submissions made by the learned counsel for the Appellants. Prior to the absorption of the Appellants in the RD Department admittedly they had no chance of being promoted on the post of Assistant Executive Engineer, Executive Engineer or Superintending Engineer. It is only upon their absorption that they now enjoy a chance of being promoted on the higher posts. We are unable to agree with the submissions of the learned counsel for the Appellants that the aforesaid ratio is, in any manner, violative



of Article 14 or 16 of the Constitution of India.

30. Even otherwise, the fixation of the quota/ratio is the prerogative of the executive. It is not disputed that the ratio of 6:2:1 has been fixed in the service rules in exercise of the powers of the governor under proviso to Article 309 of the Constitution of India. In the absence of the Appellants placing on the record material to establish that fixation of such a ratio is patently arbitrary, the action of the Government cannot be nullified. Fixation of rota/quota on the basis of qualification is well accepted in service jurisprudence. We, therefore, see no merit in the submissions of the Appellants that the ratio of 6:2:1 ought to be replaced with the ratio by 1:1.

31. The Appellants, thereafter, submitted that the Overseers possessing the degree qualification ought to be exempted from rendering five years service in the RD Department for being considered for further promotion on the basis of Assistant Executive Engineer. We are unable to accept this submission, as the Appellants had willingly given the option to be absorbed as Overseers. In case the submission made by the Appellants is accepted, it would mean that the Appellants were actually absorbed on the post of Assistant Engineer which would be factually incorrect. Under the rules, an Assistant Engineer can only be considered for promotion as Assistant Executive Engineer on completion of five years service in the RD Department. Therefore, it would not be possible to accept the submission of the Appellants that the services rendered by the Appellants in the Highways Department ought to be substituted for the service to be rendered in the RD Department. In fact, the Appellants have already been given benefit of two years service in the Highways Department on the basis that they had actually been functioning in the RD Department since 1997. But such concession would not create a legal right in favour of the Appellants to claim that the services rendered in the Highways Department ought to be treated as service rendered in the RD Department. We, therefore, see no merit in the submissions that the degree holder Overseers

ought to be exempted from having rendered five years service in the RD Department, before they can be eligible to be considered for promotion as Assistant Executive Engineer. The Appellants had relied on the judgment of *Sub-Inspector Rooplal and Another Vs. Lt. Governor through Chief Secretary, Delhi and Others*[1] in support of the submission that their past service of 20 years cannot obliterated. The aforesaid submission cannot be accepted for the simple reason that the Appellants were absorbed in the RD Department as Overseers. Their previous service in Highways Department was also on the post of Overseers. In *Rooplal's case* (supra), the Appellants were Sub-Inspectors of Boarder Security Force who were initially taken on deputation in Delhi Police as Sub-Inspectors (Executive) and were later on absorbed in Delhi Police in the same capacity. While fixing their seniority in Delhi Police, service already rendered by them as Sub-Inspectors in BSF was not taken into consideration. This Court, therefore, held that there is no reason why the Appellants on being absorbed in *equivalent* cadre in the transferred post should not be permitted to count their service in the parent department. The Appellants herein claimed the benefit of the previous service on the lower post of Overseer for determining the seniority on the higher post of Assistant Engineer. The aforesaid submission cannot be accepted for the simple reason that the Appellants had voluntarily accepted and given the option to be absorbed in the RD Department on the post of Overseer. No claim was made at that stage to be either absorbed or promoted as Assistant Engineer or to be given the benefit of the service already rendered by them in the Highways Department. Having considered the entire matter, we see no reason to differ with the view taken by the High Court.

32. The appeals are accordingly dismissed.

R.P. Appeals dismissed.

1. 2000 (1) SCC 644.



POONGODI & ANR.
*v.*
THANGAVEL
(Criminal Appeal No. 1542 of 2013)

SEPTEMBER 27, 2013

**[SUDHANSU JYOTI MUKHOPADHAYA AND RANJAN GOGOI, JJ.]**

*CODE OF CRIMINAL PROCEDURE, 1973*

*s. 125(3), first proviso – Order of High Court curtailing the entitlement of appellants to maintenance to a period of one year prior to the date of filing of application – Held: The application of appellants was in continuation of their earlier application – The provision does not create a bar nor does it in any way affect the entitlement of a claimant to arrears of maintenance – Order of High Court set aside – Respondent directed to pay the entire arrears of maintenance due to appellants and to continue to pay monthly maintenance.*

*s.125(3), first proviso – Explained.*

**In an application filed u/s. 125(3) CrPC by the appellants, namely, the wife and the son of the respondent, for a directions to the respondent to pay maintenance for the period 04.02.1993 to 05.02.2002, the High Court held that as the petition was filed on 05.02.2002, under the first proviso to s. 125(3) CrPC, the appellants were entitled to claim arrears for the period of one year preceding the date of filing of the application i.e. from 04.02.2001 to 05.02.2002.**

**Allowing the appeal, the Court**

**HELD: 1.1 The first proviso to s. 125(3) CrPC does not create a bar nor does in any way affect the entitlement**

**of a claimant to arrears of maintenance. What the proviso contemplates is that the procedure for recovery of maintenance u/s. 125(3) CrPC, namely, a levy of a fine and the detention of the defaulter in custody, would not be available to a claimant who had slept over his/her rights and has not approached the court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available. [Para 4]**

**1.2 The application dated 05.02.2002 filed by the appellants u/s. 125(3) was in continuation of the earlier applications and for subsequent periods of default on the part of the respondent. The first proviso to s. 125(3), therefore, did not extinguish or limit the entitlement of the appellants to the maintenance granted by the trial court. [Para 7]**

**1.3 The order of the High Court is set aside and the respondent is directed to pay the entire arrears of maintenance due to the appellants commencing from the date of filing of the maintenance petition i.e. 4.2.1993 and continue to pay the monthly maintenance as directed in the judgment. If the order is not complied with by the respondent, the trial court is directed to issue a warrant for the arrest of the respondent and ensure that the same is executed and the respondent taken into custody to suffer imprisonment as provided by s. 125(3) CrPC. [Para 8]**

*Kuldip Kaur v. Surinder Singh and Anr.* **1988 (3) Suppl. SCR 762 = (1989) 1 SCC 405**; *Shantha alias Ushadevi and Another v. B. G. Shivananjappa* **2005 (1) Suppl. SCR 153 = (2005) 4 SCC 468 – relied on.**





*Shahada Khatoon & Ors. v. Amjad Ali & Ors.* **(1999) 5 SCC 672 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1988 (3) Suppl. SCR 762** | **relied on** | **para 5** |
| **2005 (1) Suppl. SCR 153** | **relied on** | **para 6** |
| **(1999) 5 SCC 672** | **referred to** | **para 6** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1542 of 2013.

From the Judgment and Order dated 21.04.2004 of the High Court of Madras in Crl. R.C. No. 620 of 2003.

Movita, R. Nedumaran for the Appellants.

V. Kanagaraj, Promila, S. Thananjayan for the Respondents.

The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. Delay condoned. Leave granted.

2. The appellants are the wife and son of one Thangavel. By an order dated 12.01.1998 passed by the learned trial court each of the appellants have been granted maintenance @ Rs. 300/- per month w.e.f. 04.02.1993 i.e. date of filing of the application under Section 125 of the Code of Criminal Procedure (CrPC). As the respondent-husband had not complied with the order of payment, in a miscellaneous petition, i.e., C.M.P. No. 566/1998 filed by the appellant, the trial court by its order dated 21.07.1998 had sentenced the respondent to imprisonment. The default in payment of maintenance was for the period 4.2.1993 to 4.2.1998. On 5.2.2002 another miscellaneous application (Crl.M.P. No.394/2002) was filed by the appellants claiming maintenance for the period 4.2.1993 to 5.2.2002. The same was allowed by the learned Magistrate

on 31.12.2002 against which the respondent had filed Crl. R.C. No. 620/2003. The High Court by its order dated 21.4.2004 held that as Crl.M.P. No. 394/2002 was filed on 5.2.2002, under the first proviso to Section 125(3) CrPC, the appellants were entitled to claim arrears for the period of one year preceding the date of filing of the application i.e. from 4.2.2001 to 5.2.2002. Accordingly, the High Court directed the respondent (revision petitioner before it) to pay the arrears for the aforesaid period within two months failing which it was directed that an arrest warrant would be issued against the respondent and the sentence of imprisonment earlier imposed by the learned Magistrate would come into effect. As the aforesaid order of the High Court had curtailed the entitlement of the appellants to maintenance to a period of one year prior to the date of filing of the Crl. M.P. No. 394/2002, the appellants have filed this appeal.

3. We have heard learned counsel for the parties.

4. A reading of the order dated 21.4.2004 passed by the High Court would go to show that the proviso to Section 125(3) CrPC has been construed by the High Court to be a fetter on the entitlement of the claimants to receive arrears of maintenance beyond a period of one year preceding the date of filing of the application under Section 125(3) CrPC. Having considered the said provision of the Code we do not find that the same creates a bar or in any way effects the entitlement of a claimant to arrears of maintenance. What the proviso contemplates is that the procedure for recovery of maintenance under Section 125(3) CrPC, namely, by construing the same to be a levy of a fine and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the Court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.



5. The decision of this Court in *Kuldip Kaur v. Surinder Singh and Anr.*[1] may be usefully recalled wherein this Court has held the provision of sentencing under Section 125 (3) to be a "mode of enforcement" as distinguished from the "mode of satisfaction" of the liability which can only be by means of actual payment. Paragraph 6 of the report to the above effect, namely, that the mode of enforcement i.e. sentencing to custody does not extinguish the liability may be extracted below:

> "6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a "mode of enforcement". It is not a "mode of satisfaction" of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance "without sufficient cause" to comply with the order. It would indeed be strange to hold that a person who "without reasonable cause" refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to

1. (1989) 1 SCC 405.

enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. Parliament in its wisdom has not said so. Commonsense does not support such a construction. From where does the court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery. No other view is possible. That is the reason why we set aside the order under appeal and passed an order in the following terms:

…… …."

6. In another decision of this Court in *Shantha alias Ushadevi and Another v. B.G. Shivananjappa*[2] it has been held that the liability to pay maintenance under Section 125 CrPC is in the nature of a continuing liability. The nature of the right to receive maintenance and the concomitant liability to pay was also noticed in a decision of this Court in *Shahada Khatoon & Ors. v. Amjad Ali & Ors.*[3]. Though in a slightly different context, the remedy to approach the court by means of successive applications under Section 125(3) CrPC highlighting the subsequent defaults in payment of maintenance was acknowledged by this Court in *Shahada Khatoon* (supra).

7. The ratio of the decisions in the aforesaid cases

2. (2005) 4 SCC 468.

3. (1999) 5 SCC 672



squarely apply to the present case. The application dated 05.02.2002 filed by the appellants under Section 125(3) was in continuation of the earlier applications and for subsequent periods of default on the part of the Respondent. The first proviso to Section 125(3), therefore did not extinguish or limit the entitlement of the appellants to the maintenance granted by the learned trial court, as has been held by the High Court.

8. In view of the above, we are left in no doubt that the order passed by the High Court needs to be interfered with by us which we accordingly do. The order dated 21.04.2004 of the High Court is set aside and we now issue directions to the respondent to pay the entire arrears of maintenance due to the appellants commencing from the date of filing of the Maintenance Petition (M.C.No.1/1993) i.e. 4.2.1993 within a period of six months and current maintenance commencing from the month of September, 2013 payable on or before 7th of October, 2013 and thereafter continue to pay the monthly maintenance on or before the 7th of each successive month. If the above order of this Court is not complied with by the Respondent, the learned Trial Court is directed to issue a warrant for the arrest of the respondent and ensure that the same is executed and the respondent taken into custody to suffer imprisonment as provided by Section 125(3) CrPC.

The appeal is allowed.

R.P. Appeal allowed.