ANIL KUMAR & ORS.
v.
M.K. AIYAPPA & ANR.
(Criminal Appeal Nos. 1590-1591 of 2013)

OCTOBER 01, 2013

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

Code of Criminal Procedure, 1973:

ss.197 r/w ss.190, 200 and 156(3) CrPC and s.19 of the PC Act – Complaint u/s 200 against a public servant – Previous sanction not obtained – Special Judge directing investigation to be conducted by DSP, Lokayukta – Held: Once it is noticed that there was no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers u/s. 156(3) Cr.P.C. – The Special Judge has stated no reason for ordering investigation -- High Court has rightly quashed the order of Special Judge as well as the complaint – Prevention of Corruption Act, 1988 – s.14.

ss.156(3) r/w s.190 – Power of Magistrate to order investigation – Held: A Magistrate, who is otherwise competent to take cognizance, has the power to refer a private complaint for police investigation u/s. 156(3) Cr.P.C. -- When a Special Judge refers a complaint for investigation u/s. 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage.

The Appellants filed a complaint u/s 200 of Cr.P.C. before the Additional City Civil and Special Judge alleging commission of offences under Prevention of Corruption Act, 1988. The Special Judge passed an order referring the complaint for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta u/s.

156(3) of Cr.P.C. The first respondent filed writ petitions before the High Court, which quashed the order passed by the Special Judge, as well as the complaint.

In the instant appeal filed by the complainants, the question for consideration before the Court was: whether the Special Judge/Magistrate was justified in referring a private complaint made u/s. 200 Cr.P.C. for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta, in exercise of powers conferred u/s. 156(3) Cr.P.C. without the production of a valid sanction order u/s. 19 of the Prevention of Corruption Act, 1988.

Dismissing the appeals, the Court

HELD: 1.1 This Court in *Maksud Saiyed* has held that where jurisdiction is exercised on a complaint filed in terms of s. 156(3) or s. 200 Cr.P.C., the Special Judge/ Magistrate is required to apply his mind and cannot refer the matter u/s. 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. What weighed with the Magistrate to order investigation u/s. 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. In the instant case, the Special Judge has stated no reasons for ordering investigation. [Para 8] [876-C-F]

Maksud Saiyed v. State of Gujarat and Others **2007 (9) SCR 1113 = (2008) 5 SCC 668 – relied on.**

1.2 When a private complaint is filed before the Magistrate, he has two options: He may take cognizance of the offence u/s. 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance u/s 190, may direct an investigation u/s. 156(3) Cr.P.C. The Magistrate, who is empowered u/s. 190 to take

cognizance, alone has the power to refer a private complaint for police investigation u/s. 156(3) Cr.P.C. When a Special Judge refers a complaint for investigation u/s. 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. [Para 10- 11] [878-E-F; 879-A-B]

1.3 Sub-s. (3) of s. 19 of the PC Act has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers u/s. 156(3) Cr.P.C. [Para 13] [880-G-H; 881-A-B]

1.4 The High Court, has rightly held that the Special Judge could not have taken notice of the private complaint unless the same was accompanied by a sanction order, irrespective of whether the court was acting at a pre-cognizance stage. Therefore, there is no error in the order passed by the High Court. [Para 5 and 15] [874-E-F; 881-F]

State of Uttar Pradesh vs. Paras Nath Singh **2009 (8) SCR 85 = (2009) 6 SCC 372;** *Subramanium Swamy vs. Manmohan Singh and another* **2012 (3) SCR 52 = (2012) 3 SCC 64 – relied on.**

R.S. Nayak v. A.R. Antulay **(1984) 2 SCR 495 and** *P. V. Narasimha Rao v. State* **(CBI/SPE) 1998 (2) SCR 870 = (1998) 4 SCC 626** *Tula Ram and Others v. Kishore Singh* **1978 (1) SCR 615 = (1977) 4 SCC 459 and** *Srinivas Gundluri and Others v. SEPCO Electric Power Construction*

Corporation and Others **2010 (9) SCR 278 = (2010) 8 SCC 206;** *State of West Bengal and Another v. Mohd. Khalid and Others* **1994 (6) Suppl. SCR 16 = (1995) 1 SCC 684;** *General Officer, Commanding v. CBI* **2012 (5) SCR 599 = 2012 (6) SCC 228 – cited.**

Case Law Reference:

(1984) 2 SCR 495	**cited**	**para 6**
1998 (2) SCR 870	**cited**	**para 6**
1978 (1) SCR 615	**cited**	**para 6**
2010 (9) SCR 278	**cited**	**para 6**
2012 (3) SCR 52	**relied on**	**para 7**
2007 (9) SCR 1113	**relied on**	**para 7**
2009 (8) SCR 85	**relied on**	**para 9**
1994 (6) Suppl. SCR 16	**cited**	**para 9**
2012 (5) SCR 599	**cited**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1590-1591 of 2013.

From the Judgment and Order dated 21.05.2013 of the High Court of Karnataka at Bangalore in Writ Petition Nos. 13779-780 of 2013 (GM-RES).

Kailash Vasdev, Girish Ananthamurthy, Preshant Jain, Umrao Singh Rawat, Vaijayanthi Girish for the Appellants.

Uday U. Lalit, Sandeep Patil, Nishant Patil (for Guntur Prabhakar) for the Respondents.

The Judgment of the Court was delivered by

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

2. We are in this case concerned with the question whether the Special Judge/Magistrate is justified in referring a private complaint made under Section 200 Cr.P.C. for investigation by the Deputy Superintendent of Police - Karnataka Lokayukta, in exercise of powers conferred under Section 156(3) Cr.P.C. without the production of a valid sanction order under Section 19 of the Prevention of Corruption Act, 1988.

3. The Appellants herein filed a private complaint under Section 200 of Cr.P.C. before the Additional City Civil and Special Judge for Prevention of Corruption on 9.10.2012. The complaint of the Appellants was that the first respondent with mala fide intention passed an order dated 30.6.2012 in connivance with other officers and restored valuable land in favour of a private person. On a complaint being raised, the first respondent vide order dated 6.10.2012 recalled the earlier order. Alleging that the offence which led to issuance of the order dated 30.6.2012 constituted ingredients contained under Section 406, 409, 420, 426, 463, 465, 468, 471, 474 read with Section 120-B IPC and Section 149 IPC and Section 8, 13(1)(c), 13(1)(d), 13(1)(e), 13(2) read with Section 12 of the Prevention of Corruption Act, a private complaint was preferred under Section 200 Cr.P.C. On receipt of the complaint, the Special Judge passed an order on 20.10.2012 which reads as follows:-

> "On going through the complaint, documents and hearing the complainant, I am of the sincere view that the matter requires to be referred for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta, Bangalore Urban, under Section 156(3) of Cr.P.C. Accordingly, I answer point No.1 in the affirmative.
>
> Point No.2 : In view of my finding on point No.1 and for the foregoing reasons, I proceed to pass the following:

ORDER

> The complaint is referred to Deputy Superintendent of Police - 3 Karnataka Lokayukta, Bangalore Urban under Section 156(3) of Cr.PC for investigation and to report."

4. Aggrieved by the said order, the first respondent herein approached the High Court of Karnataka by filing Writ Petition Nos.13779-13780 of 2013. It was contended before the High Court that since the appellant is a pubic servant, a complaint brought against him without being accompanied by a valid sanction order could not have been entertained by the Special Court on the allegations of offences punishable under the Prevention of Corruption Act. It was submitted that even though the power to order investigation under Section 156(3) can be exercised by a Magistrate or the Special Judge at pre-cognizance stage, yet, the governmental sanction cannot be dispensed with. It was also contended that the requirement of a sanction is the pre-requisite even to present a private complaint in respect of a public servant concerning the alleged offence said to have been committed in discharge of his public duty.

5. The High Court, after hearing the parties, took the view that the Special Judge could not have taken notice of the private complaint unless the same was accompanied by a sanction order, irrespective of whether the Court was acting at a pre-cognizance stage or the post-cognizance stage, if the complaint pertains to a public servant who is alleged to have committed offences in discharge of his official duties. The High Court, therefore, quashed the order passed by the Special Judge, as well as the complaint filed against the appellant. Aggrieved by the same, as already stated, the complainants have come up with these appeals.

6. We have heard the senior counsel on either side. Shri Kailash Vasdev, learned senior counsel appearing for the appellants, submitted that if the interpretation of the High Court

is accepted, then the provisions of Section 19(3) of the PC Act would be rendered otiose. Learned senior counsel also submitted that, going through the above mentioned provision, the requirement of sanction under Section 19(1) is only procedural in nature and the same can be cured at a subsequent stage of the proceedings even after filing of the charge-sheet and hence the requirement of "previous sanction" is merely directory and not mandatory. Reliance was placed on the judgments of this Court in *R. S. Nayak v. A.R. Antulay* (1984) 2 SCR 495 and *P. V. Narasimha Rao v. State (CBI/ SPE)* (1998) 4 SCC 626. Learned senior counsel further submitted that the High Court also committed an error in holding that the sanction was necessary even while the Court was exercising its jurisdiction under Section 156(3) Cr.P.C. Learned senior counsel submitted that the order directing investigation under Section 156(3) Cr.P.C. would not amount to taking cognizance of the offence. Reference was made to the judgments of this Court in *Tula Ram and Others v. Kishore Singh* (1977) 4 SCC 459 and *Srinivas Gundluri and Others v. SEPCO Electric Power Construction Corporation and Others* (2010) 8 SCC 206.

7. Shri Uday U. Lalit, learned senior counsel appearing for the respondents, on the other hand, submitted that the question raised in this case is no more res integra. Reference was made to the judgment of this Court in *Subramanium Swamy v. Manmohan Singh and Another* (2012) 3 SCC 64. Learned senior counsel submitted that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duties. The purpose of obtaining sanction is to see that the public servant be not unnecessarily harassed on a complaint, failing which it would not be possible for a public servant to discharge his duties without fear and favour. Learned senior counsel also placed reliance on the judgment of this Court in *Maksud Saiyed v. State of Gujarat and Others* (2008) 5 SCC 668 and submitted that the requirement of application of mind by the Magistrate

before exercising jurisdiction under Section 156(3) Cr.P.C. is of paramount importance. Learned senior counsel submitted that the requirement of sanction is a prerequisite even for presenting a private complaint under Section 200 Cr.P.C. and the High Court has rightly quashed the proceedings and the complaint made against the respondents.

8. We may first examine whether the Magistrate, while exercising his powers under Section 156(3) Cr.P.C., could act in a mechanical or casual manner and go on with the complaint after getting the report. The scope of the above mentioned provision came up for consideration before this Court in several cases. This Court in *Maksud Saiyed* case (supra) examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/ Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

9. We will now examine whether the order directing investigation under Section 156(3) Cr.P.C. would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance

stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act. The expression "cognizance" which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in *State of Uttar Pradesh v. Paras Nath Singh* (2009) 6 SCC 372, and this Court expressed the following view:

> "6. .....And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.
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> xxx xxx xxx
>
> xxx xxx xxx"

In *State of West Bengal and Another v. Mohd. Khalid and Others* (1995) 1 SCC 684, this Court has observed as follows:

> "It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

10. The meaning of the said expression was also considered by this Court in *Subramanium Swamy* case (supra). The judgments referred to herein above clearly indicate that the word "cognizance" has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the

magisterial powers provided under the Code of Criminal Procedure. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C.

12. We may now examine whether, in the above mentioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section 156(3) Cr.P.C., even at a pre-cognizance stage. Section 2(c) of the PC Act deals with the definition of the expression "public servant" and provides under Clauses (viii) and (xii) as under:

> "(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty.
>
> (xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority."

The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:

> **"19. Previous sanction necessary for prosecution.**-(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction-
>
> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
>
> (b) in the case of a person who is employed in connection with the affairs of a State and is not removeable from his office save by or with the sanction of the State Government, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office."

Section 19(3) of the PC Act also has some relevance; the operative portion of the same is extracted hereunder:

> **"Section 19(3)** - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-
>
> (a) no finding, sentence or order passed by a special judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;
>
> (b) xxx xxx xxx
>
> (c) xxx xxx xxx"

13. Learned senior counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in

appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in *Paras Nath Singh* and *Subramanium Swamy* cases (supra).

14. Further, this Court in Criminal Appeal No. 257 of 2011 in the case of *General Officer, Commanding v. CBI* and opined as follows:

> "Thus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him….. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio."

15. We are of the view that the principles laid down by this Court in the above referred judgments squarely apply to the facts of the present case. We, therefore, find no error in the order passed by the High Court. The appeals lack merit and are accordingly dismissed.

R.P. Appeals dismissed.

SANOBANU NAZIRBHAI MIRZA & ORS.
v.
AHMEDABAD MUNICIPAL TRANSPORT SERVICE
(Civil Appeal No. 8251 of 2013)

OCTOBER 03, 2013

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

MOTOR VEHICLES ACT, 1988:

s. 166 – Fatal motor accident – Compensation – Annual income of deceased-Polisher -- Addition towards future prospects – Multiplier – Tribunal and High Court taking annual income of deceased at Rs. 15000/- -- Held: Claim petition having been filed u/s. 166, taking notional income of deceased at Rs.15,000/- per annum on the basis of IInd Schedule to s. 163-A is an erroneous approach to determine just and reasonable compensation in favour of legal representatives of the deceased who was the sole earning member of family – Deceased was working as a polisher, which is a skilled job – Keeping in view the evidence on record, it would be just and proper to take a sum of Rs. 5000/- as monthly income of deceased – Since deceased was self-employed and about 25 years of age, there must be an addition of 50 % to his actual income – There being 5 dependents, 1/5th amount is to be deducted towards personal expenses – Keeping in view life expectancy of deceased, multiplier of 20 must be applied – Besides, Rs. 1,00,000/- must be added towards loss of consortium and further Rs. 1,00,000/- under the head loss of care and guidance of minor children -–– Total compensation allowed as Rs. 16,96,000/- as detailed in the judgment – Further directions with regard to payment, its apportionment amongst dependents and fixed deposits, given.

s. 166 – Fatal motor accident – Compensation – Tribunal

awarding Rs. 3,51,300/- as total compensation – High Court reducing it to Rs. 2,51,500/- and directing to return Rs. 99,500/- to respondent with 9 % interest – Held: The finding of fact recorded by Tribunal in the absence of any evidence in rebuttal to show that deceased was not working as a polisher and it is not a skilled work, is an erroneous finding for the reason that both Tribunal and High Court have not assigned reason for not accepting the evidence on record with regard to the nature of work that was being performed by deceased -- State Government in exercise of its statutory power u/s. 3 of Minimum Wages Act, 1948 must issue a notification for fixing the wages of a polisher -- Even in the absence of such a notification, both Tribunal as well as High Court should have at least taken the income of deceased as Rs.40,000/- per annum as per the table provided in the IInd Schedule to s. 163-A of M.V. Act for the purpose of determining just, fair and reasonable compensation under the heading loss of dependency of appellants, though said amount is applicable only to the claims under no fault liability – Minimum Wages Act, 1923 – s. 3 – Legislation.

s. 166 – Claim petition – Enhancement of compensation in appeal – Held: Legal representatives of deceased are entitled to compensation as mentioned under various heads in the table as provided in the judgment -- Even though certain claims were not preferred by them, they are legally and legitimately entitled for the said claims -- Accordingly, the Court awards compensation, more than what was claimed by dependants as it is the statutory duty of Tribunal and appellate court to award just and reasonable compensation to legal representatives of deceased to mitigate their hardship and agony, as they filed application u/s. 166.

A youngman of 25 years was crushed under the bus belonging to the respondent. He succumbed to the injuries the same day. In a petition filed by the appellants-dependants u/s. 166 of the Motor Vehicles Act, 1988, it

was stated that the deceased was a polisher and was earning Rs. 4000 – 5000/- per month. However, the Tribunal took a sum of Rs. 15,000/- per annum as notional income as provided in II Schedule to s. 163-A of the Act, and awarded a total sum of Rs. 3,51,300/- with 9% interest. On appeal by the respondent, the High Court reduced the compensation to Rs. 2,51,800/- and directed the claimants to refund Rs. 99,500/- with 9% interest to the respondent.

Allowing the appeal, the Court

HELD: 1.1 The approach of the Tribunal in taking notional income of the deceased at Rs.15,000/- per annum to which Rs.30,000/- was added and divided by 2, bringing it to a net yearly income of Rs.22,500/- which has been further interfered with by the High Court by taking Rs.15,000/- as notional income on the basis of the IInd Schedule to s. 163-A of the M.V. Act, is an erroneous approach to determine just and reasonable compensation in favour of the legal representatives of the deceased who was the sole earning member of the family. [Para 7] [892-E-G]

1.2 It is an undisputed fact that the deceased was working as a polisher, which is a skilled job. This important aspect of the case of the appellants was not taken into consideration by both the Tribunal as well as the High Court, thereby they have gravely erred by taking such low notional income of the deceased though there is evidence on record in support of the claim and the petition was filed u/s. 166 of the M.V. Act. Taking Rs.15,000/- per annum as the notional income and deducting 1/5th towards personal expenses which would come to Rs.12,000/- is not only an erroneous approach of the High Court but is also vitiated in law. Both the Tribunal and the High court have not assigned any reason for not accepting the evidence on record with regard to the nature of work that was being performed

by the deceased. The finding of fact recorded by the Tribunal in the absence of any evidence in rebuttal to show that the deceased was not working as a polisher and it is not a skilled work is also an erroneous finding. [para 7] [892-H; 893-A-C]

1.3 The State Government in exercise of its statutory power u/s 3 of the Minimum Wages Act, 1948 must issue a notification for fixing the wages of a polisher. Even in the absence of such a notification, both the Tribunal as well as the High Court should have at least taken the income of the deceased as Rs.40,000/- per annum as per the table provided in the IInd Schedule to s. 163-A of the M.V. Act for the purpose of determining just, fair and reasonable compensation under the heading loss of dependency of the appellants, though the said amount is applicable only to the claims under no fault liability. If 1/5th amount is deducted out of the said annual income the resultant multiplicand would be Rs.32,000/- per annum. [Para 7] [893-C-F]

1.4 In view of the facts of the case, it would be just and proper for this Court to take a sum of Rs.5000/- as the monthly income of the deceased and thus, the annual income would come to Rs.60,000/-. In the recent decision in Rajesh & Ors. vs. Rajbir Singh, this Court while referring to the case of Santosh Devi has held that in the case of self-employed persons or persons with fixed wages, in case the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects of the deceased. Keeping in view the five dependants of the deceased in the case on hand, 1/5th amount is to be deducted towards personal expenses. Having regard to the age of the deceased as 25, as mentioned in the post mortem report, which age is taken by both the Tribunal as well as the High Court, and keeping in mind the life

expectancy of the deceased, multiplier of 20 must be applied to the multiplicand for the purpose of quantifying loss of dependancy. Further, following the decision of this Court in Rajesh V. Rajbir Singh, Rs.1,00,000/- must be added under the head of loss of consortium and Rs.1,00,000 under the head of loss of care and guidance for minor children. [Para 8] [893-G-H; 894-A-E]

Santosh Devi v. National Insurance Co. Ltd. & Ors. **2012 (3) SCR 1178 = (2012) 6 SCC 421;** *Rajesh & Ors. v. Rajbir Singh* **2013 (6) SCALE 563;** *Nagappa v. Gurudayal Singh & Ors.* **2002 (4) Suppl. SCR 499 = (2003) 2 SCC 274 – relied on.**

1.5 Even though certain claims were not preferred by the dependants, they are legally and legitimately entitled for the said claims. Accordingly this Court awards the compensation, more than what was claimed by the dependants as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation u/s. 166 of the M.V. Act. Keeping in view the relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, this Court determines just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- under various heads as detailed in the judgment, with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants. [Para 9] [896-F-H; 897-A-B]

Ritaben @ Vanitaben & Anr. Vs. Ahmedabad Municipal Transport Service & Anr. **1998 (2) GLH 670** *S. Chandra & Ors. Vs. Pallavan Transport Corporation* **(1994) 2 SCC 189,** *General Manager, Kerala State Road Transport Corporation,*

Trivendrum Vs. Susamma Thomas & Ors. **(1994) 2 SCC 176,** *Gujarat State Road Transport Corporation Vs. Suryakantaben D. Acharya & Ors.* **2001 (2) GLR 1777 – cited.**

Case Law Reference:

1998 (2) GLH 670	**cited**	**para 6**
(1994) 2 SCC 189	**cited**	**para 6**
(1994) 2 SCC 176	**cited**	**para 6**
2001 (2) GLR 1777	**cited**	**para 6**
2012 (3) SCR 1178	**relied on**	**para 8**
2013 (6) SCALE 563	**relied on**	**para 8**
2002 (4) Suppl. SCR 499	**relied on**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8251 of 2013.

From the Judgment and Order dated 11.01.2012 of the High Court of Gujarat at Ahmedabad in First Appeal No. 1549 of 2002.

Saroj Raichura for the Appellants.

Kuldeep S Parihar for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted.

2. The legal representatives of the deceased Nazirbhai who died in a road accident on 30th May, 1998 were aggrieved by the judgment and order dated 11.01.2012 of the High Court of Gujarat at Ahmedabad in First Appeal No. 1549 of 2002 wherein the High Court had partly allowed the appeal of the respondent and reduced the compensation awarded in favour of the claimants by the Motor Accident Claims Tribunal (in short

'the Tribunal') at Ahmedabad in MACP No. 563 of 1998 dated 23.10.2001 from Rs.3,51,300/- to Rs.2,51,800/- with a direction to the appellants-claimants to refund the excess amount of Rs.99,500/- along with the interest at the rate of 9% per annum. The appellants-claimants have filed this appeal urging certain grounds and prayed for setting aside the impugned judgment and award passed by the High Court.

3. The brief facts of this case are stated below to appreciate the rival claims of the parties:

On 30.05.1998, the deceased Nazirbhai was going on his bicycle to his contract work of polishing at about 10.30 a.m. at the house of one Rashidbhai Pathan in Haranwali Pole. While he was waiting for other labourers at Kalidas Mill Kachha cross road with a bicycle, at about 10.45 a.m., one Ahmedabad Municipal Transport Service (AMTS) bus bearing registration No. GJ-1-TT-8337 came with high speed in a rash and negligent manner in the one-way and hit him with its front portion and knocked him down and caused bodily injuries. He was crushed under the wheel of his bicycle and later succumbed to his injuries at 6.00 p.m on the same day. The legal heirs of the deceased - his widow, his minor children and his parents filed a claim petition before the Tribunal for awarding just and reasonable compensation wherein the Tribunal awarded a sum of Rs. 3,51,300/- along with interest @ 9% per annum from the date of application till realization. The respondent aggrieved by the judgment and award of the Tribunal filed an appeal in the High Court urging for reduction of compensation awarded in favour of the claimants on the ground that the Tribunal has committed an error on facts and in law in assessing the income of the deceased on the basis of the IInd schedule to Section 163-A of the Motor Vehicles Act, 1988 (in short the M.V. Act) and that the accident being of the year 1998, income should have been assessed as Rs.15,000/- per annum. The High Court partly allowed the appeal of the respondent and reduced the compensation to Rs.2,51,800/- and ordered that the excess

amount of Rs.99,500/- shall be returned to the respondent along with interest @ 9% per annum. Being aggrieved by this judgment and award passed by the High Court, the legal representatives of the deceased filed this civil appeal urging various grounds and legal contentions and requested this Court to set aside the impugned judgment and award and further, award just and reasonable compensation by modifying the judgment of the Tribunal.

4. It is urged by the learned counsel for the appellants, Ms. Saroj Raichura, that the Gujarat High Court in exercise of its appellate jurisdiction has modified the judgment and award passed by the Tribunal after a long lapse of 11-12 years, which is in violation of the right to life and natural justice and statutory rights of the appellants under the provisions of the M.V.Act. Another ground urged is that the High Court was not right in holding that the compensation awarded by the learned Members of the Tribunal is excessive and consequently, the direction issued to the appellants to refund an amount of Rs.99,500/- along with an interest of 9% interest after long lapse of 11 years is wholly unsustainable in law. It is submitted that at the time of death the deceased was aged 25 years and was hale and hearty and would have lived long, had he not met with the accident. Prior to the accident, he was engaged in the work of polishing and colouring and was earning Rs.4,000/- to Rs.5,000/- per month and he was good at his work and would have progressed in the future. It is urged that since the appellant No.3 was born after the death of the deceased, compensation under the head of loss of fatherhood should also be awarded. The further legal contention urged is that the High Court interfered with the judgment and award by reducing the compensation after 11 long years even though the Tribunal after proper appreciation of facts and legal evidence on record has rightly awarded the compensation. The same should not have been interfered with by the High Court in the exercise of its appellate jurisdiction. Therefore, the appellants have approached this Court to set aside the impugned judgment and

order of the High Court and prayed to pass an order awarding just and reasonable compensation.

5. We have carefully examined the correctness of the impugned judgment and award passed by the High Court of Gujarat in exercise of its appellate jurisdiction with a view to find out whether the interference of the High Court with the quantum of compensation awarded by the Tribunal in its judgment is legal, valid and justified and further, as to what amount the claimants are entitled to. We have also perused the judgment passed by the Tribunal on the basis of pleadings and evidence on record wherein it has recorded the categorical finding of fact holding that the deceased sustained bodily injuries in a road traffic accident on 30.05.1998 at about 10.30 a.m. while he was going to attend his contract work of polishing at the house of one Rashidbhai Pathan in Haranwali Pole. While he was waiting for the other labourers at Kalidas Mill Kachha cross road with a bicycle, at that point of time at about 10.45 a.m. one AMTS bus bearing registration No. GJ-1-TT-8337 came at high speed in a rash and negligent manner in the one-way and hit him with its front portion and knocked him down and caused grievous bodily injuries. He was crushed under the wheel of his bicycle and later succumbed to the injuries at 6.00 p.m. The finding is recorded by the Tribunal on the basis of legal evidence on record and held that the accident occurred on account of rash and negligent driving of the offending vehicle by its driver and the deceased sustained injuries and succumbed to them on the evening of the same day. The above said finding of fact has not been set aside by the appellate authority in exercise of its appellate jurisdiction.

6. The Tribunal has taken a sum of Rs. 15,000/- per annum as provided in the IInd schedule to Section 163-A of the M.V. Act as notional income on the basis of ratio laid down by the Gujarat High Court in the case of *Ritaben @ Vanitaben & Anr. Vs. Ahmedabad Municipal Transport Service & Anr.*[1] wherein

1. 1998 (2) GLH 670.

it has held that a datum figure is required to be taken into consideration for compensation in fatal cases. The same was applied to the case on hand by the Tribunal and further Rs.30,000/- was added to this figure which was then divided by 2 such that the net yearly income comes to Rs.22,500/- out of which 1/3rd amount was deducted towards personal expenses and maintenance of the deceased and thus the net awardable dependency was calculated at Rs.15,000/- per annum. The case of *S.Chandra & Ors. Vs. Pallavan Transport Corporation*[2], of this Court has also been referred to regarding the average life expectancy, wherein this Court has taken 20 as multiplier in case of the deceased aged 42 years. Adverting to the case of *General Manager, Kerala State Road Transport Corporation, Trivendrum Vs. Susamma Thomas & Ors.*[3], this Court discussed the method to be followed to determine the multiplier to the multiplicand and taken multiplier of 12 in a case where the deceased was aged 39 years. However, the Tribunal after referring to *S. Chandra's* case (supra) preferred to rely on the same for taking multiplier of 20 in the case of the deceased at the time of death as he was aged about 25 years as reflected in the post mortem report. Therefore, the future economic loss awardable to the appellants was calculated at Rs.3,00,000/-. Thereafter, following the decision in the case of *Gujarat State Road Transport Corporation Vs. Suryakantaben D. Acharya & Ors.*[4], wherein the Gujarat High Court ruled that the conventional amount was required to be raised to Rs.20,000/- from Rs.10,000/- having regard to the rise in prices and higher rate of inflation which is a common phenomenon in Indian economy, the Tribunal awarded a sum of Rs.20,000/- towards loss of expectancy of life and Rs.500/- towards medical expenses. Since no evidence was produced before the Tribunal by the appellants to sustain the medical claim and attendant charges of Rs.2000/- therefore, the Tribunal has held that the

2. (1994) 2 scc 189.
3. (1994) 2 SCC 176.
4. 2001 (2) GLR 1777.

claim was on the higher side and it has awarded a sum of Rs.500/- towards attendant charges. Further, Rs.300/- was awarded towards transportation charges since the appellants have not adduced evidence to show that Rs.2000/- was spent towards transportation of the dead body. The award has been interfered with by the High Court in the impugned judgment and the compensation was reduced to Rs.2,51,000/- taking only notional income of Rs.15,000/- per annum as provided in the IInd Schedule to Section 163-A of the M.V. Act and deducted 1/5th amount towards personal expenses. The dependency benefit is taken to Rs.12,000/- per annum and 18 multiplier was applied and awarded a sum of Rs.2,16,000 and another Rs.10,000/- was awarded towards loss of consortium, Rs.10,000/- towards loss to estate, Rs.5000/- towards funeral expenses, Rs.5,000/- towards pain, shock and suffering, Rs.500/- towards attendant charges and Rs.300/- towards transportation charges. The total compensation of Rs. 2,51,800/- was awarded by the High Court by modifying the judgment and award of the Tribunal which has awarded a compensation of Rs.3,51,300/- and further the High Court directed the appellants to refund an excess amount of Rs.99,500/- with interest at the rate of 9% per annum to the respondent. The same was rightly challenged by the appellants before this Court by filing this appeal urging various grounds.

7. In our considered view, the approach of both the Tribunal as well as the High Court in taking notional income of the deceased at Rs.15,000/- per annum to which Rs.30,000/- was added and divided by 2 bringing it to a net yearly income of Rs.22,500/- which has been interfered with by the High Court by taking Rs.15,000/- as notional income on the basis of the IInd Schedule to the Section 163-A of the M.V. Act is an erroneous approach to determine just and reasonable compensation in favour of the legal representatives of the deceased who was the sole earning member of the family. It is an undisputed fact that the deceased was working as a

polisher, which is a skilled job. This important aspect of the case of the appellants was not taken into consideration by both the Tribunal as well as the High Court, thereby they have gravely erred by taking such low notional income of the deceased though there is evidence on record and the claim petition was filed under Section 166 of the M.V. Act. The High Court taking Rs.15,000/- per annum as the notional income and deducting 1/5th towards personal expenses which would come to Rs.12,000/- is not only an erroneous approach of the High Court but is also vitiated in law. The finding of fact recorded by the Tribunal in the absence of any rebuttal evidence to show that the deceased was not working as a polisher and it is not a skilled work is also an erroneous finding for the reason that both the Tribunal and the High court have not assigned reason for not accepting the evidence on record with regard to the nature of work that was being performed by the deceased. The State Government in exercise of its statutory power under Section 3 of the Minimum Wages Act, 1948 must issue a notification for fixing the wages of a polisher. Even in the absence of such a notification, both the Tribunal as well as the High Court should have at least taken the income of the deceased as Rs. 40,000/- per annum as per the table provided in the IInd Schedule to Section 163-A of the M.V. Act for the purpose of determining just, fair and reasonable compensation under the heading loss of dependency of the appellants, though the said amount is applicable only to the claims under no fault liability. If 1/5th amount is deducted out of the above annual income the resultant multiplicand would be Rs.32,000/- per annum. Both the Tribunal and the High Court should have proceeded on the aforesaid basis and determined the compensation under the heading loss of dependency of the appellants.

8. In view of the aforesaid fact, we have to hold that it would be just and proper for this Court to take a sum of Rs.5000/- as the monthly income of the deceased having regard to the nature of job that the deceased was performing as a polisher, which

is a skilled job, wherein the annual income would come to Rs.60,000/-. This Court in judgment of *Santosh Devi v. National Insurance Co. Ltd.& Ors.*[5], has held that an addition of 30% increase must be applied for increase in total income of the deceased over a period of time if he had been alive. Further, in the recent decision in *Rajesh & Ors. v. Rajbir Singh*[6], this Court while referring to the case of *Santosh Devi* (supra) held that in the case of self-employed persons or persons with fixed wages, in case the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects of the deceased. Keeping in view the five dependants of the deceased in the case on hand, 1/5th amount is to be deducted towards personal expenses. Having regard to the age of the deceased as 25, as mentioned in the post mortem report, which age is taken by both the Tribunal as well as the High Court, and keeping in mind the life expectancy of the deceased, multiplier of 20 must be applied to the multiplicand for the purpose of quantifying loss of dependancy. Further, following the decision of this Court in *Rajesh v. Rajbir Singh* (supra), Rs.1,00,000/- must be added under the head of loss of consortium and Rs.1,00,000 under the head of loss of care and guidance for minor children. Further, it was held by this Court in the case referred to supra that Rs.25,000/- must be awarded for funeral expenses as this Court has made observations in the case referred to supra that the tribunals have been frugal in awarding the compensation under the head 'funeral expenses' and hence, we award Rs.25,000 under the head of funeral expenses to the claimants/ legal representatives.

Hence, the total compensation has to be assessed under the various heads as follows:

5. (2012) 6 SCC 421.

6. 2013 (6) SCALE 563

Sl No.	HEADS	CALCULATIONS
(i)	Income	**Rs.5,000/- p.m.**
(ii)	50% of above to be added as future prospects	[Rs.5,000+Rs.2,500] **=Rs.7,500/- p.m.**
(iii) .	1/5th of (ii) to be deducted as personal expenses of the deceased	[Rs.7,500-Rs.1,500/-] **=Rs.6,000/- p.m.**
(iv)	Compensation after multiplier of 20 is applied	[Rs.6,000/-x12x20] **=Rs.14,40,000/-**
(v)	Loss of consortium	**Rs.1,00,000/-**
(vi)	Loss of care and guidance for minor children	**Rs.1,00,000/-**
(vii)	Funeral and obsequies expenses	**Rs.25,000/-**
(ix)	Pain, loss and suffering	**Rs.25,000/-**
(x)	Medical expenses	**Rs.3,000/-**
(xi)	Attendant charges and transportation expenses	**Rs.3,000/-**
TOTAL COMPENSATION AWARDED		**Rs. 16,96,000/-**

The amount of Rs.16,96,000/- as calculated above, under the various heads of losses, should be awarded in favour of appellants-claimants, though there is no specific mention regarding enhancing of compensation as in the appeal it has been basically requested by the appellants to set aside the judgment and order passed by the High Court in the appeal filed by the respondent. We must follow the legal principles of *Nagappa Vs. Gurudayal Singh & Ors.*[7] at para 7, wherein with respect to the provisions of the M.V. Act, this Court has

observed as under:

> "There is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case, where from the evidence brought on record if the Tribunal/court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. The only embargo is - it should be "just" compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the MV Act. Section 166 provides that an application for compensation arising out of an accident involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; or (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be."

9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of

the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants.

10. Accordingly, the appeal is allowed on the above said terms. The respondent is directed to pay the enhanced compensation in this appeal with interest awarded, in favour of the appellants in the following ratio. 75% of the awarded amount shall be paid equally in favour of appellant Nos. 1 to 3 and the remaining 25% must be in the name of appellant Nos. 4 and 5 in equal proportion with proportionate interest. Out of the 75%, each of appellant Nos. 1 to 3 will get 25% and further, 10% of the share of appellant No.2 and 10% of the share of appellant No.3 must be deposited with proportional interest payable to each one of them in any Nationalized Bank of their choice and the rest 15% of each of their award amounts, with proportionate interest to be paid to them. The appellant Nos. 2 and 3 are at liberty to move the Tribunal to release the money so deposited for their welfare and developmental purpose. The above said direction regarding the payment and deposit shall be made within six weeks by depositing it in the Bank and disburse the amount by way of demand draft drawn in the name of each one of them as directed above. There will be no order as to costs.

R.P. Appeal allowed.

DEPUTY COMMISSIONER, KVS & ORS.

v.

J. HUSSAIN

(Civil Appeal No. 8948 of 2013)

OCTOBER 4, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND A.K.SIKRI, JJ.]

SERVICE LAW:

Misconduct - Dismissal from service - Appellant, in drunken state, forcibly entering into office of Principal - High Court substituting the order of dismissal by withholding of two increments without cumulative effect - Held: When the charge is proved, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed - If appellate authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty imposed by Disciplinary Authority - However, such a power is ordinarily not available to court/ tribunal - Where it is found that punishment is disproportionate to the nature of charge, court can only refer matter back to disciplinary authority to take appropriate view by imposing lesser punishment, rather than directing itself the exact nature of penalty -- Judgment of High Court is set aside and that of Tribunal restored, upholding the punishment of removal of respondent from service.

Punishment - Judicial review - Held: Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts - In exercise of power of judicial review, court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic - Entering the school premises in working hours in an inebriated condition and thereafter forcibly entering into Principal's room would

constitute a serious misconduct - Penalty of removal for such a misconduct cannot be treated as disproportionate - Constitution of India, 1950 - Art.14.

Dismissal of the appellant, an UDC, in a Kendriya Vidyalaya, was upheld by the Central Administrative Tribunal, as his misconduct in forcibly entering into the office of the Principal in drunken state in duty hours was found proved. However, the High Court, in writ petition, substituted the punishment by withholding two increments without cumulative effect.

In the instant appeal filed by the School, the question for consideration before the High Court was: whether the penalty of removal from service inflicted upon the respondent by the appellant-school was "disproportionate to the gravity of the misconduct to the extent that it shocks the conscience of the Court and is to be treated so arbitrary as to term it as violative of Art. 14 of the Constitution".

Allowing the appeal, the Court

HELD: 1.1 When the charge is proved, as happened in the instant case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of charge. The disciplinary authority is to decide a particular penalty specified in the relevant Rules. Several factors go into the decision making while exercising such a discretion which include, apart from the nature and gravity of misconduct, past conduct, nature of duties and responsibilities assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in department or establishment where he works, as well as extenuating circumstances, if any exist. The order of the appellate authority while having a re-look

of the case would, obviously, examine as to whether the punishment imposed by the disciplinary authority is reasonable or not. If the appellate authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the disciplinary authority. Such a power which vests with the appellate authority departmentally is ordinarily not available to the court or a tribunal. The court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts. In exercise of power of judicial review the court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities. [Para 6] [905-C-H; 906-A-B]

1.2 When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with Wednesbury Rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the court and the court is forced to believe that it is totally unreasonable and arbitrary. [Para 7] [906-C-D]

Ranjit Thakur vs. Union of India **1988 (1) SCR 512 = (1987) 4 SCC 611 - referred to**

1.3 In the instant case, the High Court has committed an error while holding that the punishment was shocking

and arbitrary. Moreover, while interfering therewith, the High Court has itself prescribed the punishment which, according to it, "would meet the ends of justice", little realizing that the court cannot act as a disciplinary authority and impose a particular penalty. Even in those cases where it is found that the punishment is disproportionate to the nature of charge, the court can only refer the matter back to the disciplinary authority to take appropriate view by imposing lesser punishment, rather than directing itself the exact nature of penalty in a given case. [Para 9] [907-E-G]

1.4 The High Court has totally downplayed the seriousness of misconduct. It was a case where the respondent had gone to the place of work in a fully drunken state, which would itself be a serious act of misconduct. What compounds the gravity of delinquency is that the place of work is not any commercial establishment but a school where even a singular act of this nature would have serious implications. Further, the respondent had barged into the office of the Principal, which would, obviously, be a case of forcible entry. There is no explanation of this behavior on the part of the respondent in his reply. Penalty of removal for such a serious misconduct cannot be treated as disproportionate. It does not seem to be unreasonable and does not shock the conscience of the court. It does not appear to be excessive either. Merely because in the opinion of the court lesser punishment could have been more justified, cannot be a reason to interfere with the said penalty. In all cases dealing with the penalty of removal, dismissal or compulsory retirements, hardship would result. That cannot a ground for the court to interdict with the penalty. Courts should not be guided by misplaced sympathy or continuity ground, as a factor in judicial review while examining the quantum of punishment. [Para 10-12] [907-H; 908-A-H; 909-C-E; 910-C]

H.G.E.Trust & Anr. vs. State of Karnataka & Ors. **2005 (5) Suppl. SCR 937 = (2006) 1 SCC 430;** *Karnataka Bank Ltd. Vs. A.L.Mohan Rao* **(2006) 1 SCC 63;** *Ex-Constable Ramvir Singh vs. Union of India & Ors.* **2008 (17) SCR 1112 = (2009) 3 SCC 97; and** *Charanjit Lamba vs. Commanding Officer* **2010 (7) SCR 820 = (2010) 11 SCC 314 - relied on.**

1.5 In the instant case, it cannot be imputed that the departmental authorities while imposing the punishment acted in a manner which manifests lack of reasonableness or fairness. The judgment of the High Court is set aside and that of the Tribunal restored, upholding the punishment of removal of the respondent from service. [Para 12 and 14] [910-A, G]

Case Law Reference:

1988 (1) SCR 512	**referred to**	**Para 8**
2005 (5) Suppl. SCR 937	**relied on**	**Para 11**
(2006) 1 SCC 63	**relied on**	**Para 12**
2008 (17) SCR 1112	**relied on**	**Para 13**
2010 (7) SCR 820	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8948 of 2013.

From the Judgment and Order dated 20.04.2006 of the High Court of Judicature at Bilaspur (C.G.) in W.P. No. 162 of 2004.

S. Rajappa for the Appellant.

M.K. Choudhary, Namita Choudhary, Yudhister Bhardwaj, S.K. Verma for the Respondent.

The Judgment of the Court was delivered by

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

2. The respondent herein was served with a charge memo dated 2/3rd August 2000 under the provisions of Rule 14 of the Central Civil Services (CCA) Rules, 1965 and Rule 20 of the Central Civil Services (Conduct) Rules 1964. Primary allegation against him was that he had forcibly entered into the office of Principal of Kendriya Vidayala Sangthan, Tura in the State of Meghalaya, where he was posted and working as Upper Division Clerk. It was on 24.5.2000 at around 11.30 a.m. The respondent was in a fully drunken state.

The respondent in his reply admitted the incident, namely he entered the office of the Principal in that condition. However, according to him, he did not enter the office of the Principal forcibly. The respondent also offered his unconditional apology for consumption of alcohol and requested the Disciplinary Authority to take a sympathetic view of the matter and pardon him. The Disciplinary Authority went through the reply. Since the respondent had admitted the charge, it was felt that in view thereof, no regular enquiry was needed and on the basis of admission, the orders dated 31st August 2000 were passed, imposing the penalty of 'removal' from the service for the said misconduct. Departmental Appeal filed by the respondent was also dismissed by the Appellate Authority. The respondent knocked the Judicial Forum challenging both the orders passed by Disciplinary as well as Appellate Authority. He first approached the Central Administrative Tribunal. The Tribunal, however, dismissed his petition. Against the order of the Tribunal, the respondent filed Writ Petition. This time he succeeded in his effort inasmuch as by the impugned judgment, the High Court has found the penalty of removal from service to be disproportionate to the nature and gravity of his misconduct. Thus, invoking the doctrine of proportionality, the High Court has directed reinstatement of the respondent into service with continuity of service only for the purpose of pensionary benefits. It is, further, directed that the respondent would not be entitled to two annual increments without any

cumulative effect and no back wages for the intervening period shall be admissible to him. According to the High Court, the aforesaid penalty, instead of removal, would meet the ends of justice. It is in these circumstances, the appellant-school has approached this Court questioning the reasoning and rationale of the direction given by the High Court.

3. In the aforesaid backdrop, the only question to be examined in these proceedings is as to whether the penalty of removal from service inflicted upon the respondent herein by the appellant-school offends the principle of proportionality i.e. whether the penalty is disproportionate to the gravity of the misconduct to the extent that it shocks the conscience of the Court and is to be treated so arbitrary so as to term it as violative of Artice 14 of the Constitution?

4. The parties are not at cudgels in so far as facts are concerned and in such a scenario we have to examine the nature of misconduct imputed to the respondent in the charge memorandum and then apply the principle of proportionality thereto. The sole article of charge was that the respondent, on 24th May 2000 in duty hours, entered forcibly in the Principal's office in duty hours at 11.30 a.m. in fully drunken alcohol state. The statement of imputation of the said misconduct/misbehavior annexed with the charge sheet as Annexure II reads as under:

> "That the said Md. J.Hussain, while functioning as UDC reported at Kendriya Vidalaya, Tura on 24th May 2000 in duty hours and entered forcibly in the Principal's Office at around 11.30 a.m. in fully drunken alcohol state. He was beyond the control. It was complaint to the police beat office Araimile, New Tura, by the Principal vide her letter dated 24.5.2000. The Police Authority escorted Md.J.Hussain to the Tura Civil hospital for Medical examination under Ref.No.Araimile B.H./GDE No.316 dated 24.5.2000 as mentioned by in-Charge Araimile B.H., Tura letter dated 28.5.2000. The consumption of alcohol by Md.J.Hussain was confirmed by the Senior Medical &

Health Officer, Tura Civil Hospital, vide his certificate TCH Ref. No.E.2806/2000 dated 24.5.2000.

Thus Md.J.Hussain, UDC, has committed a serious misconduct and violated rule 3(1) (i) (ii) & (iii) of CCS (Conduct) Rules 1964 as extended to the employees of Kendriya Vidalaya Sangathan."

5. As pointed out above in his reply, the respondent accepted the charge, though he insisted that it was not a case of forcibly entry. It would also pertinent to add that immediately after the incident police was called and respondent was medically examined as well. The medical examination confirmed that the respondent was under the influence of liquor.

6. When the charge proved, as happened in the instance case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of charge. The Disciplinary Authority is to decide a particular penalty specified in the relevant Rules. Host of factors go into the decision making while exercising such a discretion which include, apart from the nature and gravity of misconduct, past conduct, nature of duties assigned to the delinquent, responsibility of duties assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in department or establishment where he works, as well as extenuating circumstances, if any exist. The order of the Appellate Authority while having a re-look of the case would, obviously, examine as to whether the punishment imposed by the Disciplinary Authority is reasonable or not. If the Appellate Authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the Disciplinary Authority. Such a power which vests with the Appellate Authority departmentally is ordinarily not available to the Court or a Tribunal. The Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts.(See: *Union Territory of Dadra & Nagar Haveli vs. Gulabhia M.Lad* (2010) 5 SCC 775) In exercise of power of judicial review, however, the Court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the Court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.

7. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with doctrine of Wednesbury Rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the Court and the Court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality was propounded by *Lord Diplock in Council of Civil Service Unions vs. Minister for Civil Service* in the following words:

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads of the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality."

8. Imprimatur to the aforesaid principle was accorded by this Court as well, in *Ranjit Thakur vs. Union of India* (1987)

4 SCC 611. Speaking for the Court, Justice Venkatachaliah (as he then was) emphasizing that "all powers have legal limits" invokes the aforesaid doctrine in the following words:

> "The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

9. To be fair to the High Court, we may mention that it was conscious of the narrowed scope of the doctrine of proportionality as a tool of judicial review and has stated so while giving lucid description of this principle in the impugned judgment. However, we are of the view that it is the application of this principle on the facts of this case where the High Court has committed an error while holding that the punishment was shocking and arbitrary. Moreover, while interfering therewith, the High Court has itself prescribed the punishment which, according to it, "would meet the ends of justice", little realizing that the Court cannot act a disciplinary authority and impose a particular penalty. Even in those cases where it is found that the punishment is disproportionate to the nature of charge, the Court can only refer the matter back to the Disciplinary Authority to take appropriate view by imposing lesser punishment, rather than directing itself the exact nature of penalty in a given case.

10. Here in the given case, we find that the High Court has totally downplayed the seriousness of misconduct. It was a case

where the respondent employee had gone to the place of work in a fully drunken state. Going to the place of work under the influence of alcohol during working hours (it was 11.30 a.m.) would itself be a serious act of misconduct. What compounds the gravity of delinquency is that the place of work is not any commercial establishment but a school i.e. temple of learning. The High Court has glossed over and trivialized the aforesaid aspect by simply stating that the respondent was not a "habitual drunkard" and it is not the case of the management that he used to come to the school in a drunken state "regularly or quite often". Even a singular act of this nature would have serious implications. There is another pertinent aspect also which cannot be lost sight of. The respondent had barged into the office of the Principal. As per the respondent's explanation, he had gone to the market and his friends offered him drinks which he consumed. It was a new experience for him. Therefore, he felt drowsiness immediately after consumption of alcohol and while returning home, he remembered that he had left some articles in the school premises and therefore he had gone to school premises to pick up those left out articles belonging to him. If the respondent was feeling drowsiness as claimed by him where was the occasion for him to go to the school in that condition? Moreover, if he had left some articles in the school premises and had visited the school only to pick up those articles, what prompted him to enter the office of the Principal? There is no explanation of this behavior on the part of the respondent in his reply. It would, obviously, be a case of forcible entry as it is no where pleaded that the Principal asked him to come to his room or he had gone to the room of the Principal with his permission or for any specific purpose.

11. Thus, in our view entering the school premises in working hours i.e. 11.30 a.m. in an inebriated condition and thereafter forcibly entering into the Principal's room would constitute a serious misconduct. Penalty of removal for such a misconduct cannot be treated as disproportionate. It does not seem to be unreasonable and does not shock the conscience of the Court. Though it does not appear to be excessive either,

but even if it were to be so, merely because the Court feels that penalty should have been lighter than the one imposed, by itself is not a ground to interfere with the discretion of the disciplinary authorities. The penalty should not only be excessive but disproportionate as well, that too the extent that it shocks the conscience of the Court and the Court is forced to find it as totally unreasonable and arbitrary thereby offending the provision of Article 14 of the Constitution. It is stated at the cost of the repetition that discretion lies with the disciplinary/ appellate authority to impose a particular penalty keeping in view the nature and gravity of charge. Once, it is found that the penalty is not shockingly disproportionate, merely because in the opinion of the Court lesser punishment could have been more justified, cannot be a reason to interfere with the said penalty. The High Court has also mentioned in the impugned order that the respondent is a married man with family consisting of number of dependents and is suffering hardship because of the said "economic capital punishment". However, such mitigating circumstances are to be looked into by the departmental authorities. It was not even pleaded before them and is an after effect of the penalty. In all cases dealing with the penalty of removal, dismissal or compulsory retirements, hardship would result. That would not mean that in a given case punishment of removal can be discarded by the Court. That cannot a ground for the Court to interdict with the penalty.

This is specifically held by this Court in *H.G.E.Trust & Anr. vs. State of Karnataka & Ors.* (2006) 1 SCC 430 in the following words:

> "A person, when dismissed from service, is put to a great hardship but that would not mean that a grave misconduct should go unpunished. Although the doctrine of proportionality may be applicable in such matter, but a punishment of dismissal from service for such a misconduct cannot be said to be unheard of. Maintenance of discipline of an institution is equally important. Keeping the aforementioned principles in view, we may hereinafter notice a few recent decisions of this Court."

12. In the present case, it cannot be imputed that the departmental authorities while imposing the punishment acted in a manner which manifests lack of reasonableness or fairness. In *Karnataka Bank Ltd. Vs. A.L.Mohan Rao* (2006) 1 SCC 63, charge against the delinquent employee was that he had colluded with one of the Branch Managers and enabled grant of fictitious loan. The High Court interfered with the punishment of dismissal and ordered reinstatement on sympathetic ground even when he found misconduct was proved. This Court reversed the judgment of the High Court. Repeatedly this Court has emphasized the courts should not be guided by misplaced sympathy or continuity ground, as a factor in judicial review while examining the quantum of punishment.

13. We would like to refer the case of the *Ex-Constable Ramvir Singh vs. Union of India & Ors.* (2009) 3 SCC 97as well. The appellant in that case was working as a Constable in the Border Security Force. Penalty of removal from service was imposed upon him on account of his failure to return to place of duty despite instructions given to him and refusal to take food in protest when he was punished and refusal to do pack drill while undergoing rigorous imprisonment. This Court held that the punishment imposed upon him was not disproportionate. In *Charanjit Lamba vs. Commanding Officer* (2010) 11 SCC 314 where the appellant who was holding the rank of Major in the Indian Army had exhibited dishonesty in making a false claim of transport charges of household luggage. It was held that the penalty of dismissal was not disproportionate.

14. For all these reasons, we find the reasoning of the High Court as unacceptable. We, accordingly allow this appeal, set aside the judgment of the High Court and restore the decision of the Tribunal thereby upholding the punishment of removal of the respondent from service. No costs.

R.P. Appeal allowed.

AJAHAR ALI
v.
STATE OF WEST BENGAL
(Criminal Appeal No.1623 of 2013)

OCTOBER 4, 2013

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

PENAL CODE, 1860:

s. 354 - Criminal force to outrage modesty of woman - Accused convicted and sentenced to six months simple imprisonment with fine - Held: Provisions of s.354 have been enacted to safeguard public morality and decent behaviour - If any person uses criminal force upon any woman with the intention or knowledge that woman's modesty will be outraged, he is to be punished - Courts cannot take lenient view in awarding sentence on the ground of sympathy or delay as the same cannot be any ground for reduction of sentence - Appellant has committed a heinous crime and with the social condition prevailing, modesty of a woman has to be strongly guarded - It is not a fit case so as to give benefit of 1958 Act to appellant - As appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage - Juvenile Justice (Care and Protection of Children) Act, 2000 - Probation of Offenders Act, 1958 - Delay.

CONSTITUTION OF INDIA, 1950:

Art. 136 - Criminal appeal - Concurrent findings of three courts below - Court declines to reappreciate the evidence.

The appellant was convicted u/s. 354 IPC and was sentenced to simple imprisonment for six months and to pay a fine of Rs. 1,000/- for having forcefully caught hold of a sixteen year old girl on her way and planted a kiss

causing a cut over her lower lip. His appeal and revision were dismissed by the Sessions Judge and the High Court, respectively.

In the instant appeal, leniency was pleaded by the appellant on the ground that the incident occurred 18 years back and both the complainant and the appellant had settled in their respective lives. It was further submitted that on the date of the incident, the appellant was a juvenile and in view of the Juvenile Justice (Care and Protection of Children) Act, 2000, he ought to have been tried before the Juvenile Justice Board; and that, in all circumstances, the Court should give the appellant the benefit of Probation of Offenders Act, 1958.

Dismissing the appeal, the Court

HELD: 1.1 The complainant who had no enmity against the appellant has been very consistent about the factual matrix not only in her statement u/s. 161 of CrPC but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a concurrent finding that the appellant was guilty beyond reasonable doubt. In the circumstances, this Court declines to re-appreciate the evidence. [Para 7] [917-D-F]

1.2 The provisions of s. 354 IPC have been enacted to safeguard public morality and decent behaviour. Therefore, if any person uses criminal force upon any woman with the intention or knowledge that the woman's modesty will be outraged, he is to be punished. Courts cannot take lenient view in awarding sentence on the ground of sympathy or delay as the same cannot be any ground for reduction of sentence. In the instant case, the High Court has opined that appellant has been dealt with very leniently and it was a fit case where the High Court

wanted to enhance the sentence but considering the fact that the incident occurred long back, the High Court refrained to do so. [Paras 14, 20 and 21] [920-A-B; 921-F, G-H; 922-A]

State of Punjab v. Major Singh, **1966 SCR 286 = AIR 1967 SC 63;** *Aman Kumar v. State of Haryana,* **2004 (2) SCR 237 = AIR 2004 SC 1497;** *Raju Pandurang Mahale v. State of Maharashtra,* **2004 (2) SCR 287 = AIR 2004 SC 1677;** *Turkeshwar Sahu v. State of Bihar,* **2006 (7) Suppl. SCR 10 = (2006) 8 SCC 560;** *Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Anr.* **1995 (4) Suppl. SCR 237 = AIR 1996 SC 309;** *Chinnadurai v. State of Tamil Nadu,* **AIR 1996 SC 546;** *State of U.P. v. Shri Kishan,* **AIR 2005 SC 1250,** *Sadhupati Nageswara Rao v. State of Andhra Pradesh,* **AIR 2012 SC 3242 - referred to.**

1.3 The appellant has committed a heinous crime and with the social condition prevailing, the modesty of a woman has to be strongly guarded and keeping in view the manner in which the appellant behaved, it is not a fit case where the benefit of the Act 1958 should be given to him. [Para 12] [919-E]

Karamjit Singh v. State of Punjab, **(2009) 7 SCC 178,** *Om Prakash & Ors. v. State of Haryana,* **(2001) 10 SCC 477;** *Manjappa v. State of Karnataka,* **2007 (7) SCR 275 = (2007) 6 SCC 231;** *State of Himachal Pradesh v. Dharam Pal,* **(2004) 9 SCC 681 - referred to.**

Mohamed Aziz Mohamed Nasir v. State of Maharashtra, **1976 (3) SCR 663 = AIR 1976 SC 730 - distinguished.**

1.4 As regards the applicability of JJ Act 2000, if the matter came before the Juvenile Justice Board, the maximum sentence that can be awarded in such a case is of 3 years. In the instant case, the punishment awarded is only six months, so the cause of the appellant is not prejudiced. This Court is, therefore, of the considered

opinion that as the appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. [Para 13 and 21] [919-F, G-H; 921-G]

Vishaka & Ors. v. State of Rajasthan & Ors., **1997 (3) Suppl. SCR 404 = AIR 1997 SC 3011;** *Apparel Export Promotion Council v. A.K. Chopra,* **1999 (1) SCR 117 = AIR 1999 SC 625;** *Musa Khan & Ors. v. State of Maharashtra,* **AIR 1976 DV 2566;** *Abuzar Hossain @ Gulam Hossain v. State of West Bengal* **2012 (9) SCR 244 = (2012) 10 SCC 489 - referred to.**

Case Law Reference:

1976 (3) SCR 663	**distinguished**	**para 8**
AIR 1976 DV 2566	**referred to**	**para 9**
(2009) 7 SCC 178	**referred to**	**para 10**
(2001) 10 SCC 477	**referred to**	**para 10**
2007 (7) SCR 275	**referred to**	**para 10**
(2004) 9 SCC 681	**referred to**	**para 11**
2012 (9) SCR 244	**referred to**	**Para 13**
1966 SCR 286	**referred to**	**Para 15**
2004 (2) SCR 237	**referred to**	**Para 15**
2004 (2) SCR 287	**referred to**	**Para 15**
2006 (7) Suppl. SCR 10	**referred to**	**Para 15**
1995 (4) Suppl. SCR 237	**referred to**	**Para 16**
1997 (3) Suppl. SCR 404	**referred to**	**Para 17**
1999 (1) SCR 117	**referred to**	**Para 17**

AIR 1996 SC 546	**referred to**	**Para 18**
AIR 2005 SC 1250	**referred to**	**Para 18**
AIR 2012 SC 3242	**referred to**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1623 of 2013.

S.C. Ghosh, Reshmi Rea Sinha, Rameshwar Prasad Goyal for the Appellant.

Soumitra G. Chaudhuri, Anip Sachthey for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the impugned judgment and order dated 19.9.2012 passed by the High Court of Calcutta in Criminal Revision No. 3240 of 2012 affirming the judgment and order of the learned Sessions Judge dated 22.8.2012 dismissing the appeal of the appellant against the judgment and order of the learned Magistrate dated 9.5.2012, by which and whereunder the learned Magistrate had found the appellant guilty for the offence punishable under Section 354 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). He had been sentenced to suffer SI for 6 months and further to pay a fine of Rs.1,000/-, and in default of payment of fine, further to undergo SI for two months.

3. Facts and circumstances giving rise to appeal are that:

A. On 6.11.1995, Nasima Begum (PW.1), aged about 16 years filed a complaint alleging that on that day while she was going to attend her tuition alongwith her friend Nilufa Khatun, she met the appellant on the way who suddenly came and forcibly caught hold of her hair and planted a kiss, resultantly, she suffered a cut over her lower lip and started bleeding.

B. A case under Section 354/324 IPC was registered. After conducting the trial, the court of Ist Judicial Magistrate, Ist Court, Malda vide judgment and order dated 9.5.2012 found the appellant guilty for offence under Section 354 IPC and sentenced him as referred to hereinabove.

C. Aggrieved, the appellant preferred Criminal Appeal No.2/2012 before the learned Sessions Judge, Malda and the said appeal was dismissed vide judgment and order dated 22.8.2012.

D. Appellant challenged both the aforesaid orders by filing Criminal Revision before the High Court which has been dismissed by the impugned judgment and order dated 19.9.2012.

Hence, this appeal.

4. Shri S.C. Ghosh, learned counsel appearing for the appellant has half-heartedly challenged the findings of fact recorded by the courts below. However, we are not inclined to re-appreciate the evidence and disturb the findings recorded by the three courts, therefore, he argued that since the incident occurred more than 18 years ago and at that time the appellant as well as the complainant were about 16 years of age, the court should not send the appellant to jail at such a belated stage. Considering the fact that the appellant was juvenile in view of the provisions of Juvenile Justice Act, 2000 (hereinafter referred to as the 'JJ Act 2000'), he ought to have been tried before the Juvenile Justice Board and not by the criminal court, as was done. Even otherwise, considering the time gap of 18 years and the fact that the appellant as well as the complainant have settled in life and both of them are married and have children, their lives should not be disturbed. In all circumstances, the court should give the benefit to the appellant under the provisions of Probation of Offenders Act, 1958 (hereinafter referred to as the 'Act 1958'). Therefore, the appeal deserves to be allowed.

5. On the other hand, Shri Anip Sachthey, learned Standing counsel appearing for the State of West Bengal has opposed the appeal contending that considering the nature of offence wherein the modesty of a young girl was outraged, the question of showing any leniency or granting the benefit of the Act 1958 is not warranted. Even if the case of the appellant is considered under the JJ Act 2000, the maximum punishment that can be awarded is of 3 years, while in the instant case, the appellant had been sentenced only for a period of six months. Therefore, it will be a futile exercise to consider the case of the appellant on that anvil. Thus, the appeal is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

7. In view of the concurrent findings recorded by the three courts below, we are not inclined to re-appreciate the evidence. The same is also not warranted in view of the fact that the complainant, Nasima Begum who had no enmity against the appellant has been very consistent about the factual matrix not only in her statement under Section 161 of Code of Criminal Procedure, 1973 (hereinafter referred to as `Cr.P.C.') but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a finding that the appellant was guilty beyond reasonable doubt.

8. Learned counsel for the appellant pleads for leniency on the ground that the trial has gone on for a long time; furthermore, he has no previous criminal history and that he may lose his job. For the purpose of seeking a benefit under the Act 1958 he has placed reliance on the judgment of this Court in *Mohamed Aziz Mohamed Nasir v. State of Maharashtra,* AIR 1976 SC 730, wherein the benefit of the Act 1958 was given observing further that even if such plea had not been raised before the court below, it can be raised for the first time before this court. That was a case under Section 379 r/w Section 34 IPC and the charge against the said appellant was

snatching two sarees from one Govind who was carrying them from the shop of his master to that of a washer and dyer.

9. In *Musa Khan & Ors. v. State of Maharashtra,* AIR 1976 DV 2566, this Court observed that the purpose of the provisions of the Act 1958 is to reform the juvenile offenders though that was a case of Section 149 IPC and the court held that culpable liability does not arise from mere presence in the assembly and even participation does not necessarily lead to the conclusion that he joined that unlawful assembly willingly.

10. This Court in *Karamjit Singh v. State of Punjab,* (2009) 7 SCC 178, to which one of us (Dr. B.S. Chauhan, J.) was a member of the Bench, after considering various earlier judgments and particularly *Om Prakash & Ors. v. State of Haryana,* (2001) 10 SCC 477 and Manjappa v. State of Karnataka, (2007) 6 SCC 231; held that a relief under the Act 1958 should be granted in the offences which were not of a very grave nature or where the mens rea is absent.

11. In *State of Himachal Pradesh v. Dharam Pal,* (2004) 9 SCC 681, this Court considered the appeal of the State of Himachal Pradesh wherein the benefit of the Act 1958 had been given to the accused who was held guilty for offence under Section 376/511 IPC for attempt to commit rape. This Court in the peculiar facts and circumstances of that case did not interfere with the judgment and order of the High Court, but at the same time did not approve of the reasoning given by the High Court. The court held as under:

> "According to us, the offence of an attempt to commit rape is a serious offence, as ultimately if translated into the act leads to an assault on the most valuable possession of a woman i.e. character, reputation, dignity and honour. In a traditional and conservative country like India, any attempt to misbehave or sexually assault a woman is one of the most depraved acts. The Act is intended to reform the persons who can be reformed and would cease to be a

nuisance in the society. But the discretion to exercise the jurisdiction under Section 4 is hedged with a condition about the nature of offence and the character of the offender. Section 6 of the Act makes the provisions applicable in cases where offenders are under 21 years of age, as restrictions on imprisonment of offenders have been indicated in the said provision. In a case involving similar facts, this Court in *State of Haryana v. Prem Chand,* (1997) 7 SCC 756 upheld the judgment of the High Court which extended the benefit of provisions under Section 4 of the Act. Considering the peculiar circumstances of the case and taking into account the fact that on the date of occurrence the accused was less than 21 years old, we feel this is a case where no interference is called for with the judgment of the High Court, though some of the conclusions arrived at by the High Court do not have our approval."

12. In the instant case, as the appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the appellant behaved like a road side Romeo, we do not think it is a fit case where the benefit of the Act 1958 should be given to the appellant.

13. This brings us to the next question regarding the applicability of JJ Act 2000. This issue has been raised for the first time in this court and the appellant can do so in view of the larger Bench judgment of this Court in *Abuzar Hossain @ Gulam Hossain v. State of West Bengal,* (2012) 10 SCC 489, wherein it was held that the plea of juvenility can be raised at any stage irrespective of delay in raising the same. But the question that would arise is if the matter came before the Juvenile Justice Board, the maximum sentence that can be awarded in such a case is of 3 years. In the instant case, the punishment awarded is only six months so the cause of the appellant is not prejudiced.

14. The provisions of Section 354 IPC has been enacted to safeguard public morality and decent behaviour. Therefore, if any person uses criminal force upon any woman with the intention or knowledge that the woman's modesty will be outraged, he is to be punished.

15. In *State of Punjab v. Major Singh,* AIR 1967 SC 63, this Court observed that modesty is the quality of being modest which means as regards women, decent in manner and conduct, scrupulously chaste, though the word 'modesty' has not been defined in the Code. The ultimate test for determining whether modesty has been outraged is whether the action of the offender as such can be perceived as one which is capable of lowering the sense of decency of a woman.

(See also: *Aman Kumar v. State of Haryana,* AIR 2004 SC 1497; *Raju Pandurang Mahale v. State of Maharashtra,* AIR 2004 SC 1677; and *Turkeshwar Sahu v. State of Bihar,* (2006) 8 SCC 560).

16. In *Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Anr.,* AIR 1996 SC 309, slapping a woman on her posterior amounted to outraging of her modesty within the meaning of Sections 354 and 509 IPC.

17. In *Vishaka & Ors. v. State of Rajasthan & Ors.,* AIR 1997 SC 3011 and *Apparel Export Promotion Council v. A.K. Chopra,* AIR 1999 SC 625, this court held that the offence relating to modesty of woman cannot be treated as trivial and a lenient view by giving six months imprisonment on the ground of juvenility does not require consideration.

18. In *Chinnadurai v. State of Tamil Nadu,* AIR 1996 SC 546, this Court rejected the plea for reduction of sentence in view of considerable delay and other circumstances observing that sentence has to be awarded taking into consideration the gravity of the injuries.

19. In *State of U.P. v. Shri Kishan,* AIR 2005 SC 1250,

this Court has emphasised that just and proper sentence should be imposed. The Court held:

> "…… Any liberal attitude by imposing meager sentences or **taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive** in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.
>
> The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'."
>
> (Emphasis added)

20. In *Sadhupati Nageswara Rao v. State of Andhra Pradesh,* AIR 2012 SC 3242, this Court observed that the courts cannot take lenient view in awarding sentence on the ground of sympathy or delay as the same cannot be any ground for reduction of sentence.

21. In view of the above, we are of considered opinion that as the appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. The High Court had been of the opinion that appellant had been dealt with very leniently and it was a fit case where the High Court wanted to enhance the sentence but considering the fact that

the incident occurred long back, the High Court refrained to do so.

22. Thus, the appeal fails and is accordingly dismissed. The appellant is directed to surrender within a period of four weeks to serve out the sentence, failing which the Chief Judicial Magistrate, Malda, is directed to take him into custody to serve out the sentence. A copy of the order be sent to Chief Judicial Magistrate, Malda for information and action.

R.P. Appeal dismissed.

OMPRAKASH
v.
LAXMINARAYAN & ORS.
(Civil Appeal No. 9032 of 2013)

OCTOBER 7, 2013

[CHANDRAMAULI KR. PRASAD AND KURIAN JOSEPH, JJ.]

STAMP ACT, 1899:

s.35 r/w s.2(10), Schedule 1-A, Art. 23, as substituted by s. 6 of Act 22 of 1990 - Instrument not duly stamped, inadmissible in evidence - "Conveyance" - Agreement to sell containing recital that possession had been handed over to purchaser - Held: In the instant case, the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance -- Duty as required, has not been paid and, therefore, trial court rightly held the same to be inadmissible in evidence.

EVIDENCE:

Agreement to sell - Containing the recital of delivery of possession - Held: At the time of considering the question of admissibility of document, it is the recital therein which shall govern the issue -- It does not mean that the recital in the document shall be conclusive but for the purpose of admissibility it is the terms and conditions incorporated therein which shall hold the field -- Deeds and Documents.

During the trial of a suit for specific performance of contract, possession and permanent injunction in respect of the suit land, admissibility of the agreement to sell was objected to by defendant no. 1 as the same contained a recital that possession had been handed over to the

purchaser and, therefore, it was a conveyance on which the required stamp duty was not affixed. The trial court, accordingly, held the deed of agreement to be inadmissible. However, in the writ petition filed by the plaintiffs, the single Judge of the High Court accepted their case that since the defendant denied the possession having been delivered, the recital in the agreement was of no consequence, and held the agreement to sell to be admissible in evidence.

In the instant appeal filed by the defendant, the questions for consideration before the Court were: "whether the admissibility of a document produced by the party would depend upon the recital in the document or the plea of the adversary in the suit" and "whether the document in question is "conveyance" as defined under the Stamp Act, 1899 and was duly stamped".

Allowing the appeal, the Court

HELD: 1.1 At the time of considering the question of admissibility of document, it is the recital therein which shall govern the issue. It does not mean that the recital in the document shall be conclusive, but for the purpose of admissibility it is the terms and conditions incorporated therein which shall hold the field. In the instant case, the agreement to sell acknowledges payment of the part of consideration money and further giving actual physical possession to the purchaser by the seller. [para 9] [929-F-H; 930-A]

1.2 From a plain reading of s.2(10) of the Stamp Act, 1899 defining "conveyance", it is evident that an instrument by which movable or immovable property is transferred, comes within the expression "conveyance". In the instant case, an immovable property has been transferred on payment of part of the consideration and handing over the possession of the property. It is

significant to note that by the Indian Stamp (Madhya Pradesh Second Amendment) Act, 1990, Article 23 of Schedule 1-A has been substituted and Explanation added to it creates a legal fiction, in that the agreement to sell shall be deemed to be a conveyance and stamp duty is leviable on an instrument whereby possession has been transferred. Thus, the agreement to sell in question is a conveyance within the meaning of s.2 (10) of the Act and is to be duly stamped. [para 10 and 11] [930-E-F; 931-D-E]

Avinash Kumar Chauhan v. Vijay Krishna Mishra, **2008 (17) SCR 944 = (2009) 2 SCC 532 - relied on.**

Laxminarayan & Ors. v. Omprakash & Ors., **2008 (2) MPLJ 416 - stood overruled (in** *Man Singh (deceased) through Lrs. Smt Sumranbai and Ors. vs. Rameshwar* **decided by Madhya Pradesh High Court on 22.1.2010).**

1.3 From a plain reading of s.35, it is evident that an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. In the instant case, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, therefore, the trial court rightly held the same to be inadmissible in evidence. The order of the High Court is unsustainable and, as such, is set aside and that of the trial court restored. [para 12,15-16] [932-C-F; 934-B-C]

Case Law Reference:

2008 (17) SCR 944 relied on para 12

2008 (2) MPLJ 416 stood overruled para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9032 of 2013.

From the Judgment and Order dated 27.02.2008 of the High Court of Madhya Pradesh, Indore in W.P. No. 7237 of 2007.

Niraj Sharma, Sumit Kumar Sharma for the Appellant.

Fakhruddin, Khalid Noor Fakhruddin, Raj Kishor Choudhary, Neeru Sharma, Surya Kamal Mishra (for Mushtaq Ahmad) for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Plaintiffs filed a suit for specific performance of contract, possession and permanent injunction in respect of un-irrigated land having an area of 0.506 hectares bearing Survey No. 16012 in Village Arniapitha situated within Tahsil Jaora in District Ratlam in the State of Madhya Pradesh. It is founded on an agreement to sell dated 27th December, 2000. It is the case of the plaintiffs that the properties in question were delivered to them on payment of the part consideration money in pursuance of the agreement to sell and such a recital finds place in the said agreement. Paragraph 1 of the agreement to sell reads as under:

> "1.That while selling the aforesaid land I the seller, have received Rs. 1,15,000/- (Rupees one lac fifteen thousand) cash as a token amount before the witnesses and, by remaining present at the spot, actual physical possession has been handed over to the purchaser, and after receiving remaining sale consideration amount Rs. 25,000/- (Rupees twenty five thousand) from the purchaser within a year I, the purchaser, will get the sale deed of the said land registered in the name of the purchaser."

2. The defendants in the written statement, however, denied the assertion of the plaintiffs and stated that no agreement to sell was ever executed and possession given. On the basis of the pleading and the written statement, the trial court framed several issues. During the course of the trial the agreement to sell was sought to be proved and admitted in evidence by the plaintiffs' witness Shankarlal. This was objected to by defendant no. 1. Its admissibility was questioned on the ground that the agreement to sell in question contains a recital that possession has been handed over to the purchaser and, therefore, it is a conveyance over which the stamp duty as indicated in Schedule 1A of the Indian Stamp Act, 1899 as substituted by M.P. Act 22 of 1990 is required to be affixed. It is pointed out that the agreement to sell in question is on a stamp paper of Rs. 50 only. The submission made by defendant no. 1 found favour with the trial court and it held the agreement to sell to be inadmissible in evidence as it has not been sufficiently stamped. It further observed that if the plaintiffs want to produce the said document in evidence then they can make proper application as envisaged under Section 35 of the Indian Stamp Act, hereinafter referred to as 'the Act'. While doing so, the trial court observed as follows:

".....Therefore, it is found that sale agreement dated 27.12.2000 due to mention of possession being handed over, should be stamped like a conveyance. In the sale agreement the cost of the land is mentioned as Rs.1,40,000 and its 7 ½ per cent comes to Rs. 10,500/-. Therefore, it is concluded that the sale agreement can be admissible in evidence only on being on stamp of Rs. 10,500/-. Therefore, it is concluded that the sale agreement is not properly stamped, therefore, not admissible in evidence. Thus, objection of defendant No. 1 is allowed sale agreement dated 27.12.2000 is refused to be admitted in evidence. If the plaintiff wants to produce the said documents in evidence then he may make proper application

under Section 35 of the Stamp Act on the next date."

3. Plaintiffs challenged the aforesaid order before the High Court in a writ petition filed under Article 227 of the Constitution of India, inter alia, contending that when defendants themselves have asserted that possession of the property was not delivered, the recital in agreement is of no consequence. It was also pointed out that plaintiffs themselves have claimed relief of possession, which obviously means that they are not in possession and when this fact is taken into consideration, the view taken by the trial court appears to be erroneous. The High Court by its order dated 27th February, 2008 passed in Writ Petition No. 7237 of 2007 accepted this contention and held the agreement to sell to be admissible in evidence. The High Court, in this connection, has observed as follows:

"Although there is no dispute with regard to the fact that in the document in question, which is an agreement alleged to have been executed by the defendants in favour of the plaintiffs, and which is basis of the suit, it is recited that possession of the property in question had been delivered to the plaintiffs, but the fact cannot be ignored that a specific plea has been raised by the defendants in their written statement denying the execution of the said agreement and also specifically denying that the possession of the property had ever been delivered to the plaintiff-petitioners. In these circumstances, once, the defendants themselves have claimed that possession of the property had not been delivered, then the recital in agreement looses all significance. In such a situation, the document cannot be held to be insufficiently stamped merely because it was not stamped in accordance with Article 23 of Stamp Act."

4. Defendant no. 1 assails this order in the present special leave petition.

5. Leave granted.

6. We have heard Mr. Niraj Sharma on behalf of the appellant and Mr. Fakhruddin, Senior Counsel on behalf of the respondents.

7. Mr. Sharma contends that for admissibility of the document what is relevant is the recital therein. He submits that agreement to sell is "conveyance" as defined under Section 2(10) of the Act and shall be chargeable with duty as contemplated under Section 3 of the Act. According to him, as the agreement in question is not duly stamped, it shall be inadmissible in evidence under Section 35 of the Act. Mr. Fakhruddin, however, submits that the defendants having joined the issue with regard to the possession of the plaintiffs in terms of the agreement to sell, the document in question shall not come within the expression "conveyance" as defined under the Act and, hence, it cannot be said that it is not duly stamped.

8. In view of the rival submission, the question which falls for our determination is as to whether the admissibility of a document produced by the party would depend upon the recital in the document or the plea of the adversary in the suit and whether the document in question is "conveyance" as defined under the Act and is duly stamped.

9. As stated earlier, the plaintiffs filed a suit for specific performance of contract and their case is founded on the agreement to sell executed on 27th December, 2000. The agreement to sell acknowledges payment of the part of consideration money and further giving actual physical possession to the purchaser by the seller. Though the defendants dispute that, but in our opinion, for determination of the question of admissibility of a document, it is the recital therein which shall be decisive. Whether the possession in fact was given or not in terms of the agreement to sell is a question of fact which requires adjudication. But, at the time of considering the question of admissibility of document, it is the recital therein which shall govern the issue. It does not mean that the recital in the document shall be conclusive but for the

purpose of admissibility it is the terms and conditions incorporated therein which shall hold the field. Having said that, we proceed to consider as to whether the document in question is "conveyance" within the meaning of Section 2(10) of the Act. Section 2(10) of the Act reads as follows:

> 2. Definitions. -In this Act, unless there is something repugnant in the subject or context, -
>
> xxx xxx xxx
>
> (10)"Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I;
>
> xxx xxx xxx"

10. From a plain reading of the aforesaid provision, it is evident that an instrument by which movable or immovable property is transferred, comes within the expression "conveyance". In the present case, an immovable property is transferred on payment of part of the consideration and handing over the possession of the property. It is relevant here to state that by the Indian Stamp (Madhya Pradesh Second Amendment) Act, 1990 (Act No.22 of 1990) few Articles including Article 23 of Schedule 1-A has been substituted and Explanation has been added to Article 23. The Explanation appended to Article 23 of Schedule 1-A of the Stamp Act as substituted by Section (6) of Act 22 of 1990 reads as follows:

> **"Explanation.**-For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of, such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be

a conveyance and stamp duty thereon shall be leviable accordingly:

Provided that, the provisions of Section 47-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs. 10."

11. The aforesaid Explanation has come into effect with effect from 26th September, 1990. The Explanation, therefore, creates a legal fiction. The agreement to sell shall be deemed to be a conveyance and stamp duty is leviable on an instrument whereby possession has been transferred. Thus the agreement to sell in question is a conveyance within the meaning of Section 2(10) of the Act and is to be duly stamped. Section 35 of the Act makes instruments not duly stamped inadmissible in evidence, the relevant portion whereof reads as follows:

"35. Instruments not duly stamped inadmissible in evidence, etc.-No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that-

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument

insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

xxx xxx xxx."

12. From a plain reading of the aforesaid provision, it is evident that an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The court being an authority to receive a document in evidence to give effect thereto, the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, hence, the trial court rightly held the same to be inadmissible in evidence. The view which we have taken finds support from a decision of this Court in the case of *Avinash Kumar Chauhan v. Vijay Krishna Mishra,* (2009) 2 SCC 532, in which it has been held as follows:

"21. It is not in dispute that the possession of the property had been delivered in favour of the appellant. He has, thus, been exercising some right in or over the land in question. We are not concerned with the enforcement of the said agreement. Although the same was not registered, but registration of the document has nothing to do with the validity thereof as provided for under the provisions of the Registration Act, 1908.

22. We have noticed heretobefore that Section 33 of the

Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act."

13. To put the record straight, the correctness of the impugned judgment (*Laxminarayan & Ors. v. Omprakash & Ors.,* 2008 (2) MPLJ 416) came up for consideration before a Division Bench of the High Court itself in Writ Petition No. 6464 of 2008 (*Man Singh (deceased) through Legal Representatives Smt. Sumranbai & Ors. v. Rameshwar*) and same has been overruled by judgment dated January 22, 2010. The High Court observed as follows:

"8. A document would be admissible on basis of the recitals made in the document and not on basis of the pleadings raised by the parties. In the matter of *Laxminarayan* (supra), the learned Single Judge with due respect to his authority we don't think that he did look into the legal position but it appears that he was simply swayed away by the argument that as the defendant was denying the delivery of possession, the endorsement/recital in the document lost all its effect and efficacy.

9. It would be trite to say that if in a document certain recitals are made then the Court would decide the admissibility of the document on the strength of such recitals and not otherwise. In a given case, if there is an absolute unregistered sale deed and the parties say that the same is not required to be registered then we don't think that the Court would be entitled to admit the document because simply the parties say so. The jurisdiction of the Court flows from Sections 33, 35 and 38 of the Indian Stamp Act and the Court has to decide the question of

admissibility. With all humility at our command we over-rule the judgment in the matter of *Laxminarayan* (supra)."

14. We respectfully agree with the conclusion of the High Court in this regard.

15. In view of what we have observed above, the order of the High Court is unsustainable and cannot be allowed to stand.

16. In the result, the appeal is allowed, the impugned order of the High Court is set aside and that of the trial court is restored but without any order as to costs.

R.P. Appeal allowed.

SOMNATH SARKAR
v.
UTPAL BASU MALLICK & ANR.
(Criminal Appeal No. 1651 of 2013)

OCTOBER 07, 2013

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

NEGOTIABLE INSTRUMENTS ACT, 1881:

s.138 of N.I. Act r/w s.357(3) CrPC - Dishonour of cheque - Conviction - Sentence of six months simple imprisonment and to pay compensation to complainant, affirmed by Sessions Judge - High Court in revision filed by accused, substituting six months sentence by imposing a further sum equivalent to cheque amount - Held: High Court was competent to impose a sentence of fine only upon accused -- It has rightly set aside the sentence of imprisonment - However, as the amount of fine imposed by High Court over and above the amount of compensation exceeds double the cheque amount, it would violate s.138 N.I. Act - Complainant has received compensation as per adjudication of trial court - Accused sentenced to pay further a fine of Rs.20,000/- and on his failure to do so, he would be liable for imprisonment for six months - Code of Criminal Procedure, 1973 - s.357(3).

s. 138 - Power of court to levy fine - Held: Is circumscribed to twice the cheque amount -- Even in a case where court may be taking a lenient view in favour of accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount -- That statutory limit is inviolable and must be respected -- High Court has, in the case at hand, overlooked the statutory limitation on its power to levy a fine.

s. 138 of N.I. Act and s. 357, CrPC -- Held: Power to award compensation is not available u/s 138 of N.I. Act -- It is only

when court has determined the amount of fine that the question of paying compensation out of the same would arise -- This implies that the process comprises two stages -- First, when court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case -- The second stage comprises invocation of the power to award compensation out of the amount so levied -- In the instant case, High Court has not followed that process -- It has taken payment of compensation to be distinct from the amount of fine it imposed equivalent to the cheque amount -- High Court should have determined the fine amount to be paid by the accused, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant out of the same -- Ordered accordingly.

The appellant was convicted u/s 138 of the Negotiable Instruments Act, 1881 for dishonour of a cheque drawn for Rs.69,500/-, and was sentenced to six months simple imprisonment and to pay compensation of Rs.80,000/- which was paid to the complainant. The order was affirmed by the Sessions Judge in appeal. The High Court, in the revision filed by the accused-appellant, substituted the sentence of imprisonment by imposing upon the accused an additional sum of Rs.69,500/-.

Allowing the appeal in part, the Court

HELD: (Per Vikramajit Sen, J.) 1.1 A reading of the impugned order indicates that the intention of the High Court was that upon deposit/payment of the further sum of Rs.69,500/- (in addition to the earlier sum of Rs. 80,000/-), the sentence of imprisonment for six months would stand withdrawn. However, the direction of the High Court to pay further sum of Rs.69,500/- over and above the sum of Rs.80,000/- would violate s.138 of the N.I. Act inasmuch as it would exceed the double of the cheque amount. [para 4] [941-E-G]

1.2 The use of the word, 'additional sum' in the impugned order has led to considerable confusion. To put the matter finally at rest, this Court holds that the total compensation payable u/s 138 of the N.I. Act read with s. 357(3), Cr.P.C. is Rs.80,000/-. i.e., the cheque amount of Rs.69,500/- together with Rs.10,500/- which may be seen as constituting interest on the dishonoured cheque. With the receipt of Rs.80,000/-, the complainant has received compensation for the dishonoured cheque as per the adjudication of the trial court. In these circumstances, any further payment would be in the nature of fine. The appellant is a man of limited financial means. He is sentenced to pay further a fine of Rs.20,000/- and, on his failure to make the payment, he would be liable for imprisonment for six months. [para 4] [941-C-E; 942-A-C]

Per T.S. Thakur, J. (Concurring and supplementing):

1.1 In cases involving s. 138 of the N.I. Act, courts can reduce the period of imprisonment depending, inter alia, upon the nature of the transaction, the bona fides of the accused, the contumacy of his conduct, the period for which the prosecution goes on, the amount of the cheque involved, the social strata to which the parties belong. Some of these factors may indeed make out a case where the court may impose only a sentence of fine upon the defaulting drawer of the cheque. There is for that purpose considerable discretion vested in the court concerned which can and ought to be exercised in appropriate cases for good and valid reasons. [para 7] [946-G-H; 947-A]

1.2 The High Court was competent on a plain reading of s. 138 to impose a sentence of fine only upon the appellant. It has rightly set aside the sentence of six months simple imprisonment awarded to the appellant, which has not been assailed by the complainant. [para 5 and 7] [944-H; 945-A; 947-A-B]

Damodar S. Prabhu v. Syed Babalal H. **2010 (5) SCR 678 = (2010) 5 SCC 663 - relied on.**

1.3 As regards the additional amount which the High Court has directed the appellant to pay in lieu of the sentence of imprisonment, two significant aspects must be kept in view: First and foremost is the fact that the power to levy fine is circumscribed under the statute to twice the cheque amount. Even in a case where the court may be taking a lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. That statutory limit is inviolable and must be respected. The High Court has, in the case at hand, overlooked the statutory limitation on its power to levy a fine. [para 8] [947-C-F]

1.4 The second aspect relates precisely to the need for appreciating that the power to award compensation is not available u/s 138 of N. I. Act. It is only when the court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages: The first, when the court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court has not followed that process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it was imposing equivalent to the cheque amount of Rs.69,500/-. The High Court appears to have proceeded on the basis as though payment of compensation u/s 357 of CrPC is different from the power to levy fine u/s 138, which assumption is not correct. The High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation

to the complainant out of the same. Viewed thus, the direction of the High Court that the appellant shall pay a further sum of Rs.69,500/- does not appear to be legally sustainable. Therefore, payment of a further sum of Rs.20,000/- towards fine, making a total fine of Rs.1,00,000/- out of which Rs.80,000/- has already been paid as compensation to the complainant, should suffice. The amount of Rs.20,000/- shall not go to the complainant who has been suitably compensated by the amount already received by him. [para 8-9] [947-E-H; 948-A-E]

Case Law Reference:

2010 (5) SCR 678 relied on para 5

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1651 of 2013.

From the Judgment and order dated 01.04.2011 of the High Court of Calcutta in CRR No. 2447 of 2004.

Vikramjit Banerjee, Rishi Maheshwari, Shally Bhasin Maheshwari for the Appellant.

Avijit Bhattacharjee, Parthapratim Chaudhari, K.S. Rana, Anip Sachtehy for the Respondents.

The Judgments of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted. The Appellant before us makes what is essentially a mercy plea - to reduce the sum of Rs.80,000/- imposed on him by way of compensation in lieu of the six months sentence of incarceration imposed by the Metropolitan Magistrate, Calcutta. The Appellant has admittedly issued a cheque in favour of the Respondent No.1-complainant for a sum of Rs.69,500/-, which cheque on presentation was dishonourned with the endorsement 'insufficient funds'. After due compliance with the statutory provisions contained in the Negotiable Instruments Act,

1881 (for short, 'N.I. Act') prosecution was commenced and the aforementioned punishment under Section 138 thereof came to be passed. The payment of compensation amounting to Rs.80,000/- has admittedly been received by the complainant. The Appellant preferred an appeal to the Additional District & Sessions Judge, Calcutta who by judgment dated 5.7.2004 dismissed the appeal and ordered the Appellant to surrender within 15 days. In these circumstances, Criminal Revision Record No.2447 of 2004 was filed in the High Court of Calcutta which was pleased to substitute the six months' sentence by an additional payment of Rs.69,500/-. C.R.R. No.2447 of 2004 was heard and decided along with C.R.R. No.2865 of 2004 also filed by the Appellant. Accordingly, as against the cheque amount of Rs.69,500/- the Appellant is liable to the extent of Rs.1,49,500/-. Faced with the prospects of jail the Appellant had earlier agreed to payment of the additional sum of Rs.80,000/- and for these reasons his plea for reduction thereto was turned down by the High Court in the impugned order. The Appellant was directed to pay a sum of Rs.19,500/- by May 31, 2011 and the balance of Rs.50,000/- in five equal instalments thereafter. Unfortunately, despite repeated readings of the Orders and related documents, the total liability of the Appellant is not clear as also the payments made till date.

2. Although the learned counsel for the complainant has appeared before us and has endeavoured to persuade us to uphold the impugned order, we find it unnecessary to hear him since the complainant has indubitably already received the sum of the dishonourned cheque alongwith the compensation thereon aggregating Rupees Eighty Thousand.

3. It seems to us that since the Appellant has already faced prosecution in the Magistracy in which he presented virtually no defence, and has thereafter filed an appeal before the Sessions Court, and subsequently two Revisions before the High Court, the ends of justice will be met, were he be directed to pay a sum of Rs.20,000/- only, in default, of which he would

be liable to undergo the punishment of simple imprisonment for a term of six months as imposed by the aforementioned Magistrate. The said payment should be made within eight weeks.

4. As already expressed, the language employed by the High Court in the impugned order raises a doubt as to the total liability of the Appellant. A perusal of the sentence passed by the Trial Court as well as the Sessions Judge while dismissing the Appeal also does not completely clarify the position. The cheque amount is Rs.69,500/- and in this regard a sum of Rs.80,000/- has been directed towards compensation which, by virtue of Section 357(3), Code of Criminal Procedure (Cr.P.C.) would be receivable by the complainant. It appears that this sum of Rs.80,000/- has been received by the complainant. The use of the word, 'additional sum' in the impugned order has led to considerable confusion. To put the matter finally at rest, we hold that the total compensation payable under Section 138 of the N.I. Act read with Section 357(3), Cr.P.C. is Rs.80,000/-. i.e., the cheque amount of Rs.69,500/- together with Rs.10,500/- which may be seen as constituting interest on the dishonoured cheque. In the arguments addressed before us there appears to be no controversy that this sum has been duly paid to the Respondent-complainant. A reading of the impugned order appears to indicate that the payment of further sum of Rs.69,500/-, in the instalments indicated in that order would be over and above the said sum of Rs.80,000/-. This would violate Section 138 of the N.I. Act inasmuch as it would exceed the double of the cheque amount. This leads us to conclude that the intention of the High Court was that upon deposit/payment of the further sum of Rs.69,500/- (in addition to the earlier sum of Rs.80,000/-), the sentence of imprisonment for six months would stand withdrawn. Learned counsel for the Appellant has fervently submitted that the Appellant is a man of limited financial means and this position has not been controverted. Palpably, the convict has filed appeals all the way to the Apex Court which

would have entailed further expenses of no mean measure. We think that with the receipt of Rs.80,000/-, the complainant has received compensation for the dishonoured cheque as per the adjudication of the Trial Court. In these circumstances, any further payment would be in the nature of fine. Accordingly, we clarify that the Appellant must pay a sum of Rs.80,000/- receivable by the complainant within four weeks from today, if not already paid. The Appellant is also sentenced to payment of a fine of Rs.20,000/-, payable within eight weeks from today, and on the failure to make this payment, would be liable for imprisonment for six months. The Appeal is allowed in these terms.

T.S. THAKUR, J. 1. I have had the advantage of going through the order proposed by my esteemed Brother Vikramajit Sen, J. While I entirely agree that the order passed by the High Court directing payment of a sum of Rs.69,500/- over and above Rs.80,000/- already paid under the orders of the Court to the complainant towards compensation needs to be modified to bring the same in tune with Section 138 of Negotiable Instruments Act, 1881, I would like to add a few words of my own in support of that view. Before I do that, I may briefly set out the factual backdrop in which the appellant came to be prosecuted and convicted under the provision mentioned above.

2. The appellant, who is the proprietor of M/s Tarama Medical Centre, Tarakeswar, Hooghly, issued a cheque in favour of the respondent/complainant bearing no.419415 dated 6th September, 1999 drawn on SBI, Tarakeswar Branch for Rs.69,500/- towards discharge of existing liabilities. When the cheque was presented by the complainant through his banker on 6th September, 1999 it was dishonoured for "insufficient funds", which dishonour was communicated to the complainant on 7th October, 1999. The complainant respondent issued a demand notice, which was received by the accused appellant within the prescribed limitation period. However, since the

accused failed to repay the amount within time, the complainant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 on 9th December, 1999.

3. The Metropolitan Magistrate, 6th Court, Calcutta convicted the appellant for the offence under Section 138, Negotiable Instruments Act and sentenced him to six months simple imprisonment and to pay compensation of Rs.80,000/- under Section 357(3) CrPC vide order dated 10th December, 2003 in Case No.C-4490/99. Both the conviction and sentence were upheld by the Additional District & Sessions Judge of the Fast Track Court in appeal vide order dated 5th July, 2004. In a revision petition filed against the said two orders, the High Court upheld the conviction, but imposed an additional fine of Rs.69,500/- (cheque amount) in lieu of six months simple imprisonment awarded by the Metropolitan Magistrate. That the appellant has paid the compensation amount of Rs.80,000/- in instalments of Rs.30,000/- and Rs.50,000/- is not disputed before us and is evidenced by an affidavit dated 20th November, 2006 filed in CRR No.2447 of 2004 before the Calcutta High Court besides a receipt dated 14th February, 2008 respectively, which are on record.

4. The only question that falls for our determination in the above backdrop is whether the High Court was justified in directing payment of an additional fine of Rs.69,500/- which happens to be the cheque amount also, having regard to the fact that the appellant has already paid the sum of Rs.80,000/- to the complainant towards compensation in obedience to the order made by the Metropolitan Magistrate. There is no gainsaying that the High Court could have sentenced the appellant to imprisonment extending up to two years and/or to payment of fine equivalent to twice the cheque amount. This is evident from the provisions of Section 138 which reads as under:

> **"138. Dishonour of cheque for insufficiency, etc., of funds in the account.** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid. either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-
>
> (a) the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course. of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation.- For the purposes of this section," debt or other liability" means a legally enforceable debt or other liability."
>
> (emphasis supplied)

5. In as much as the High Court set aside the sentence of six months simple imprisonment awarded to the appellant there is no quarrel nor any challenge mounted before us. That part

of the order could be assailed by the complainant who has not chosen to do so. Whether or not the High Court was justified in setting aside the sentence of imprisonment awarded to the appellant is, therefore, a non-issue before us. Having said that we have no hesitation in adding that the High Court may have indeed been justified in setting aside the sentence of imprisonment awarded to the appellant in the facts and circumstances of the case. We say so having regard to a three-Judge Bench decision of this Court in *Damodar S. Prabhu v. Syed Babalal H.* (2010) 5 SCC 663 where this Court briefly examined the object sought to be achieved by the provisions of Section 138 and the purpose underlying the punishment provided therein. This Court has held that unlike other crimes, punishment in Section 138 cases is meant more to ensure payment of money rather than to seek retribution. The Court said:

> "17....Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque."
>
> (emphasis supplied)

6. This Court also took note of the number of cases involving dishonor of cheques choking the criminal justice system of this country, especially at the level of the Magisterial Courts, and held that dishonor of cheque being a regulatory offence, aimed at ensuring the reliability of negotiable instruments, the provision for imprisonment extending up to two years was only intended to ensure quick recovery of the amount payable under the instrument. The following passages from the decision are in this regard apposite:

> "4...It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a `fine which may extent to twice the amount of the cheque' serves a compensatory purpose. What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.
>
> 5. Invariably, the provision of a strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts. As per the 213th Report of the Law Commission of India, more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system."
>
> (emphasis supplied)

7. We do not consider it necessary to examine or exhaustively enumerate situations in which Courts may remain content with imposition of a fine without any sentence of imprisonment. There is considerable judicial authority for the proposition that the Courts can reduce the period of imprisonment depending upon the nature of the transaction, the *bona fides* of the accused, the contumacy of his conduct, the period for which the prosecution goes on, the amount of the cheque involved, the social strata to which the parties belong, so on and so forth. Some of these factors may indeed make

out a case where the Court may impose only a sentence of fine upon the defaulting drawer of the cheque. There is for that purpose considerable discretion vested in the Court concerned which can and ought to be exercised in appropriate cases for good and valid reasons. Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. In as much as the High Court did so, it committed no jurisdictional error. In the absence of a challenge to the order passed by the High Court deleting the sentence of imprisonment awarded to the appellant, we do not consider it necessary or proper to say anything further at this stage.

8. Coming then to the question whether the additional amount which the High Court has directed the appellant to pay could be levied in lieu of the sentence of imprisonment, we must keep two significant aspects in view. First and foremost is the fact that the power to levy fine is circumscribed under the statute to twice the cheque amount. Even in a case where the Court may be taking a lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. That statutory limit is inviolable and must be respected. The High Court has, in the case at hand, obviously overlooked the statutory limitation on its power to levy a fine. It appears to have proceeded on the basis as though payment of compensation under Section 357 of CrPC is different from the power to levy fine under Section 138, which assumption is not correct.

9. The second aspect relates precisely to the need for appreciating that the power to award compensation is not available under Section 138 of Negotiable Instruments Act. It is only when the Court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages. First, when the Court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the

instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court does not appear to have followed that process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it is imposing equivalent to the cheque amount of Rs.69,500/-. That was not the correct way of looking at the matter. Logically, the High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant out of the same. Viewed thus, the direction of the High Court that the appellant shall pay a further sum of Rs.69,500/- does not appear to be legally sustainable as rightly observed by my erudite Brother Vikramajit Sen, J. I, therefore, entirely agree with my Brother's view that payment of a further sum of Rs.20,000/- towards fine, making a total fine of Rs.1,00,000/- (Rupees one lac) out of which Rs.80,000/- has already been paid as compensation to the complainant, should suffice. The amount of Rs.20,000/- (Rupees twenty thousand) now directed to be paid shall not go to the complainant who is, in our view, suitably compensated by the amount already received by him. In the event of failure to pay the additional amount of Rs.20,000/- the appellant shall undergo imprisonment for a period of six months. With these words, I concur with the order proposed by Brother Vikramajit Sen, J.

R.P. Appeal partly allowed.

STATE OF HARYANA & OTHERS
v.
NAVIR SINGH AND ANOTHER
(Civil Appeal No. 9030 of 2013 etc.)

OCTOBER 07, 2013

[CHANDRAMAULI KR. PRASAD AND KURIAN JOSEPH, JJ.]

TRANSFER OF PROPERTY ACT, 1872:

ss.59 and 58(f) - Mortgage and mortgage by deposit of title deeds - Discussed.

s.58(f) - Mortgage by deposit of title deeds - Held: Charge of mortgage can be entered into revenue record in respect of mortgage by deposit of title-deeds and for that, instrument of mortgage is not necessary.

REGISTRATION ACT, 1908:

s. 17(1)(c) - Registration of instrument creating interest - Mortgage by deposit of title deeds - Held: When debtor deposits with creditor title-deeds of property for the purpose of security, it becomes mortgage in terms of s. 58(f) of Transfer of Property Act and no registered instrument is required u/s. 59 thereof, as in other classes of mortgage - Mortgage by deposit of title-deeds may be effected in specified towns by debtor delivering to his creditor documents of title to immovable property with intent to create a security thereon - No instrument is required to be drawn for this purpose - However, parties may choose to have a memorandum prepared only showing deposit of title-deeds - In such a case also registration is not required and, therefore, payment of registration fee and stamp duty is not required - Letter of Finance Commissioner would apply in cases where

the instrument of deposit of title-deeds incorporates terms and conditions in addition to what flows from the mortgage by deposit of title-deeds - Transfer of Property Act, 1872 - ss. 58(f) and 59 - Letter dated 29.3.2007 issued by Finance Commissioner.

The instant appeals arose from the orders of the High Court directing entry of charge in the revenue records on the basis of mortgage created by deposit of title-deeds. The question for consideration before the Court was: "whether 'charge' of mortgage can be entered in the revenue record in respect of a mortgage effected by deposit of title-deeds without its registration and payment of registration fee and stamp duty".

Disposing of the appeals, the Court

HELD: 1.1 Section 17(1)(c) of the Registration Act, 1908 provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. Mortgage, inter alia, means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Mortgage by deposit of title-deeds is sanctioned by law u/s. 58(f) of the Transfer of Property Act in specified towns. Mortgage by deposit of title-deeds acknowledges the receipt and transfer of interest. Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument. In the face of it, when the debtor deposits with the creditor title-deeds of the property for the purpose of security, it becomes mortgage in terms of s. 58(f) of the Transfer of Property Act and no registered instrument is required u/s. 59 thereof, as in other classes of mortgage. [Para 14] [956-F-H; 957-A]

1.2 The essence of mortgage by deposit of title-deeds is handing over by a borrower to the creditor title-deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title-deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration u/s. 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration. [Para 14] [957-B-D]

Rachpal Mahraj v. Bhagwandas Daruka **1950 SCR 548 = AIR 1950 SC 272 - relied on.**

United Bank of India v. M/s. Lekharam Sonaram & Co. **AIR 1965 SC 1591 - referred to.**

1.3 The letter dated 29th March, 2007 of the Finance Commissioner inter alia makes "instrument of deposit of title-deeds compulsorily registrable u/s. 17(1)(c) of the Registration Act." The said letter would apply in cases where the instrument of deposit of title-deeds incorporates terms and conditions in addition to what flows from the mortgage by deposit of title-deeds. But in that case there has to be an instrument which is an integral part of the transaction regarding the mortgage by deposit of title-deeds. A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration. Mortgage by deposit of title-deeds may be effected in specified town by the debtor delivering to his creditor documents of title to immoveable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the

parties may choose to have a memorandum prepared only showing deposit of the title-deeds. In such a case also registration is not required. [Para 17] [959-B-F]

1.4 In the case in hand, the original deeds have just been deposited with the bank. In the face of it, the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of title-deeds and for that, instrument of mortgage is not necessary. Mortgage by deposit of title-deeds further does not require registration. Therefore, the question of payment of registration fee and stamp duty does not arise. [Para 17] [959-G-H; 960-A]

1.5 In C.A. No. 9049 of 2013, the properties mortgaged by deposit of title-deeds are stated as not situated in the towns specified u/s. 58(f) nor in the towns notified by the State Government in terms of s. 58 of Transfer of Property Act. This aspect of the matter has not been considered by the High Court in the impugned judgment. As the same goes to the root of the matter, the impugned order of the High Court is set aside and the matter is remitted back for its consideration afresh in accordance with law in the light of the observation made in the judgment. [Para 21-24] [960-E-F-G; 961-B-D]

Case Law Reference:

1950 SCR 548	**relied on**	**para 15**
AIR 1965 SC 1591	**referred to**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9030 of 2013.

From the Judgment and Order dated 30.08.2007 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 3533 of 2007.

WITH

C.A. No. 9049 of 2013.

B.S. Mor, Addl. AAG, Nikhil Nayyar AAG, Neeraj Mor, Naresh Bakshi, Ashok Kumar Singh, Kuldip Singh for the Appellants.

Rajesh Kumar, Anupama Dhruve, Sarv Mitter (for Mitter & Mitter), Kamal Mohan Gupta, Ashok Kumar Singh, Jitendra Kumar for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J.

C.A.NO.9030 OF 2013 (@SLP (CIVIL) NO.18323 OF 2008)

1. The petitioners, aggrieved by the order of the High Court directing entry of charge in the revenue records on the basis of mortgage created by deposit of title-deeds, have preferred this special leave petition.

2. Delay condoned.

3. Leave granted.

4. Shorn of unnecessary details, facts giving rise to the present appeal are that one M/s. Ultra Tech Private, a company incorporated under the Companies Act, was sanctioned a term loan of Rs. 425 lakhs and working capital facility of Rs.99 lakhs by the Punjab National Bank (hereinafter referred to as the Bank). As agreed by the Bank, original title-deeds in respect of 19 Marlas of land belonging to Narvir Singh and 31 Marlas of land owned by Rajinder Kaur were deposited with the Bank by the borrower. In this way mortgage by deposit of title-deeds took place. It is not in dispute that this transaction had taken place in a town notified under Section 58(f) of the Transfer of Property Act. The Bank wrote to the Tahsildar, Panchkula for mutation on the basis of mortgage effected by deposit of the title-deeds. When nothing was done, the land owner filed writ

petition before the High Court inter alia praying for mutation on the basis of mortgage aforesaid.

5. The respondents resisted mutation inter alia on the ground that no entry can be made as the instrument of deposit of title-deeds is compulsorily registrable under Section 17(1)(c) of the Registration Act and for that, they relied on a letter dated 29th March, 2007 of the Finance Commissioner and Principal Secretary to Government, the relevant portion whereof reads as under:

"xxx xxx xxx

2. It is clarified that the instrument of deposit of title-deed/ Equitable Mortgage is compulsorily registrable under Section 17(1)(c) of the Indian Registration Act, 1908. Registration fee is payable under Article 1(1)(b) in the table of Registration Fees Notification dated 06th November, 2006. Article 6 of the schedule I-A of the Indian Stamp Act, 1899 provides for rate of Stamp Duty (SD) chargeable on deposit of title-deeds/equitable mortgage.

xxx xxx xxx"

6. According to the respondents, in the absence of registration as aforesaid and payment of registration fee and stamp duty, the prayer for mutation cannot be allowed.

7. The High Court considered the objection and negatived the same in the following words:

"We are of the view that an equitable mortgage is created by deposit of title-deeds and not through any written instrument. Simple pledge of the title-deeds to the bank as Security creates an equitable mortgage, therefore, there is never an instrument of deposit of title-deed/ equitable mortgage. The petitioner simply went to the bank and handed over the title-deeds of their respective properties. This act was enough to create a mortgage as

envisaged under Section 58(f) of the Transfer of Property Act. Quite often a memorandum is drawn up regarding the handing over of the title-deeds but this memorandum is simply a written record of the pledge. The memorandum itself is not an instrument of mortgage……."

8. Mr. B.S. Mor, Additional Advocate General appearing for the State submits that mortgage by deposit of title-deeds requires registration under Section 17(1)(c) of the Registration Act, 1908. Further it mandates payment of fee as prescribed under article 1(1)(b) of the Registration Fees notification dated 6th November, 2006. In addition, payment of stamp duty as per Article 6 of the Indian Stamp Act is also required. According to Mr. Mor in the absence of all these the mortgage by deposit of title-deeds cannot form the basis of mutation.

9. Mr. Harikesh Singh, learned counsel appearing for the respondents, however, submits that mortgage by deposit of title-deeds does not need any registered instrument. Hence, there is no question of deposit of any fee thereon. According to him, it also does not require payment of duty under the Stamp Act.

10. An application for impleadment has been filed by the Bank for being impleaded as a party to the proceedings, which was allowed by this Court vide order dated 12th July, 2010. The Bank is represented by Mr.Rajesh Kumar, Advocate for M/s. Mitter & Mitter, Advocates.

11. Another application for impleadment (I.A. No. 3 of 2011) has been filed by Shankar Twine Products Pvt. Ltd. through its Director. We reject this petition giving liberty to it to take recourse to such other remedy as is available to it before the court of competent jurisdiction.

12. In view of rival submissions, the question which falls for consideration is whether 'charge' of mortgage can be entered in the revenue record in respect of a mortgage effected

by deposit of title-deeds without its registration and payment of registration fee and stamp duty.

13. Mortgage by deposit of title-deeds is sanctioned by law under Section 58(f) of the Transfer of Property Act in specified towns, same reads as follows:

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.-

(a) xxx xxx xxx

(e) xxx xxx xxx

(f) Mortgage by deposit of title-deeds.-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

14. Mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. Mortgage by deposit of title-deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title-deeds of the property for the

purpose of security, it becomes mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required under Section 59 thereof as in other classes of mortgage. The essence of mortgage by deposit of title-deeds is handing over by a borrower to the creditor title-deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title-deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration under Section 17(1)c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.

15. This Court had the occasion to consider this question in the case of *Rachpal v. Bhagwandas,* AIR 37 1950 SC 272, and the statement of law made therein supports the view we have taken, which would be evident from the following passage of the judgment:

> "4. A mortgage by deposit of title-deeds is a form of mortgage recognized by S. 58(f), T.P. Act, which provides that it may be effected in certain towns (including Calcutta) by a person "delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon." That is to say, when the debtor deposits with the creditor the title-deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under S.59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the

> document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under S.17, Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title-deeds and yet may not be registrable……"

16. This Court while relying on the aforesaid judgment in the case of *United Bank of India v. M/s. Lekharam Sonaram & Co.,* AIR 1965 SC 1591 reiterated as follows:

> "7. ……It is essential to bear in mind that the essence of a mortgage by deposit of title-deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under Section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the

transaction itself cannot be proved by oral evidence either……."

17. Bearing in mind the principles aforesaid, we proceed to consider the facts of the present case. It is relevant here to state that letter dated 29th March, 2007 of the Finance Commissioner inter alia makes "instrument of deposit of title-deeds compulsorily registrable under Section 17(1)(c) of the Registration Act." In such contingency, registration fee and stamp duty would be leviable. But the question is whether mortgage by deposit of title-deeds is required to be done by an instrument at all. In our opinion, it may be effected in specified town by the debtor delivering to his creditor documents of title to immoveable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit of the title-deeds. In such a case also registration is not required. But in a case in which the memorandum recorded in writing creates right, liability or extinguishes those, same requires registration. In our opinion, the letter of the Finance Commissioner would apply in cases where the instrument of deposit of title-deeds incorporates terms and conditions in addition to what flow from the mortgage by deposit of title-deeds. But in that case there has to be an instrument which is an integral part of the transaction regarding the mortgage by deposit of title-deeds. A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration. Nothing has been brought on record to show existence of any instrument which has created or extinguished any right or liability. In the case in hand, the original deeds have just been deposited with the bank. In the face of it, we are of opinion that the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of title-deeds and for that, instrument of mortgage is not necessary. Mortgage by deposit of title-deeds further does not require registration. Hence, the question of payment of

registration fee and stamp duty does not arise. By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce the contract in writing and if such a document is the sole evidence of terms between them, the document shall form integral part of the transaction and same shall require registration under Section 17 of the Registration Act. From conspectus of what we have observed above, we do not find any error in the judgment of the High Court.

18. In the result, we do not find any merit in the appeal and it is dismissed accordingly but without any order as to costs.

CIVIL APPEAL NO.9049 OF 2013 (@SLP (C) NO. 924/2009)

19. Delay condoned.

20. Leave granted.

21. By the impugned order, the High Court had directed the appellants herein to enter mutation in favour of Punjab National Bank in respect of the properties mortgaged by deposit of title-deeds. According to the appellants, the properties mortgaged by deposit of title-deeds are situated in the village Matab Garh in the District of Ludhiana and at village Dallomajra, Tahsil and District Fatehgarh Sahib and village Sadhugarh in the District Sirhind.

22. It is the stand of the appellants that deposit of the title-deeds are not in relation to the properties situated in the towns specified under Section 58(f) or in the towns notified by the State Government in terms of Section 58 of the Transfer of Property Act. In this connection, our attention has been drawn to the notification dated May 26, 2003 of the Government of Punjab in the Department of Revenue and Rehabilitation, same reads as follows:

"In exercise of the power conferred by clause (f) of Section 58 of the Transfer of Property Act, 1882 (Central Act No.

4 of 1882) and all other powers enabling him in this behalf, the Governor of Punjab is pleased to specify Gobindgarh in the district Fatehgarh Sahib and Mohali in District Roop Nagar in the State of Punjab as Towns for the purpose of the aforesaid section of the said Act."

23. This aspect of the matter has not been considered by the High Court in the impugned judgment. As the same goes to the root of the matter, we have no option than to set aside the impugned order and remit the matter back for its fresh consideration in accordance with law in the light of the observation made above.

24. In the result, we allow this appeal, set aside the impugned judgment of the High Court and remit the matter back to the High Court for fresh consideration in accordance with law.

R.P. Appeal allowed.

TOFAN SINGH
v.
STATE OF TAMIL NADU
(Criminal Appeal No. 152 of 2013)

OCTOBER 08, 2013

[A.K. PATNAIK AND A.K. SIKRI, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

s. 67 – Power to call for information etc. – Questions: (i) whether the officer investigating the matter under NDPS Act would qualify as police officer or not and (ii) whether the statement recorded by the investigating officer u/s. 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer – Referred to large Bench – Further, sentence suspended till the disposal of appeal by the larger Bench – Appellant released on bail.

The appellant, along with others, was convicted u/s. 8(c) r/w s. 21(c) and s. 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and was sentenced to R1 for 10 years with fine of Rs. 1 lakh under each of the two counts. His appeal was dismissed by the High Court.

In the instant appeal, it was primarily contended for the appellant that appellant's conviction was vitiated as it was based solely on the purported confessional statement recorded u/s. 67 of the NDPS Act, which did not have any evidentiary value. It was submitted that there was no power in s. 67 of the NDPS Act to either record confessions or substantive evidence which can form basis for conviction of the accused; and that in any case, such a statement was not admissible in evidence as the

excise official recording the statement was to be treated as "police officer" and thus, the evidential value of the statement recorded before him was hit by the provisions of s. 25 of the Evidence Act. On the other hand, on behalf of the State, it was pointed out that in the case of *Kanhaiyalal*[1], it was categorically held that the officer u/ s. 63 was not a police officer.

Referring the matter to larger Bench, the Court

HELD: 1.1 *Abdul Rashid* and *Noor Aga* were the cases under the Customs Act. But the reasons for holding custom officer as police officer would have significant bearing even when the issue is cosidered in the context of NDPS Act as well. It would be more so when the schemes and purport of the two enactments are kept in mind. NDPS Act is purely penal in nature. In contradistinction, as far as the Customs Act and the Central Excise Act are concerned, their dominant object is to protect revenue of the State and penal provisions to punish the person found offending those laws are secondary in nature. [Para 32] [992-C-D]

Abdul Rashid v. State of Bihar **(2001) 9 SCC 578;** *Raja Ram Jaiswal v.* **(1964) 2 SCR 752;** *Noor Aga v. State of Punjab* **2008 (10) SCR 379 = (2008) 9 SCALE 681 – referred to.**

1.2 NDPS Act is a complete code relating to Narcotic Substances, and dealing with the offences and the procedure to be followed for the detection of the offences as well as for the prosecution and the punishment of the accused. The provisions are penal provisions which can, in certain cases, deprive a person of his liberty for a minimum period of 10 years and can also result in sentences which can extend upto 20 years or even death

1. Kanhaiyalal v. Union of India 2008 (1) SCR 350.

sentence under certain circumstances. The provisions, therefore, have to be strictly construed and the safeguards provided therein have to be scrupulously and honestly followed. [Para 33] [992-E-G]

Baldev Singh **(1997) 1 SCC 416;** *Union of India v. Bal Mukund* **2009 (5) SCR 205 = (2009) 12 SCC 161;** *Balbir Singh v. State of Haryana* **1987 (1) SCR 1095 = (1987) 1 SCC 533 – relied on.**

1.3 The crucial test to determine is whether an officer is a police officer for the purpose of s. 25 of the Evidence Act viz. the "influence or authority" that an officer is capable of exercising over a person from whom a confession is obtained. The term "police officer" has not been defined under the Code or in the Evidence Act and, therefore, the meaning ought to be assessed not by equating the powers of the officer sought to be equated with a police officer but from the power he possesses from the perception of the common public to assess his capacity to influence, pressure or coercion on persons who are searched, detained or arrested. The influence exercised has to be, assessed from the consequences that a person is likely to suffer in view of the provisions of the Act under which he is being booked. It, therefore, follows that a police officer is one who:-

(i) is considered to be a police officer in "common parlance" keeping into focus the consequences provided under the Act.

(ii) is capable of exercising influence or authority over a person from whom a confession is obtained. [Para 34] [992-H; 993-A-D]

1.4 This Court is of the view that the ratio of Kanhaiyalal necessitates a re-look, more so, when the dicta in Kanhaiyalal has already been doubted in Nirmal

singh Pehalwan. Therefore, the matter needs to be referred to larger Bench for re-consideration of the issue as to whether the officer investigating the matter under NDPS Act would qualify as police officer or not. In this context, the other related issue viz. whether the statement recorded by the investigating officer u/s. 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement u/s. 161 of the Code or it partakes the character of statement u/s. 164 of the Code. [Para 39-40] [998-B-D]

Kanhaiyalal v. Union of India **2008 (1) SCR 350 = 2008 (4) SCC 668 =;** *Nirmal Singh Pehalwan* **2011 (9) SCR 446 = (2011) 12 SCC 298;** *State of Punjab v. Barkat Ram* **(1962) 3 SCR 338;** *Raj Kumar Karwal v. Union of India* **1990 (2) SCR 63 =1990 (2) SCC 409;** *Shahid Khan vs. Director of Revenue Intelligence* **2001 (Criminal Law Journal 3183 – referred to.**

Queen Empress v. Babulal **I.L.R (1884). 6 All. 509 – referred to.**

2. Since the appellant has already undergone more than 9 years of sentence, further sentence is suspended till the disposal of the appeal by the large Bench. The appellant shall be released on bail. [para 43] [999-B-C]

Case Law Reference:

2008 (1) SCR 350	**referred to**	**para 21**
1990 (2) SCR 63	**referred to**	**para 21**
2008 (10) SCR 379	**referred to**	**para 27**
(2001) 9 SCC 578	**referred to**	**para 30**

(1964) 2 SCR 752	**referred to**	**para 30**
(1997) 1 SCC 416	**relied on**	**para 33**
2009 (5) SCR 205	**relied on**	**para 33**
1987 (1) SCR 1095	**relied on**	**para 33**
(1962) 3 SCR 338	**referred to**	**para 37**
2011 (9) SCR 446	**referred to**	**para 38**
2001 (Criminal Law Journal 3183	**referred to**	**para 41**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 152 of 2013.

From the Judgment and Order dated 18.06.2012 of the High Court of Judicature at Madras in Criminal Appeal No. 8 of 2010.

Sushil Kumar Jain, Puneet Jain, Christi Jain, Ruchika Gohil, Anurag Gohil, Pramod Sharma, Pratibha Jain for the Appellant.

S. Nanda Kumar, Chetan Chawla, Soniya Malhotra, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. The appellant herein, Tofan Singh, was listed as Accused No. 3 in the trial for the offences under Section 8(c) r/w Section 21 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as the NDPS Act) as well as for the offences under Section 8(c) r/w Section 29 of the NDPS Act. This trial, conducted by the Special Judge, Additional Special Court, under NDPS Act, Chennai, resulted in the conviction of the appellant holding him guilty of the offences under the aforesaid provisions of the Act. As a consequence of the said judgment dated 18.12.2009 convicting him under the provisions of the NDPS Act, the

learned Special Judge sentenced the appellant to undergo 10 years rigorous imprisonment and to pay a fine of Rs. one lakh. In default whereof, it was ordered that the appellant would undergo rigorous imprisonment for a further period of one year. Identical sentences were imposed for the offences under Section 8 (c) read with Section 21 & 29 of the NDPS Act, 1985 with the direction that both the sentences had to be undergone by the appellant concurrently.

2. Appeal filed by the appellant against the order of the Special Judge, Addl. Special Court, has been dismissed by the High Court of Judicature at Madras vide judgment dated 18.6.2012 thereby maintaining the conviction as well as the sentence awarded by the Special Judge, Addl. Special Court under NDPS Act, Chennai. Dissatisfied and undeterred by the judgments of the Courts below, the appellant preferred the Special Leave Petition in which the leave was granted on 18.1.2013. However, at the same time, bail application preferred by the appellant was rejected and appeal was posted for hearing. This is how the present appeal arises against the impugned judgment dated 18.6.2012 of the High Court of Judicature at Madras.

3. The allegations against the appellant (alongwith five others out of whom two are absconding) were that 5.250 Kgs of heroin was seized from these accused persons which they were carrying and attempting to export out of India. As per the complaint filed by the Intelligence Officer, NCB, Chennai in this behalf, the prosecution case is stated, in a summary form, as below:-

4. On 23.10.2004, the Intelligence Officer, NCB, South Zone Unit, Mr. L.S. Aruldoss (PW-7), received information at about 9.00 p.m. that one Prem @ Kannan @ Sudeshwaran resident of Nanganallur, Chennai was procuring Narcotic Drugs from Guddu Singh resident of Rajasthan with the assistance of one Bapulal resident of Pattalam, Chennai, for trafficking it from Chennai to Srilanka and that they had made arrangements for

the supply of 5 Kgs. of heroin through his two persons, who were identified to Bapulal by Guddusingh and those two persons were arriving at Chennai on the next day by Jaipur Express. It was further reported that the said Bapulal and Kannan had planned to leave at 10.00 p.m. on 23.10.2004 to Nellore, Andhra Pradesh, in a white Ambassador Car bearing Registration No. TN-01-K0923 and on reaching Chennai, Prem @ Kannan @ Sudeshwaran would receive the heroin and smuggle it out to Srilanka.

5. After receiving the information, Mr. L.S. Aruldoss, the Intelligence Officer (PW-7) discussed the matter with other officers namely Mr. Gunabalan (PW-6) and Mr. A. Sendhil Murugan (PW-10) resulting into the orders by Mr. Gunabalan (PW-6) to proceed with the case. Accordingly, on 24.10.2004, at about 9.00 a.m., P.W.6, P.W.7, and P.W.10 and two other staff members viz., one Sepoy and Driver left NCB Office and reached the scene of occurrence at 11.00 a.m. On the instruction of P.W.6, P.W.7 procured two independent witnesses viz. S. Gopi (P.W.8) and one Krishnamurthy (not examined). They intercepted the Ambassador Car bearing Registration No. TN-01-K0923 and found that there were six passengers inside the car. On the front seat, there were two drivers namely, Satyakeerthi and Mariappan and next to driver Mariappan, the appellant herein was sitting. On the back seat Prem @ Kannan @ Sudeshwaran (Accused No. 2) of Srilanka, Bapulal (Accused No. 1) of Chennai & Badrilal Sharma (Accused No. 4) were seated. After the police party enquired as to whether there were any Narcotic Drugs, Accused No. 1 & 2 who were seated on the back seat, took out one green colour bag from beneath their seat and handed it over to Mr. Aruldoss (P.W.7) stating that it contains 5 Kgs. of heroin. The recoveries were, thereafter, effected and the accused persons were arrested for commission of offences under the NDPS Act. The two drivers of the ambassador car were, thereafter, allowed to go. The appellant and the other accused persons were arrested by the raiding party.

6. While the four accused persons including the appellant were arrested, the other two accused namely Guddu Singh @ Vikram Singh and Ravi could not be arrested and were absconding. The statements of the arrested accused persons were recorded by Mr. A. Sendhil Murugan, Intelligence Officer. The appellant also gave his statement under Section 67 of the NDPS Act as per which he confessed to the commission of the crime.

7. The case was, thereafter, handed over to Mr. R. Murugan (P.W.2) for investigation. After completing the investigation, he filed a report under Section 173 of the Code of Criminal Procedure, 1973 before the Special Judge under NDPS Act. Charges were framed and the matter went on trial. The prosecution examined as many as 10 witnesses. Among them were Mr. L.S. Aruldoss - Intelligence Officer, NCB (P.W.7), Mr. Gunabalan - Superintendent (P.W.6), Mr. A. Sendhil Murugan (P.W.10), Mr. R. Murugan (P.W.2), Smt. Saraswathy Chakravarthy, Chemical Examiner in Customs House Laboratory at Chennai (P.W.4), Mr. T. Sridhar (P.W.5).

8. The information relating to the commission of the offence has been taken note of and discussed by the Trial Court as well as the High Court in the impugned judgment in detail. It is not necessary to burden this judgment with all those details as our purpose would be served by referring to those aspects which are essential for the purposes of the present appeal. We may state that the prosecution had also produced Exs. P1 to P81 and M.Os 1 to 19 during the trial. After examining the prosecution witnesses, statements of the accused persons under Section 313 of the Code of Civil Procedure (hereinafter to be referred as 'Code')were recorded. The accused persons denied the same and stated as follows:

A-1: Denied the incriminating evidence against him and stated that he was compelled to come to the NCB Office and a false case is foisted against him and gave a written statement stating that the NCB

officers came to his house between 12.30 to 1.00 p.m. on 25.10.2004 and took him to their office at Chennai in the presence of his wife and his children and have forcibly taken the signatures on some papers written in Hindi and that he is not connected with the other accused and that he was not occupant of the Car as alleged in the case and he was not aware of the contraband seized and examined defence witnesses on his behalf namely Mr. Vinay, son of A-1, D.W.1 and Dr. Somasundaram D.W.2.

A-2: Denying the incriminating evidence against him stated that he was taken from Nanganallur to the NCB Office and that he was not allowed to talk before the Judge during remand.

A-3: Stated that summon was not issued to him and Rs. 1,600/- and train tickets were seized from him at Chennai Central Railway Station and he was beaten and forced to sign in the NCB office on blank papers and stated that it is a false case.

A-4: Stated that he was arrested at Nellore Railway Station while he was coming from train and his signatures were obtained forcibly and the Intelligence Officer Mr. Karthikeyan (P.W.3) has foisted a false case against him due to quarrel in the train between him and the Intelligence Officer and that he was working in the RPF and is not connected with the contraband seized and gave a written statement stating that he travelled in mufti to go to Tirupathy and got down at Chennai Central Railway Station and was arrested and false case was foisted against him due to wordy quarrel with the officer and that Section 67 statement was obtained by force and torture and that he was not carrying any Narcotic Drug.

Thereafter, the accused persons produced two witnesses who were examined and one document Ex. D1 was marked.

9. Defence evidence is as follows:-

DW.1: The NCB Officers came at about 1.00 p.m on 25.10.2004 and searched the house of A-1 and they obtained his signature and his mother's signature in blank papers by threatening them. A-2 has not gone anywhere during September and October of 2004 and he was at home doing cloth business. A-1 was taken from his office and arrested. The other accused had never contacted A-2 over phone at any time.

DW.2: Dr. Somasundaram has recommended A-1 for treatment for Paralysis at Royapettah Hospital and his case sheet containing 21 pages for treatment from January, 2008 to 25.9.2008 is Ex. D.1.

10. It would be relevant to point that two of the accused persons namely Guddu Singh @ Vikram Singh and Ravi were absconding and they could not be procured during the trial, resulting into splitting up of case as new C.C. No. 9 of 2007. Thereafter, the trial proceeded against the other four accused persons which led to their conviction, as mentioned above. All these four accused persons had filed the appeal which has been dismissed by the High Court of Judicature at Madras vide impugned Judgment. However, out of the four convicted persons, only the appellant herein has preferred the present appeal.

JUDGMENT OF THE TRIAL COURT:

11. The learned Trial Court in its judgment dated 18.12.2009, after pointing out the main prosecution evidence as well as the defence, noted that the gist of the prosecution

case was that the six accused persons had hatched criminal conspiracy at Nellore, Andhra Pradesh, Chennai and Srilanka to procure, possess, transport and attempt to export out of India 5.250 Kgs. of heroin to Srilanka. Accused No. 2 had indulged in financing for purchase of heroin for which he entered India without registering himself as a foreigner. The heroin, which was seized, was being taken for the said export which was intercepted in the manner stated below:-

> "As per the prosecution, after the information was received by Mr. L.S. Aruldoss, Intelligence Officer (P.W.9) on 23.10.2004 and discussed with Mr. Gunabalan, Superintendent (P.W.6) and Mr. A. Sendhil Murugan, Intelligence Officer (P.W.10) and further action was sanctioned, the raiding party consisting of PW.6, PW.7, PW.10 with Sepoy and driver, left the NCB office in the vehicle Mini Bus bearing Registration No. TN 09 C 3113 on 24.10.2004 at 9.00 a.m and had reached GNT Road 100' Road Junction at 11.00 a.m. Two independent witnesses namely, Mr. S. Gopi (P.W.8) and Krishnamurthy were also associated. When they were mounting surveillance at about 12.00 noon, they noticed Ambassador Car bearing Regd. No. TN 01 K 0923 coming towards Chennai which was intercepted by the raiding authority and the heroin in question seized in the manner already explained above. The case argued by the prosecution was that the conspiracy hatched between Accused No. 1 to 4 was proved by the seizure of Ex. P-4 train ticket PNR No. 840-7161615 dt. 14.10.2004 and Ex. P-41 the booking particulars disclose the name of A-2, A-2 and Rajesh and the place of travel from Mumbai to madras and another passenger name through it was mentioned in it was given as Shahid by A-1 in his further voluntary statement in Hindi Ex. P-6 of which the free English translation is Ex. P-77 in which it is stated that Shahid is the person through whom money was sent to Guddu Singh which in fact is within the special knowledge

of A-1. In the same manner Ex. P-5 telephone bills were seized from the residence of A-1 and when A-21 was questioned about the telephone numbers Faroth and Sarola A-2 has stated in Ex. P-77 that these numbers belong to Guddu Singh and his brother through which he used to talk about smuggling of heroin. In the English translation of voluntary statement of A-3, Ex. P-78 of which the Hindi version is Ex. P-10 it is stated that A-3 met Guddu Singh who introduced him to A-4 and told him that A-4 is working in RPF, Bhawani Mandi, Rajasthan and that A-4 would travel with him in uniform in Jaipur Chennai Express and handed over a bag containing 5 Kgs. of heroin stating that it should be handed over to A-1 at Nellore who was already introduced to A-3 on 13.10.2004. The version of A-3 in Ex. P-78 that he travelled in Jaipur Chennai Express from Shamgarh is corroborated by the seizure of two train tickets Ex. P-61 and Ex. P-62 from Shamgarh to Chennai from A-3 and I.D. Card of A-4 Ex. P-63 discloses that A-3 was working in RPF. Ex. P-79 is the voluntary statement of A-4 which is free english translation of the hindi statement of Ex. P-74 in which A- has stated that he boarded Jaipur Express on 22.10.2004 and met A-3 in Bhopal in the train and that he knew that A-3 brought Narcotic Drug with him. Conspiracy could be proved only through the conduct of the accused. A-3 and A-4 had travelled with the contraband in the train and have met A-1 and A-2 at Nellore and handed over the same and boarded in the ambassador car only due to the previous meeting of minds by fixing the time and place of handing over the contraband to the concerned accused. From the proved conduct of A-1 to A-4 it is clear that they have involved themselves in the illegal trafficking of heroin. Ex. P-21 call analysis discloses that 07425-284050 in the name of Bhuvan Singh of M.P. was frequently in touch with A-2 and A-2 mobile numbers A-1 in his voluntary statement Ex. P-2 has stated that Guddu Singh Number is 07425-284050 through which he used to contact A-3 and Guddu

Singh. Hence, the prosecution contended that the charges against A-1 to A-4 for possession transportation of heroin for Export from India and Conspiracy U/s. 8(c) r/2. 21 (c) and 29 of NDPS Act were well proved."

12. In so far as the charge under Section 28 of the NDPS Act is concerned, the trial court held that the said charge was not proved against the accused persons, in as much as at the stage of preparation to commit the offence of illegal export of contraband, the car was intercepted and search and seizure conducted which resulted in the recovery of the contraband. As such, the accused persons were apprehended in the middle of the operation and since the attempt to commit the offence of export had not yet begun, it could not be said that the accused persons had committed any act which could be considered as a step towards the commission of offence of export of the contraband. The accused persons were, thus, acquitted of the charge under Section 28 of the NDPS Act.

13. Likewise, the trial court held that charge under Section 27A of the NDPS Act foisted upon the accused No. 2 was not proved as no oral or documentary evidence was produced in the form of Bank Pass Book or income particulars or documents regarding the money transactions between the seller and the purchaser of heroin. Moreover, there was no oral or documentary evidence to show that the Accused No. 2 had failed to register himself as a foreigner or that he had entered into India without valid and legal documents and thus, he was acquitted of the charge under Section 3(3) of the Passport (Entry into India) Act, 1920 read with Rule 3 (a) as well as under Section 14 of the Foreigners Act, 1946.

14. While discussing the main charge leveled under Section 8(c) read with Section 21(c) and 29 of the NDPS Act, the trial court noted that the defence counsel had sought for discard of the prosecution case on the following grounds:

(i) Voluntary statement recorded under Section 67 of

the NDPS Act had been retracted and so, they had no evidentiary value.

(ii) There was violation of Section 50 of the NDPS Act as there was non-compliance of the provisions thereof.

(iii) Driver of the vehicle was not examined which was fatal to the prosecution case.

(iv) Sample sent for analysis and the seized contraband were not one and the same.

(v) There was no link evidence which vitiated the trial.

(vi) Names of Accused No. 3 (the appellant) and Accused No. 4 were not mentioned in the information which was received by the Intelligence Officer and, therefore, they were wrongly included in the charge sheet.

(vii) There was a violation of standing order 1/88 in as much as samples were not submitted to the Chemical Examiner within 72 hours of seizure and the report was not submitted within 15 days of receipt of contraband for analysis.

(viii) Statements under Section 67 were not recorded in accordance with law, as no statutory warning under Section 164 of the Code of Criminal Procedure was given to the accused persons before recording the statement.

15. The trial court discussed the arguments predicated on the aforesaid defence but found the same to be meaningless. On the basis of prosecution evidence, the trial court concluded that the prosecution was able to prove the charges under Section 8(c) read with Section 21(c) and Section 29 of the NDPS Act and convicted and sentenced the accused persons

in the manner mentioned in the beginning of this judgment.

JUDGMENT OF THE HIGH COURT:

16. A perusal of the impugned judgment reveals that as many as six arguments were advanced before the High Court, attacking the findings of the learned Trial Court. Taking note of these grounds of appeal, the High Court framed the questions in Para 12 of the judgment. We reproduce hereinbelow those six questions formulated by the High Court which reflected the nature of defence:

(i) Whether Section 50 of NDPS Act is complied with or not?

(ii) Whether the provision of Section 42 of NDPS Act is complied with or not?

(iii) Whether non-examination of drivers and non-seizure of vehicle/ car are fatal to the case of the prosecution?

(iv) Whether Section 67 statement of the accused is reliable?

(v) Whether Accused No. 2 is entitled to invoke Section 30 of NDPS Act?

(vi) Whether conviction and sentence passed by the trial court is sustainable.

17. Obviously, all these questions have been answered by the High Court against the appellant herein as the outcome of the appeals has gone against the appellant. However, it is not necessary to mention the reasons/ rationale given by the High Court in support of its conclusion in respect of each and every issue. We say so because of the reason that all the aforesaid contentions were not canvassed before us in the present appeal. Thus, eschewing the discussion which is not relevant

for these appeals, we would be narrating the reasons contained in the impugned judgment only in respect of those grounds which are argued by Mr. Sushil Kumar Jain, learned Counsel appearing for the appellant, that too while taking note of and dealing with those arguments.

THE ARGUMENTS:

18. After giving brief description of the prosecution case, in so far as the alleged involvement of the appellant is concerned. Mr. Sushil Kumar Jain drew our attention to the following aspects as per the prosecution case itself:

(a) In the present case in the prior secret information with the police, there was no prior information with regard to the appellant herein. The secret information (Ex. P-72) does not disclose the name of the appellant at all.

(b) On the date of incident also, the appellant was found sitting on the front seat alongwith the two drivers who have been let off by the investigating agency itself and the ambassador car from which the recoveries had been effected has also not been seized. The said drivers could have been the best witnesses but they have not been examined by the prosecution.

(c) The recovery of the narcotic substance was made at the instance of A1 and A2 (and not the appellant herein), who while sitting on the back seat took out a green colour bag from beneath their seat and handed it over to PW.7. The appellant cannot be said to be in conscious possession of the narcotic substance.

(d) In the search conducted of the appellant herein, the raiding party found Indian currency of Rs. 680/- (vide Ex. P-11) which is M.O. 15 and two second class

train tickets from Shamgarh to Chennai. Thus no incriminating material has been recovered from the appellant. Further there is also no recovery of any mobile phone from the appellant herein which could link the appellant with the other co-accused.

(e) The prosecution case hinges solely upon the confessional statement of the appellant herein (Ex. P-9), which was recorded by PW.2 - R. Murugan under Section 67 of the Act, and the same person acted as the investigating officer in the present case.

19. From the above, Mr. Jain argued that there was no evidence worth the name implicating the appellant except the purported confessional statement of the appellant recorded under Section 67 of the NDPS Act. After drawing the aforesaid sketch, Mr. Jain endeavoured to fill therein the colours of innocence in so far as the appellant is concerned with the following legal submissions:-

(I) It was argued that the conviction of the appellant is based upon a purported confessional statement (Ex. P-9] recorded by PW.2 R. Murugan under the provisions of Section 67 of the NDPS Act, which did not have any evidentiary value. Mr. Jain submitted in this behalf that:

(a) There is no power under Section 67 of the NDPS Act to either record confessions or substantive evidence which can form basis for conviction of an accused, in as much as:

(i) The scheme of the Act does not confer any power upon an officer empowered under Section 42 to record confessions since neither a specific power to record confession has been conferred as was provided under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)

or under Section 32 of the Prevention of Terrorism Act, 2002 (POTA) nor the power under Section 67 is a power to record substantive "evidence" as in Section 108 of the Customs Act or Section 14 of the Central Excise Act which are deemed to be judicial proceedings as specifically provided under Section 108(4) of the Customs Act or Section 14(3) of the Central Excise Act.

(ii) The powers under Section 67 has been conferred upon an officer under Section 42 so that such officer can effectively perform his functions. The power under Section 67 is incidental to and intended to enable an officer under Section 42 to effectively exercise his powers of entry, search, seizure or arrest which is provided under Section 42 of the Act. The powers under Section 67 are powers to "call for information" which information can thereafter form the basis for satisfaction of "reasons to believe by personal knowledge or information" appearing in Section 42 and which a jurisdictional basis and a pre-condition to exercise powers under Section 42 of the Act. Absence of reasons to believe or information would render the exercise under Section 42 of the Act bad in law and hence in order to derive the said information power has been conferred under Section 67 to an officer empowered under Section 42. This statement is, therefore, merely "Information" subject to investigation and cannot be treated as substantive evidence.

(b) Pitching this argument to the next level, it was submitted that the power under Section 67(c) of the Act is merely a power to examine any person acquainted with the facts and circumstances of the case. Such statements are not required in law to be truthful as provided under Section

161(2) of the Criminal Procedure Code, which required the person making statement to a police officer under Section 161 Cr.P.C. to make a true statement. Even such a statement made under Section 161 Cr. P.C. is not a substantive evidence on which a conviction can be based. Statements under Section 67 are not required in law to be given truthfully and hence cannot in any case be treated to be a substantive evidence. Further statement under Section 67 are not recorded after administration of oath as is required under Section 164(5) of the Criminal Procedure Code, the officers are not competent to administer oaths and, therefore, the statements under Section 67 cannot be substantive evidence for recording conviction.

(c) Taking the arguments to a still higher pedestal, Mr. Jain's effort was to demonstrate that the officer recording the statement was a police officer and, therefore, such a statement was hit by Section 25 of the Indian Evidence Act. He submitted that an officer empowered under Section 42 of the Act has been conferred with substantive powers which are powers available to a police officer for detection and prevention of crime. The learned Counsel placed heavy reliance upon the ratio of the judgment of the Constitution Bench of this Court in the case of *Batku Jyoti Sawat Vs. State of Mysore* 1966 (3) SCC 698 which accepted a broader view, as laid down in the case of *Rajaram Jaiswal Vs. State of Bihar* 1964 (2) SCR 752 and *State of Punjab Vs. Barkat Ram* 1962 (3) SCR 338. It was submitted that in view of the ratio of the above judgments, officers empowered under Section 42 and conferred with powers to enter, search, seize or arrest are "police officers" properly so called and hence statements made to such officers would be hit by the provisions of Section 25 of the Evidence Act. In any case such officers would come within the meaning of term "person in authority" and hence the statements recorded by such

officers would be hit by the provisions of Section 24 of the Evidence Act especially since the statements were not voluntary and had been retracted by the accused.

(d) In the alternate, the submission of Mr. Jain was that even if it is assumed, without admitting, that Section 67 confers powers to record confessions, the status of a statement recorded by an officer under Section 42 of the Act can at best be recorded as "extra judicial confession" and no conviction can be based solely on the basis of extra judicial convictions.

(e) It was also argued that in any case the statement under Section 67 was retracted and as such the confession in the present case is a retracted confession which ought to have been investigated and could have been used only to corroborate other evidence and not as a substantive evidence itself. He submitted that no conviction can be based on uncorroborated retracted confessional statement as held in *Noor Aga Vs. State of Punjab* 2008 (9) SCALE 681.

(II) Next submission of Mr. Jain was that there was complete absence of Fair Investigation and Non-compliance of the provisions of Section 52(3) of the Act-

Pointing out that in the present case the appellant had been arrested by PW.2 - R. Murugan after recording statement under Section 67 of the Act, the ld. Counsel made a fervent plea to the effect that it was evident that PW.2 R. Murugan was exercising purported powers conferred to an officer under Section 42 of the Act. It was submitted that Section 52(3) of the Act casts an obligation on an officer empowered under Section 42 of the Act to forward, without unnecessary delay every person arrested or article seized to either an officer-in-charge of a police station or an officer empowered under Section 53. According to him, since there is an obligation to

forward such person arrested or article seized, to an officer under Section 53 or an officer-in-charge of the police station, it necessarily follows that an officer under Section 42 would be different and distinct from an officer invested with the task of investigation, i.e., either the officer-in-charge of the police station or an officer empowered under Section 53 of the Act. In the present case, however, the PW.2 R. Murugan recorded the statement of the appellant under Section 67 and thereafter arrested him. He was, therefore, required to forward the statement as well as the appellant to the Investigating officer in terms of Section 52(3). Instead, he himself became the Investigating Officer in the present case, which amounted to non-compliance of Section 52(3) read with Section 58 of the Act. Fair investigation demands existence of an independent investigating agency which is also contemplated and is evident from the scheme of NDPS Act. It was submitted that since Section 58 of the Act provides for punishment for vexatious entry, search, seizure and arrest, the conduct of the officer arresting or an officer under Section 42 is subject matter of investigation by an independent agency and hence PW. 2 R. Murugan could not have been made an investigating officer in the present case after he has already acted and exercised powers under Section 42 of the Act.

(III) Another submission of Mr. Jain was that trial was initiated because of Non-compliance of the Provisions of Section 57 of the Act -

It was submitted that Section 57 requires that whenever any person makes any arrest or seizure under the Act, then a report thereof has to be submitted of such arrest or seizure to his immediate superior officer. In the present case the raiding party comprised of PW.6- Gunabalan, Superintendent - PW.7 Aruldoss, Intelligence Officer, PW.10 Sendhil Murugan, Intelligence Officer and two other staff members i.e., one Sepoy and one driver. It was submitted that the senior most officer among the raiding team was PW.6 Gunabalan who was, therefore, exercising powers under Section 42 of the Act and

the other officers being his subordinates were assisting him in exercise of such powers. Therefore, the report contemplated under Section 57 ought to have been made by PW.6 Gunabalan to his immediate superior officer but instead, in the present case PW.7 Aruldoss has submitted a report to PW.6 Gunabalan under Section 57 of the Act with regard to seizure and PW.2 R. Murugan has submitted report to PW.6 Gunabalan under Section 57 with regard to arrest of the appellant herein. It is, thus, submitted that there is a complete non-compliance of the provisions of Section 57 of the Act which has vitiated the safeguards provided under the Act and as such the appellant could not have been convicted.

20. Arguing on behalf of the prosecutor, Mr. S. Nanda Kumar, learned Counsel submitted that the appellant had given voluntary statement that discloses his involvement in the commission of the offence alongwith other accused persons. In the statement he has categorically admitted having bringing 5.250 kgs of heroin/ narcotic substance from Maniki Village, District Mandsaur, Rajasthan to Chennai by Jaipur - Chennai Express along with other co-accused Badrilal Sharma wearing RPF Uniform till Nelore, Andhra Pradesh. He has also admitted that, thereafter, the other accused namely Guddu Singh @ Vikram Singh and Bapulal Jain picked them in a car and proceeded to Chennai. It is on the way that these accused persons were caught by the respondent's officials and based on their confession as well as the material seized, the case was registered. He also pointed out that it has come on record that Babulal Jain (declared as absconder) and Guddu Singh were involved in the similar offence by selling 8 Kgs. of heroin on earlier occasions which was handed over to Prem @ Kannan, a Srilankan National, another co-accused in this case. It was the second time that the accused persons planned to smuggle the heroin to Srilanka.

21. Refuting the submissions of the appellant, it was submitted that the confessional statement recorded under Section 67 of the NDPS Act could be acted upon, as the officer

recording statement under this provision under Section 67 is not a "police officer" and, therefore, such a statement is not hit by the provisions of Section 24 to 27 of the Evidence Act or Article 20(3) of the Constitution of India. His submission was that law on this aspect had already been settled by the judgment of this Court in *Kanhaiyalal v. Union of India;* 2008 (4) SCC 668 as well as *Raj Kumar Karwal v. Union of India;* 1990(2) SCC 409. The learned Counsel pointed out that judgment relied upon by the appellant pertains to other Acts like Customs Act etc. whereas the aforesaid judgments specifically dealt with the nature of duties performed by officers under the NDPS Act and, therefore, on this issue *Raj Kumar* (Supra) and *Kanhaiyalal* (Supra) were the binding precedents. He also submitted that as per Section 67 of NDPS Act, any officer referred to in Section 42 of NDPS Act was empowered to obtain a statement. Once the said statement is made it can also be construed as confessional statement since there is no specific provision in the Act to obtain the confessional statement from the accused. Therefore, such a statement of the appellant was rightly relied upon resulting into his conviction.

22. The learned Counsel for the state also countered the submission of the appellant that the officer acting under Section 53 of the NDPS Act i.e. the investigating officer had to be necessarily different from the officer who is acting under Section 42 of the NDPS Act. He submitted that Sections 42, 53 and 67 of NDPS Act do not bar the officer authorized under the act to conduct, search, seizure, investigate and enquire into the matter. His submission was that the depositions of PW.2 - Murugan, Intelligence Officer, PW.6 - Gunabalan, Superintendent and PW.10 - Senthil Murugan, Intelligence Officer establish that they are empowered to act under Section 42, 53 and 67 of the NDPS Act.

23. The learned Counsel also highlighted incriminating facts as per the records viz. the raid team was led by PW.6 - Gunabalan, Superintendent along with the PW.10 A. Senthil

Murugan, Intelligence Officer and one Aruldoss, Intelligence officer. Also two other officials conducted the raid and made a search and seizure of the heroin on 24.10.2004 at 12.00 hrs. at GNT Road, 100 ft. road, Madhavaram in Chennai where the vehicles come from Nellore, Andhra Pradesh towards Chennai Junction. After the seizure, PW.2 - Murugan enquired into the matter as per the direction of the superintendent. He also obtained the voluntary statement under Section 67 of the NDPS Act. The accused also gave another statement for supply of heroin to Guddu Singh. The confessional statement of Badrilal Sharma, who travelled alongwith accused/ appellant was also recorded. The confessional statement of absconded accused viz. Babulal Jain is also on the original record. In addition to that, the Identity Card of Badrilal Sharma and the train tickets of the appellant and Badrilal Sharma, as both of them travelled together, have come on record. All this proves that the appellant was in possession of the heroin 5.250 Kgs. and carried it from Rajasthan to Chennai with intention to smuggle the same to Srilanka, when he was caught. He thus pleaded that conviction and sentence of the appellant was rightly recorded by the courts below, which warranted no interdicting by this court.

24. From the arguments noted above, it would be clear that the appellant has challenged the conviction primarily on the following grounds:-

(i) The conviction is based solely on the purported confessional statement recorded under Section 67 of the NDPS Act which has no evidentiary value in as much as:

(a) The statement was given to and recorded by an officer who is to be treated as "Police Officer" and is thus, hit by Section 25 of the Indian Evidence Act.

(b) No such confessional statement could be recorded under Section 67 of the NDPS Act. This provision empowers to call for information and not to record such confessional statements. Thus, the

statement recorded under this provision is akin to the statement under Section 161 Cr.PC.

(c) In any case, the said statement having been retracted, it could not have been the basis of conviction and could be used only to corroborate other evidence.

(ii) There was absence of fair investigation and non-compliance of the provisions of Section 52(3) of the NDPS Act. This submission is primarily based on the argument that same person cannot be an officer under Section 42 of the NDPS Act as well as investigating officer under Section 52 of the said Act.

(iii) Non-compliance of Section 57 of the NDPS Act is also alleged because of the reason that P.W.7 who was the senior most officer among the raiding team has submitted the report under Section 57 of the NDPS Act with regard to arrest of the appellant to P.W.6j. Instead P.W.6 should have submitted the report of such arrest to P.W.7.

25. We shall take up these arguments in seriatim for our discussion:

Evidentiary value of statement u/s 67 of the NDPS Act.

Before examining this contention of the appellant, it would be apposite to take note of the provisions of Sections 42, 53 and 67 of the NDPS Act. These provisions read as under:-

42. Power of entry, search, seizure and arrest without warrant or authorization.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces

or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs, control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence fo the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building , conveyance or enclosed place, may between sunrise and sunset-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or

freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

"53. Power to invest officers of certain departments with powers of an officer-in-charge of a police station:-

(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the Department of Central Excise, narcotics, Customs, Revenue Intelligence or the Border Security Force or any class of such officers with the powers of an officer-in-charge of Police Station for the investigation of the offences under this Act.

(2) The State Government may, by notification published in the official gazette, invest any officer of the Department of Drugs Control, Revenue or Excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act."

"67. Power to call for information etc.

Any officer referred to in Section 42 who is authorized in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act:-

(a) Call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provision of this Act or any rule or order made thereunder:

(b) Require any person to produce or deliver any document or thing useful or relevant to the enquiry

(c) Examine any person acquainted with the facts and circumstances of the case."

26. We have already taken note of the contentions of Counsel for the parties on the interpretation of the aforesaid provisions. To recapitulate in brief, the submission of Mr. Jain is that there is no power in the Section67 of the NDPS Act to either record confessions or substantive evidence which can form basis for conviction of the accused. It is also argued that, in any case, such a statement is not admissible in evidence as the excise official recording the statement is to be treated as "police officer" and thus, the evidential value of the statement recorded before him is hit by the provisions of Section 25 of the Indian Evidence Act.

27. The learned Counsel for the respondent had pointed out that in the case of *Kanhaiyalal vs. Union of India;* 2008 (4) SCC 668, it has been categorically held that the officer under Section 63 is not a police officer. In arriving at that conclusion the two judge Bench judgment had followed earlier judgment in the case of *Raj Kumar Karwal Vs. Union of India;* 1990 (2) SCC 409.

28. Had the matter rested at that, the aforesaid dicta laid down by two judge Bench would have been followed by us. However, on the reading of the aforesaid judgment, we find that the only reason to conclude that an officer under Section 53 of the NDPS Act was not a police officer was based on the following observations:

> These provisions found in Chapter V of the Act show that there is nothing in the Act to indicate that all the powers under Chapter XII of the Code, including the power to file a report under Section 173 of the Code have been expressly conferred on officers who are invested with the powers of an officer-in-charge of a police station under Section 53, for the purpose of investigation of offences under the Act.

29. We find, prima facie, in the arguments of Mr. Jain to be meritorious when he points out that the aforesaid observations are without any detailed discussion or the reasons to support the conclusion arrived at. Mr. Jain's fervent plea to depart from the view taken in the said judgment deserved consideration as there is no provision under the NDPS Act which takes away the power of filing a report under Section 173 of the Code which is available with an officer-in-charge of a police station. He further argued that the provision of Section 173 are contained in Chapter XII of the Code and since all powers of an officer in-charge of a police station has been conferred, there is no legal basis to suggest that the said power is not available with the officer under Section 53 of the Act. Above all, we find that the judgment in *Raj Kumar Karwal* (supra) was considered by this court in few cases but without giving imprimatur, as can be seen below:

30. *Abdul Rashid v. State of Bihar;* (2001) 9 SCC 578, this Court after noticing the judgment in *Raj Kumar Karwal* (supra), chose to apply the Constitution Bench judgment in the case of *Raja Ram Jaiswal* reported as (1964) 2 SCR 752 and observed thus:-

"Mr. B.B. Singh also brought to our notice a judgment of this Court in the case of *Raj Kumar Karwal v. Union of India* in support of the contention that even a superintendent of excise under the Bihar and Orissa Excise Act is not a police officer and as such a confessional statement made to him would be admissible in evidence. In the aforesaid case, the question for consideration is whether the officers of the Department of Revenue Intelligence (DRI) invested with powers of officer in-charge of a police station under Section 53 are police officers or not within the meaning of Section 25, and this Court answered that those officers are not police officers. This decision is in pari material with the Constitution Bench decision in 1966 and does not in any way detract from the conclusion of this Court in Raja Ram which we have already noticed. In Pon Adithan v. Dy. Director, Narcotics Control Bureau this question had not directly been in issue and the only question that was raised is whether the statement made was under threat and pressure. It is obvious that a statement of confession made under threat and pressure would come within the ambit of Section 24 of the Evidence Act. This decision therefore would not be direct authority on the point in issue. In the aforesaid premises, the decision of Raja Ram would apply to the alleged confessional statement made by the appellant to the superintendent of excise and therefore would be inadmissible in evidence."

31. Both the said judgments i.e. *Raj Kumar Karwal* (supra) as well as *Kanhiyalal* (supra) were thereafter considered by this court in *Noor Aga vs. State of Punjab* (2008) 9 SCALE 681 where the court, has after considering the entire scheme of the Customs Act, has held that the officer under Section 53 of the customs Act is a police officer and would, therefore, attract the provisions of Section 25 of the Evidence Act. It observed:

"104. Section 53 of the Act, empowers the Customs Officer with the powers of the Station House Officers. An officer invested with the power of a police officer by reason of a special status in terms of sub-section (2) of section 53 would, thus, be deemed to be police officers and for the said purposes of Section 25 of the Act shall be applicable."

32. No doubt, Abdul Rashid & Noor Aga were the cases under the Customs Act. But the reasons for holding custom officer as police officer would have significant bearing even when we consider the issue in the context of NDPS Act as well. It would be more so when the schemes & purport of the two enactments are kept in mind. NDPS Act is purely penal in nature. In contradistinction, as far as the Customs Act and the Central Excise Act are concerned, their dominant object is to protect revenue of the State and penal provisions to punish the person found offending those laws are secondary in nature.

33. Further, the NDPS Act is a complete code relating to Narcotic Substances, and dealing with the offences and the procedure to be followed for the detection of the offences as well as for the prosecution and the punishment of the accused. The provisions are penal provisions which can, in certain cases, deprive a person of his liberty for a minimum period of 10 years and can also result in sentences which can extend upto 20 years or even death sentence under certain circumstances. The provisions therefore have to be strictly construed and the safeguards provided therein have to be scrupulously and honestly followed. [See *Baldev Singh* (1997) 1 SCC 416 Para 28; *Union of India vs. Bal Mukund* (2009) 12 SCC 161 Para 26, 27 & 28; *Balbir Singh vs. State of Haryana* (1987) 1 SCC 533].

34. We have also to keep in mind the crucial test to determine whether an officer is a police officer for the purpose of Section 25 of the Evidence Act viz. the "influence or authority" that an officer is capable of exercising over a person from

whom a confession is obtained. The term "police officer" has not been defined under the Code or in the Evidence Act and, therefore, the meaning ought to assessed not by equating the powers of the officer sought to be equated with a police officer but from the power he possesses from the perception of the common public to assess his capacity to influence, pressure or coercion on persons who are searched, detained or arrested. The influence exercised has to be, assessed from the consequences that a person is likely to suffer in view of the provisions of the Act under which he is being booked. It, therefore, follows that a police officer is one who:-

(i) is considered to be a police officer in "common parlance" keeping into focus the consequences provided under the Act.

(ii) is capable of exercising influence or authority over a person from whom a confession is obtained.

35. We would also like to point out that Mr. Sushil Kumar Jain had referred to the provisions of the Police Act as well to support his submission. The preamble of the Police Act, 1861 (Act 5 of 1861), which is an Act for the regulation of a group of officers who come within the meaning of the word "police" provides"

"Whereas it is expedient to re-organize the police and to make it a more efficient instrument for the prevention and detection of crime, it is enacted as follows."

He argued that from the above, it can be seen that the primary object of any police establishment is prevention and detection of crime which may be provided for under the Indian Penal Code or any other specific law enacted for dealing with particular offences and bring the guilty to justice. It was submitted by him that if special authorities are created under special enactments for the same purpose i.e. prevention and detection of crime, such authorities would be "Police and have

to be understood in the said perspective. Sections 23 and 25 of the said Act lay down the duties of the police officers and Section 20 deals with the authority and provides that they can exercise such authority as provided under the Police Act and any Act for regulating criminal procedure. Section 5(2) of the Criminal Procedure Code provides that "all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

36. On the strength of these provisions, the argument of the learned Counsel for the petitioner was that persons categorized as "police officers" can do all the activities and the statute gives them the power to enable them to discharge their duties efficiently. Of the various duties mentioned in Section 23, the more important duties are to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to apprehend all persons whom the police officer is legally authorized to apprehend. It is clear, therefore, in view of the nature of the duties imposed on the police officer, the nature of the authority conferred and also the purpose of the Police Act, that the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order. According to the learned Counsel, a comparison to the powers of the officers under the provisions of the NDPS Act makes it clear that the duties and responsibilities of the officers empowered under the Act are comparable to those of the police officers and, therefore, they ought to be construed as such. It is submitted that the primary objective of a NDPS Officer is to detect and prevent crime defined under the provisions of the act and thereafter the procedure has been prescribed to bring the offenders to justice. Thus, the officers under the Act are "Police Officers" and statements made to such officers are inadmissible in evidence.

37. He also drew our attention to the following pertinent observation of this Court in the case of *State of Punjab v. Barkat Ram;* (1962) 3 SCR 338.

"Section 5(2) of the Code of Criminal Procedure also contemplates investigation of, or inquiry into, offences under other enactments regulating the manner or place of investigation, that is, if an act creates an offence and regulates the manner and place of investigation or inquiry in regard to the said offence, the procedure prescribed by the Code of Criminal Procedure will give place to that provided in that Act. If the said Act entrusts investigation to an officer other than one designated as police officer, he will have to make the investigation and not the police officer. In this situation, the mere use of the words "police officer" in section 25of the Evidence Act does not solve the problem, having regard to permissible rules of interpretation of the term "police officer" in that section. It may mean any one of the following categories of officers : (i) a police officer who is a member of the police force constituted under the Police Act; (ii) though not a member of the police force constituted under the Police Act, an officer who by statutory fiction is deemed to be a police officer in charge of a police station under the Code of Criminal Procedure; and (iii) an officer on whom a statute confers powers and imposes duties of a police officer under the Code of Criminal Procedure, without describing him as a police officer or equating him by fiction to such an officer. Now, which meaning is to be attributed to the term "police officer" in a section 25 of the Evidence Act ? In the absence of a definition in the Evidence Act it is permissible to travel beyond the four corners of the statute to ascertain the legislative intention. What was the meaning which the legislature intended it give to the term "police officer" at the time the said section was enacted ? That section was taken out of the Criminal Procedure Code, 1861 (Act 25 of 1861) and inserted in the Evidence

Act of 1872 as section 25. Stephen in his Introduction to the Evidence Act states at p. 171 thus:

"I may observe, upon the provisions relating to them, that sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act XXV of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody. "

So too, Mahmood, J., in *Queen Empress v. Babulal* I.L.R(1884) . 6 All. 509), gave the following reasons for the enactment of section 25 of the Evidence Act at p. 523.

"..... the legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the Legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confessions, by taking away from the police officers as the advantage of proving such exported confessions during the trial of accused persons."

It is, therefore, clear that section 25 of the Evidence Act was enacted to subserve a high purpose and that his to prevent the police from obtaining confessions by force, torture or inducement. The salutary principle underlying the section would apply equally to other officers, by whatever designation they may be known, who have the power and duty to detect and investigate into crimes and is for that purpose in a position to extract confessions from the accused.

"..Shortly stated, the main duties of the police are the prevention and detection of crimes. A police officer

appointed under the Police Act of 1861 has such powers and duties under the Code of Criminal Procedure, but they are not confined only to such police officers. As the State's power and duties increased manifold, acts which were at one time considered to be innocuous and even praiseworthy have become offences, and the police power of the State gradually began to operate on different subjects. Various Acts dealing with Customs, Excise, Prohibition, Forest, Taxes etc., came to be passed, and the prevention, detection and investigation of offences created by those Acts came to be entrusted to officers with nomenclatures appropriate to the subject with reference to which they functioned. It is not the garb under which they function that matters, but the nature of the power they exercise or the character of the function they perform is decisive. The question, therefore, in each case is, does the officer under a particular Act exercise the powers and discharge the duties of prevention and detection of crime? If he does, he will be a police officer."

38. In our view the aforesaid discussion necessitates a re-look into the ratio of Kanhiyalal Case. It is more so when this Court has already doubted the dicta in *Kanhaiyalal* (supra) in the case of *Nirmal Singh Pehalwan* (2011) 12 SCC 298 wherein after noticing both Kanhiyalal as well as Noor Aga, this Court observed thus:

"15. We also see that the Division Bench in *Kanhaiyalal* case; 2008 (4) SCC 668; (2008) 2 SCC (Crl.) 474, had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a-vis. Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in *Raj Kumar's* case (Supra). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be

proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with."

39. For the aforesaid reasons, we are of the view that the matter needs to be referred to a larger Bench for re-consideration of the issue as to whether the officer investigating the matter under NDPS Act would qualify as police officer or not.

40. In this context, the other related issue viz. whether the statement recorded by the investigating officer under Section 67 of the Act can be treated as confessional statement or not, even if the officer is not treated as police officer also needs to be referred to the larger Bench, inasmuch as it is intermixed with a facet of the 1st issue as to whether such a statement is to be treated as statement under Section 161 of the Code or it partakes the character of statement under Section 164 of the Code.

41. As far as this second related issue is concerned we would also like to point out that Mr. Jain argued that provisions of Section 67 of the Act cannot be interpreted in the manner in which the provisions of Section 108 of the Customs Act or Section 14 of the Excise Act had been interpreted by number of judgments and there is a qualitative difference between the two sets of provisions. In so far as Section 108 of the Customs Act is concerned, it gives power to the custom officer to summon persons "to give evidence" and produce documents. Identical power is conferred upon the Central Excise Officer under Section 14 of the Act. However, the wording to Section 67 of the NDPS Act is altogether different. This difference has been pointed out by Andhra Pradesh High Court in the Case of Shahid Khan vs. Director of Revenue Intelligence; 2001 (Criminal Law Journal) 3183.

42. The Registry is accordingly directed to place the matter

before Hon'ble the Chief Justice for the decision of this appeal by a larger Bench after considering the issues specifically referred as above.

43. We find from the record that as against the sentence of 10 years awarded to the appellant he has already undergone more than 9 years of sentence. In these circumstances, we deem it a fit case to suspend further sentence till the disposal of this appeal by the larger Bench. The appellant shall be released on bail on furnishing security in the sum of Rs.50,000/- (Rupees Fifty Thousand) with two sureties of the same amount, to the satisfaction of the trial court.

R.P. Matter referred to Larger Bench.

SUNIL DUTT SHARMA
v.
STATE (GOVT. OF NCT OF DELHI)
(Criminal Appeal No. 1333 of 2013)

OCTOBER 08, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND RANJAN GOGOI, JJ.]

Penal Code, 1860:

s.304-B - Dowry death - Conviction and sentence of life imprisonment awarded by courts below - Sentence, if excessive or disproportionate - Held: The principles of sentencing evolved by Supreme Court though largely in the context of death penalty will be applicable to all lesser sentences so long as the sentencing judge is vested with the discretion to award a lesser or a higher sentence resembling the swing of the pendulum from the minimum to the maximum - In the instant case, the proved facts on the basis of which offence u/s. 304-B was held to be established, while acquitting the accused-appellant of offence u/s. 302, do not disclose any extraordinary, perverse or diabolic act on his part to take an extreme view of the matter -- On a cumulative application of the principles that would be relevant to adjudge the crime and the criminal test, this is not a case where the maximum punishment of life imprisonment ought to have been awarded At the same time, from the order of trial court, it is clear that some of the injuries on the deceased, though obviously not fatal injuries, are attributable to accused-appellant and, as such, the minimum sentence prescribed i.e. seven years would also not meet the ends of justice Rather a sentence of ten years RI would be appropriate - Ordered accordingly - Sentence/Sentencing - Code of Criminal Procedure, 1973 - s.354(2).

Sentence/Sentencing:

Sentence for offence punishable u/s 304-B IPC - Held: In a situation where commission of an offence is held to be proved by means of a legal presumption the circumstances surrounding the crime to determine the presence of aggravating circumstances (crime test) may not be readily forthcoming unlike a case where there is evidence of overt criminal acts establishing the direct involvement of the accused with the crime to enable the court to come to specific conclusions with regard to the barbarous or depraved nature of the crime committed - Necessity to combat the menace of demand for dowry or to prevent atrocities on women and like social evils as well as the necessity to maintain the purity of social conscience cannot be determinative of the quantum of sentence inasmuch as the said parameters would be common to all offences u/s. 304-B IPC - It, therefore, cannot be elevated to the status of acceptable jurisprudential principles to act as a rational basis for awarding varying degrees of punishment on a case to case basis - Factors to be taken into account while imposing the sentence u/s 304 IPC, discussed - Penal Code, 1860 - s.304-B.

The accused-appellant was tried for offences punishable u/ss. 302 and 304-B of IPC for causing the death of his wife in the night intervening 16/17.05.92. He was acquitted of the offence punishable u/s. 302, IPC on the benefit of doubt. However, he was found guilty of the offence punishable u/s. 304-B, IPC and was sentenced to imprisonment for life. The conviction and sentence was affirmed by the High Court.

In the instant appeal, limited notice was issued only as regards the sentence imposed on the accused-appellant.

Partly allowing the appeal, the Court

HELD: 1.1 The power and authority conferred by use of the different expressions in various provisions of the Penal Code, indicate the enormous discretion vested in the courts in sentencing an offender who has been found guilty of commission of any particular offence. Nowhere, either in the Penal Code nor in any other law in force, any prescription or norm or even guidelines governing the exercise of the vast discretion in the matter of sentencing has been laid down except s.354(2) of the Code of Criminal Procedure, 1973 which, inter-alia, requires the judgment of a court to state the reasons for the sentence awarded when the punishment prescribed is imprisonment for a term of years. [para 5] [1008-A-C]

1.2 There is no reason that the principles of sentencing evolved by this Court over the years though largely in the context of the death penalty will not be applicable to all lesser sentences so long as the sentencing judge is vested with the discretion to award a lesser or a higher sentence resembling the swing of the pendulum from the minimum to the maximum. The issue though predominantly dealt with in the context of cases involving the death penalty has tremendous significance to the Criminal Jurisprudence of the country inasmuch as in addition to the numerous offences under various special laws in force, hundreds of offences are enumerated in the Penal Code, punishment for which could extend from a single day to 10 years or even for life, a situation made possible by the use of the seemingly same expressions in different provisions of the Penal Code. [Para 10 and 12] [1018-D-E; 1019-C-D]

Jagmohan Singh vs. The State of U.P. **1973 (2) SCR 541 = (1973) 1 SCC 20;** *Bachan Singh vs. State of Punjab,* **(1980) 2 SCC 684;** *Machhi Singh and Others vs. State of Punjab,* **1983 (3) SCR 413 = (1983) 3 SCC 470;** *Sangeet and Another vs. State of Haryana* **2012 (13) SCR 85 = (2013) 2**

SCC 452; *Shankar Kisanrao Khade vs. State of Maharashtra* **(2013) 5 SCC 546 - referred to.**

1.3 So long as there is credible evidence of cruelty occasioned by demand(s) for dowry, any unnatural death of a woman within seven years of her marriage makes the husband or a relative of the husband of such woman liable for the offence of "dowry death" u/s. 304-B though there may not be any direct involvement of the husband or such relative with the death in question. In a situation where commission of an offence is held to be proved by means of a legal presumption the circumstances surrounding the crime to determine the presence of aggravating circumstances (crime test) may not be readily forthcoming unlike a case where there is evidence of overt criminal acts establishing the direct involvement of the accused with the crime to enable the court to come to specific conclusions with regard to the barbarous or depraved nature of the crime committed. [Para 13] [1019-F-H; 1020-A-B]

1.4 The necessity to combat the menace of demand for dowry or to prevent atrocities on women and like social evils as well as the necessity to maintain the purity of social conscience cannot be determinative of the quantum of sentence inasmuch as the said parameters would be common to all offences u/s. 304-B IPC. It, therefore, cannot be elevated to the status of acceptable jurisprudential principles to act as a rational basis for awarding varying degrees of punishment on a case to case basis. [Para 13] [1020-B-D]

1.5 The factors, namely, the time spent between marriage and the death of the woman; the attitude and conduct of the accused towards the victim before her death; the extent to which the demand for dowry was persisted with and the manner and circumstances of commission of the cruelty, would be a surer basis for determination of the crime test. Further, the fact whether

the accused was also charged with the offence u/s. 302 IPC and the basis of his acquittal of the said charge would be another very relevant circumstance. As against this the extenuating/mitigating circumstances which would determine the "criminal test" must be allowed to have a full play. These two sets of circumstances being mutually irreconcilable cannot be arranged in the form of a balance sheet as observed in Sangeet but it is the cumulative effect of the two sets of different circumstances that has to be kept in mind while rendering the sentencing decision. This would be the correct approach while dealing with the question of sentence so far as the offence u/s. 304-B IPC is concerned. [Para 13] [1020-D-H]

1.6 Applying the parameters laid down by judgments of this Court to the facts of the instant case, it transpires that the death of the wife of the accused-appellant occurred within two years of marriage. There was a demand for dowry and there is evidence of cruelty or harassment. The autopsy report of the deceased showed external marks of injuries but the cause of death of deceased was stated to be due to asphyxia resulting from strangulation. In view of the said finding of the doctor who had conducted the postmortem, the trial court thought it proper to acquit the accused of the offence u/s. 302 IPC on the benefit of doubt as there was no evidence that the accused was, in any way, involved with the strangulation of the deceased. The proved facts on the basis of which offence u/s. 304-B IPC was held to be established, while acquitting the accused-appellant of the offence u/s. 302 IPC, do not disclose any extraordinary, perverse or diabolic act on the part of the accused-appellant to take an extreme view of the matter. [Para 14] [1021-A-D]

1.7 Besides, at the time of commission of the offence, the accused-appellant was about 21 years old and as on

date he is about 42 years. The accused-appellant also has a son who was an infant at the time of the occurrence. He has no previous record of crime. On a cumulative application of the principles that would be relevant to adjudge the crime and the criminal test, this Court is of the view that this is not a case where the maximum punishment of life imprisonment ought to have been awarded to the accused-appellant. At the same time, from the order of the trial court, it is clear that some of the injuries on the deceased, though obviously not the fatal injuries, are attributable to the accused-appellant. The said part of the order of the trial court has not been challenged in the appeal before the High Court. Taking into account the said fact, this Court is of the view that in the instant case, the minimum sentence prescribed i.e. seven years would also not meet the ends of justice. Rather a sentence of ten years RI would be appropriate. Consequently, the order of the High Court is modified and the punishment of ten years RI is imposed on the accused-appellant for the commission of the offence u/s. 304-B IPC. The sentence of fine is maintained. [Para 14] [1021-D-H; 1022-A-C]

Case Law Reference:

1973 (2) SCR 541	**referred to**	**Para 5**
(1980) 2 SCC 684	**referred to**	**Para 5**
1983 (3) SCR 413	**referred to**	**Para 5**
2012 (13) SCR 85	**referred to**	**Para 5**
(2013) 5 SCC 546	**referred to**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1333 of 2013.

From the Judgment and Order dated 04.04.2011 of the High Court of Delhi at New Delhi in Criminal Appeal No. 449 of 1997.

Manisha Bhandari, Surabhi Aggarwal, Sankalp Kashyap, Shilpa Dewan, Rameshwar Prasad Goyal for the Appellant.

P.K. Dey, Asha G. Nair, S. Saini, D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The accused-appellant was tried for offences under Sections 302 and 304-B of the Indian Penal Code (hereinafter for short the "Penal Code") for causing the death of his wife in the night intervening 16/17.05.92. He has been acquitted of the offence under Section 302 of the Penal Code on the benefit of doubt though found guilty for the offence under Section 304-B of the Penal Code following which the sentence of life imprisonment has been imposed. The conviction and sentence has been affirmed by the High Court. Aggrieved, the appellant had moved this Court under Article 136 of the Constitution.

2. Limited notice on the question of sentence imposed on the accused-appellant having been issued by this Court the scope of the present appeal stands truncated to a determination of the question as to whether sentence of life imprisonment imposed on the accused-appellant for commission of the offence under Section 304-B of the Penal Code is in any way excessive or disproportionate so as to require interference by this Court.

3. Section 304-B(2) of the Penal Code which prescribes the punishment for the offence contemplated by Section 304-B(1) is in the following terms:

> "Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life." (emphasis is ours).

4. Expressions similar to what has been noticed above are to be found in different sections of the Penal Code which may be taken note of :

(i) Sections 115, 118, 123, 124, 126, 127, 134, 193, 201, 214, 216, 216A, 219, 220, 221, 222, 225, 231, 234, 243, 244, 245, 247, 249, 256, 257, 258, 259, 260, 281, 293, 308, 312, 317, 325, 333, 363, 365, 369, 370, 380, 381, 387, 393, 401, 402, 404, 407, 408, 409, 433, 435, 437, 439, 452, 455, 466, 468, 472, 473, 474, 477A, 489C, 493, 494, 495 and 496	***"may extend to seven years/ten years";***
(ii) Sections 122, 222, 225, 305, 371, 449, 450	***"imprisonment for life or imprisonment for a term not exceeding ten years"***
(iii) Sections 124A, 125, 128, 130, 194, 232, 238, 255 etc.	***"imprisonment for life or with imprisonment of either description which may extend to ____ years"***
(iv) Sections 122, 225, 305, 371, 449	***"imprisonment for life or with imprisonment of either description for a term not exceeding ___ years"***
(v) Section 304B	***"imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life"***
(vi) Section 376	***"imprisonment of either description for a term which shall not be less than seven years or for life or for a term which may extend to ten years"***

5. The power and authority conferred by use of the different expressions noticed above indicate the enormous discretion vested in the Courts in sentencing an offender who has been found guilty of commission of any particular offence. No where, either in the Penal Code or in any other law in force, any prescription or norm or even guidelines governing the exercise of the vast discretion in the matter of sentencing has been laid down except perhaps, Section 354(2) of the Code of Criminal Procedure, 1973 which, inter-alia, requires the judgment of a Court to state the reasons for the sentence awarded when the punishment prescribed is imprisonment for a term of years. In the above situation, naturally, the sentencing power has been a matter of serious academic and judicial debate to discern an objective and rational basis for the exercise of the power and to evolve sound jurisprudential principles governing the exercise thereof. In this regard the Constitution Bench decision of this Court in *Jagmohan Singh vs. The State of U.P.*[1] (under the old Code), another Constitution Bench decision in *Bachan Singh vs. State of Punjab*[2], a three Judge Bench decision in *Machhi Singh and Others vs. State of Punjab*[3], are watersheds in the search for jurisprudential principles in the matter of sentencing. Omission of any reference to other equally illuminating opinions of this Court rendered in scores of other monumental decisions is not to underplay the importance thereof but solely on account of need for brevity. Two recent pronouncements of this Court in *Sangeet and Another vs. State of Haryana*[4] and *Shankar Kisanrao Khade vs. State of Maharashtra*[5] reflect the very labourious and painstaking efforts of this Court to summarize the net result of the judicial exercises undertaken since *Jagmohan Singh* (supra) and the unresolved issues and grey areas in this regard and the solutions that could

1. (1973) 1 SCC 20.
2. (1980) 2 SCC 684.
3. (1983) 3 SCC 470.
4. (2013) 2 SCC 452.
5. (2013) 5 SCC 546.

be attempted. The aforesaid decisions of this Court though rendered in the context of exercise of the power to award the death sentence, whether the principles laid down, with suitable adaptation and modification, would apply to all 'lesser' situations so long the court is confronted with the vexed problem of unraveling the parameters for exercise of the sentencing power is another question that needs to be dealt with.

6. For the sake of precision it may be sufficient to take note of the propositions held in *Bachan Singh* (supra) to have flown from *Jagmohan Singh* (supra) and the changes in propositions (iv)(a) and (v)(b) thereof which were perceived to be necessary in the light of the amended provision of Section 354(3) of the Code of Criminal Procedure, 1973. The above changes were noticed in *Sangeet* (supra) and were referred to as evolution of a sentencing policy by shifting the focus from the crime (Jagmohan Singh) to crime and the criminal (Bachan Singh). The two concepts were described as Phase-I and Phase-II of an emerging sentencing policy.

7. The principles culled out from *Jagmohan Singh* (supra) in *Bachan Singh* (supra) and the changes in proposition (iv)(a) and (v)(b) may now be specifically noticed.

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160. In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in Jagmohan case. These propositions may be summed up as under:

"(i) The general legislative policy that underlines the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the

degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii)-(a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (referred to *McGoutha v. California*)

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in *Furman v. Georgia* decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and unguided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv)(a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different. Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an unguided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v)(a) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the court at the preconviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided. Where counsel addresses the court with regard to the character and standing of the accused, they are duly considered by the court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302 Penal Code, "the court is principally concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial

regulated by the CrPC. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), CrPC purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21". (emphasis added)"

161. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan case. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No. (iv)(a) which postulates, that according to the then extant Code of Criminal Procedure both the alternative sentences provided in Section 302 of the Penal Code are normal sentences and the court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to impose the sentence of death on that person unless there are "special reasons" - to be recorded - for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the

face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases.

163. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under Section 302 of the Penal Code, the court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.

164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv)(a) and (v)(b) in Jagmohan shall have to be recast and may be stated as below:

"(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death

only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

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

8. In *Sangeet* (supra) the Court also took note of the "suggestions" (offered at the Bar) noticed in *Bachan Singh* (supra) to be relevant in a determination of the circumstances attending the crime (described as aggravating circumstances) as well as those which pertain to the criminal as distinguished from the crime (referred to as the mitigating circumstances). The attempt at evolution of a principle based sentencing policy as distinguished from a judge centric one was noted to have suffered some amount of derailment/erosion. In fact, the several judgments noted and referred to in *Sangeet* (supra) were found to have brought in a fair amount of uncertainty in application of the principles in awarding life imprisonment or death penalty, as may be, and the varying perspective or responses of the court based on the particular facts of a given case rather than evolving standardized jurisprudential principles applicable across the board.

9. The above position was again noticed in *Shankar Kisanrao Khade* (supra). In the separate concurring opinion rendered by Brother Madan B. Lokur there is an exhaustive consideration of the judgments rendered by this Court in the recent past (last 15 years) wherein death penalty has been converted to life imprisonment and also the cases wherein

death penalty has been confirmed. On the basis of the views of this Court expressed in the exhaustive list of its judgments, reasons which were considered adequate by the Court to convert death penalty into life imprisonment as well as the reasons for confirming the death penalty had been set out in the concurring judgment at paragraphs 106 and 122 of the report in *Shankar Kisanrao Khade* (supra) which paragraphs may be extracted hereinbelow to notice the principles that have unfolded since *Bachan Singh* (supra).

> "106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:
>
> (1) the young age of the accused [*Amit v. State of Maharashtra*[6] aged 20 years, *Rahul*[7] aged 24 years, *Santosh Kumar Singh*[8] aged 24 years, *Rameshbhai Chandubhai Rathod (2)*[9] aged 28 years and *Amit v. State of U.P.*[10] aged 28 years];
>
> (2) the possibility of reforming and rehabilitating the accused (in Santosh Kumar Singh8 and Amit v. State of U.P.10 the accused, incidentally, were young when they committed the crime);
>
> (3) the accused had no prior criminal record (*Nirmal Singh*[11], *Raju*[12], *Bantu*[13], *Amit v. State of Maharashtra*[6], *Surendra Pal Shivbalakpal*[14], *Rahul*[7] and *Amit v. State of U.P.*[10]);
>
> (4) the accused was not likely to be a menace or threat or danger to society or the community (*Nirmal Singh*[11], *Mohd. Chaman*[15], *Raju*[12], *Bantu*[13], *Surendra Pal Shivbalakpal*[14], *Rahul*[7] and *Amit v. State of U.P.*[10]).
>
> (5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (*State of T.N. v. Suresh*[16], *State of Maharashtra v. Suresh*[17], *Bharat Fakira Dhiwar*[18], *Mansingh*[19] and *Santosh Kumar Singh*[8]);
>
> (6) the crime was not premeditated (*Kumudi Lal*[20], *Akhtar*[21], *Raju*[12] and *Amrit Singh*[22]);
>
> (7) the case was one of circumstantial evidence (*Mansingh*[19] and *Bishnu Prasad Sinha*[23]).
>
> In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (*Kumudi Lal*[20]) and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (*Haresh Mohandas Rajput*[24]).

6. (2003) 8 SCC 93.
7. Rahul v. State of Maharashtra (2005) 10 SCC 322.
8. Santosh Kumar Singh v. State, (2010) 9 SCC 747.
9. Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764.
10. (2012) 4 SCC 107.
11. Nirmal Singh v. State of Haryana (1993) 3 SCC 670.
12. Raju v. State of Haryana (2001) 9 SCC 50.
13. Bantu v. State of M.P. (2001) 9 SCC 615.
14. Surendra Pal Shivbalakpal v. State of Gujarat (2005) 3 SCC 127.
15. Mohd. Chaman v. State (NCT of Delhi), (2001) 2 SCC 28.
16. (1998) 2 SCC 372.
17. (2000) 1 SCC 471.
18. State of Maharashtra v. Bharat Fakira Dhiwar, (2002) 1 SCC 622.
19. State of Maharashtra v. Mansingh, (2005) 3 SCC 131.
20. Kumudi Lal v. State of U.P., (1999) 4 SCC 108.
21. Akhtar v. State of U.P., (1999) 6 SCC 60
22. Amrit Singh v. State of Punjab (2006) 12 SCC 79.
23. Bishnu Prasad Sinha v. State of Assam (2007) 11 SCC 467.
24. Haresh Mohandas Rajput v. State of Maharashtra, (2011) 12 SCC 56.

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

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (*Jumman Khan* [25], Dhananjoy *Chatterjee*[26], *Laxman Naik*[27], *Kamta Tiwari*[28], *Nirmal Singh*[11], *Jai Kumar*[29], *Satish*[30], *Bantu*[31], *Ankush Maruti Shinde*[32], *B.A. Umesh*[33], *Mohd. Mannan*[34] and *Rajendra Pralhadrao Wasnik*[35]);

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (*Dhananjoy Chatterjee*[26], *Jai Kumar*[29], *Ankush Maruti Shinde*[32] *and Mohd. Mannan*[34]);

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (*Jai Kumar*[29], *B.A. Umesh*[33] *and Mohd. Mannan*[34]);

(4) the victims were defenceless (*Dhananjoy Chatterjee*[26], *Laxman Naik*[27], *Kamta Tiwari*[28], *Ankush Maruti Shinde*[32], *Mohd. Mannan*[34] *and Rajendra Pralhadrao Wasnik*[35]);

(5) the crime was either unprovoked or that it was premeditated (*Dhananjoy Chatterjee*[26], *Laxman Naik*[27], *Kamta Tiwari*[28], *Nirmal Singh*[11], *Jai Kumar*[29], *Ankush*

25. Jumman Khan v. State of U.P. (1991) 1 SCC 752.
26. Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220.
27. Laxman Naik v. State of Orissa, (1994) 3 SCC 381.
28. Kamta Tiwari v. State of M.P., (1996) 6 SCC 250.
29. Jai Kumar v. State of M.P., (1999) 5 SCC 1.
30. State of U.P., v. Satish, (2005) 3 SCC 114.
31. Bantu v. State of U.P., (2008) 11 SCC 113.
32. Ankush Maruti Shinde v. State of Maharashtra, (2009) 6 SCC 667.
33. B.A. Umesh v. State of Karnataka, (2011) 3 SCC 85.
34. Mohd. Mannan v. State of Bihar, (2011) 5 SCC 317.

Maruti Shinde[32], *B.A. Umesh*[33] *and Mohd.Mannan*[34]) and in three cases the antecedents or the prior history of the convict was taken into consideration (*Shivu*[36], *B.A. Umesh*[33] *and Rajendra Pralhadrao Wasnik*[35])."

However, in paragraph 123 of the report the cases where the reasons for taking either of the views i.e. commutation or confirmation as above have been deviated from have been noticed. Consequently, the progressive march had been stultified and the sentencing exercise continues to stagnate as a highly individualized and judge centric issue.

10. Are we to understand that the quest and search for a sound jurisprudential basis for imposing a particular sentence on an offender is destined to remain elusive and the sentencing parameters in this country are bound to remain judge centric? The issue though predominantly dealt with in the context of cases involving the death penalty has tremendous significance to the Criminal Jurisprudence of the country inasmuch as in addition to the numerous offences under various special laws in force, hundreds of offences are enumerated in the Penal Code, punishment for which could extend from a single day to 10 years or even for life, a situation made possible by the use of the seemingly same expressions in different provisions of the Penal Code as noticed in the opening part of this order.

11. As noticed, the "net value" of the huge number of in depth exercises performed since *Jagmohan Singh* (supra) has been effectively and systematically culled out in *Sangeet* and *Shankar Kisanrao Khade* (supra). The identified principles could provide a sound objective basis for sentencing thereby minimizing individualized and judge centric perspectives. Such principles bear a fair amount of affinity to the principles applied in foreign jurisdictions, a resume of which is available in the decision of this Court in *State of Punjab vs. Prem Sagar and*

35. Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37.
36. Shivu v. High Court of Karnataka, (2007) 4 SCC 713.

Others[37]. The difference is not in the identity of the principles; it lies in the realm of application thereof to individual situations. While in India application of the principles is left to the judge hearing the case, in certain foreign jurisdictions such principles are formulated under the authority of the statute and are applied on principles of categorization of offences which approach, however, has been found by the Constitution Bench in *Bachan Singh* (supra) to be inappropriate to our system. The principles being clearly evolved and securely entrenched, perhaps, the answer lies in consistency in approach.

12. To revert to the main stream of the case, we see no reason as to why the principles of sentencing evolved by this Court over the years through largely in the context of the death penalty will not be applicable to all lesser sentences so long as the sentencing judge is vested with the discretion to award a lesser or a higher sentence resembling the swing of the pendulum from the minimum to the maximum. In fact, we are reminded of the age old infallible logic that what is good to one situation would hold to be equally good to another like situation. Beside paragraph 163 (underlined portion) of *Bachan Singh* (supra), reproduced earlier, bears testimony to the above fact.

13. Would the above principles apply to sentencing of an accused found guilty of the offence under Section 304-B inasmuch as the said offence is held to be proved against the accused on basis of a legal presumption? This is the next question that has to be dealt with. So long there is credible evidence of cruelty occasioned by demand(s) for dowry, any unnatural death of a woman within seven years of her marriage makes the husband or a relative of the husband of such woman liable for the offence of "dowry death" under Section 304-B though there may not be any direct involvement of the husband or such relative with the death in question. In a situation where commission of an offence is held to be proved by means of a legal presumption the circumstances surrounding the crime to

37. (2008) 7 SCC 550.

determine the presence of aggravating circumstances (crime test) may not be readily forthcoming unlike a case where there is evidence of overt criminal acts establishing the direct involvement of the accused with the crime to enable the Court to come to specific conclusions with regard to the barbarous or depraved nature of the crime committed. The necessity to combat the menace of demand for dowry or to prevent atrocities on women and like social evils as well as the necessity to maintain the purity of social conscience cannot be determinative of the quantum of sentence inasmuch as the said parameters would be common to all offences under Section 304-B of the Penal Code. The above, therefore, cannot be elevated to the status of acceptable jurisprudential principles to act as a rational basis for awarding varying degrees of punishment on a case to case basis. The search for principles to satisfy the crime test in an offence under Section 304-B of the Penal Code must, therefore, lie elsewhere. Perhaps, the time spent between marriage and the death of the woman; the attitude and conduct of the accused towards the victim before her death; the extent to which the demand for dowry was persisted with and the manner and circumstances of commission of the cruelty would be a surer basis for determination of the crime test. Coupled with the above, the fact whether the accused was also charged with the offence under Section 302 of the Penal Code and the basis of his acquittal of the said charge would be another very relevant circumstance. As against this the extenuating/mitigating circumstances which would determine the "criminal test" must be allowed to have a full play. The aforesaid two sets of circumstances being mutually irreconcilable cannot be arranged in the form of a balance sheet as observed in *Sangeet* (supra) but it is the cumulative effect of the two sets of different circumstances that has to be kept in mind while rendering the sentencing decision. This, according to us, would be the correct approach while dealing with the question of sentence so far as the offence under Section 304-B of the Penal Code is concerned.

14. Applying the above parameters to the facts of the present case it transpires that the death of the wife of the accused-appellant occurred within two years of marriage. There was, of course, a demand for dowry and there is evidence of cruelty or harassment. The autopsy report of the deceased showed external marks of injuries but the cause of death of deceased was stated to be due to asphyxia resulting from strangulation. In view of the aforesaid finding of Dr. L.T. Ramani (PW-16) who had conducted the postmortem, the learned Trial Judge thought it proper to acquit the accused of the offence under Section 302 of the Penal Code on the benefit of doubt as there was no evidence that the accused was, in any way, involved with the strangulation of the deceased. The proved facts on the basis of which offence under Section 304-B of the Penal Code was held to be established, while acquitting the accused-appellant of the offence under Section 302 of the Penal Code, does not disclose any extraordinary, perverse or diabolic act on the part of the accused-appellant to take an extreme view of the matter. Coupled with the above, at the time of commission of the offence, the accused-appellant was about 21 years old and as on date he is about 42 years. The accused-appellant also has a son who was an infant at the time of the occurrence. He has no previous record of crime. On a cumulative application of the principles that would be relevant to adjudge the crime and the criminal test, we are of the view that the present is not a case where the maximum punishment of life imprisonment ought to have been awarded to the accused-appellant. At the same time, from the order of the learned Trial Court, it is clear that some of the injuries on the deceased, though obviously not the fatal injuries, are attributable to the accused-appellant. In fact, the finding of the learned Trial Court is that the injuries No. 1 (Laceration 1" x ½" skin deep on the side of forehead near hair margin) and 2 (Laceration 1 ½" x 1" scalp deep over the frontal area) on the deceased had been caused by the accused-appellant with a pestle. The said part of the order of the learned Trial Court has not been challenged in the appeal before the High Court. Taking

into account the said fact, we are of the view that in the present case the minimum sentence prescribed i.e. seven years would also not meet the ends of justice. Rather we are of the view that a sentence of ten years RI would be appropriate. Consequently, we modify the impugned order dated 4.4.2011 passed by the High Court of Delhi and impose the punishment of ten years RI on the accused-appellant for the commission of the offence under Section 304-B of the Penal Code. The sentence of fine is maintained. The accused-appellant who is presently in custody shall serve out the remaining part of the sentence in terms of the present order.

15. Accordingly, the appeal is partly allowed to the extent indicated above.

R.P. Appeal partly allowed.

UNION OF INDIA & ANR.
v.
NATIONAL FEDERATION OF THE BLIND & ORS.
(Civil Appeal No. 9096 of 2013)

OCTOBER 08, 2013

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

PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995:

s.33 - Reservation of posts for persons with disabilities - Held: Section 33 lays down that every appropriate Government has to appoint on a minimum of 3% vacancies in an establishment, persons with disabilities, out of which 1% each shall be reserved for (i) persons suffering from blindness and low vision, (ii) persons suffering from hearing impairment and (iii) persons suffering from locomotor or cerebral palsy -- View of the High Court that computation of reservation must be on the basis of total cadre strength is clearly erroneous - s.33 establishes the intention of legislature viz. reservation of 3% for persons with disability should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts.

s. 33 - Reservation of posts for persons with disabilities - Held: The Section does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively -- Computation of reservation for persons with disabilities has to be done in case of Group A, B, C and D, posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" -- Accordingly, certain clauses in OM

dated 29.12.2005, which are contrary to scheme of reservation, are struck down and appropriate Government is directed to issue new Office Memorandum(s) consistent with the decision rendered by the Court - In order to ensure proper implementation of reservation policy for disabled and to protect their rights, further directions given - Government of India, Department of Personnel and training O. M. dated 29.12.2005.

INTERPRETATION OF STATUTES:

Construing of a provision - Held: While interpreting any provision of a statute the plain meaning has to be given effect and if language is simple and unambiguous, there is no need to traverse beyond the same.

Headings and marginal notes - Held: Heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent -- When the Section is clear and unambiguous, there is no need to traverse beyond those words -- Therefore, the headings or marginal notes cannot control the meaning of the body of the section.

SOCIAL JUSTICE:

Reservation in employment for persons with disabilities - Held: Employment is a key factor in the empowerment and inclusion of people with disabilities -- It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce -- Therefore, bringing them in the society based on their capabilities is the need of the hour - State has a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons - Directions issued to

ensure proper implementation of reservation policy for persons with disability and to protect their rights.

Respondent No. 1 filed a writ petition before the High Court in public interest seeking implementation of s. 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 stating that the appellants failed to provide reservation to the blind and low vision persons and they were virtually excluded from the process of recruitment to the Government posts as stipulated under the said Act. It was asserted that despite statutory provisions and various executive orders, discrimination against the persons with disabilities continued in filling up the vacancies in various government departments. The stand of appellants was that the Office Memorandum (OM) dated 29.12.2005, issued by the Department of Personnel & Training, inter alia, provided a system for ensuring proper implementation of the provisions of the Act for the persons with disabilities. The High Court disposed of the petition directing the Union of India to modify the OM dated 29.12.2005 so as to be consistent with the provisions of s. 33 of the Act and issued several other directions.

In the instant appeal, the issues for consideration before the Court were: "(i) whether post base reservation must be adhered to or vacancy reservation; and (ii) whether the modus of computation of reservation on the basis of total number of vacancies (both inclusive of identified and unidentified) in the cadre strength would uniformly apply to Group A, B, C and D or would it be applicable only to Group C and D".

Disposing of the appeal, the Court

HELD: 1.1 Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

Participation) Act, 1995 provides for reservation of posts and s. 32 of the Act stipulates for identification of posts which can be reserved for persons with disabilities. The scope of identification comes into picture only at the time of appointment of a person in the post identified for disabled persons and is not necessarily relevant at the time of computing 3% reservation u/s 33 of the Act. In succinct, it was held in Ravi Prakash Gupta that s. 32 of the Act is not a precondition for computation of reservation of 3% u/s 33 of the Act rather s. 32 is the following effect of s. 33. [para 22 and 29] [1050-E; 1054-H; 1055-A]

Govt. of India through Secretary and Anr. v. Ravi Prakash Gupta & Anr. **2010 (7) SCR 851 = (2010) 7 SCC 626 - referred to.**

1.2 There is a difference in computing reservation on the basis of total cadre strength and on the basis of total vacancies (both inclusive of identified and unidentified) in the cadre strength. The view of the High Court, in the impugned judgment, that the computation of reservation must be on the basis of total cadre strength is clearly erroneous on the face of it. Apart from the reasoning of this Court in Ravi Prakash Gupta, even a reading of s. 33 establishes vividly the intention of the legislature viz., reservation of 3% for persons with disability has to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts. There is no ambiguity in the language of s.33. [para 26 and 30] [1051-E-H; 1052-A; 1055-B-C]

1.3 A perusal of s. 33 reveals that the section has been divided into three parts. The first part is "every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability."

This part mandates that every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. Therefore, it cannot be said that reservation in terms of s. 33 has to be computed against identified posts only. [para 31] [1055-D-F]

1.4 The second part of s.33 starts as,"…of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment & locomotor disability or cerebral palsy in the posts identified for each disability," which makes it clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. The expression "of which" has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer to the identified posts. Further, in the last portion of the second part the words used are "in the identified posts for each disability" and not "of identified posts". This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz., blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived. [para 32] [1055-F-H; 1056-A-E]

1.5 The third part of s.33 is the proviso which reads, "Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section." The proviso also justifies the

interpretation that the computation of reservation has to be against the total number of vacancies in the cadre strength and not against the identified posts. [para 33] [1056-E-H; 1057-A-B]

1.6 Besides, s. 41 of the Act mandates the appropriate Government to frame incentive schemes for employers with a view to ensure that 5% of their work force is composed of persons with disabilities. On a conjoint reading of ss. 33 and 41, it is clear that while s. 33 provides for a minimum level of representation of 3% in the establishments of appropriate Government, the legislature intended to ensure 5% of representation in the entire work force both in public as well as private sector. [para 34] [1057-B-C, E-F]

1.7 Moreover, ss. 38 and 39 of the Draft Rights of Persons with Disabilities Bill, 2012 clarify all the ambiguities raised in the instant appeal. The intention of the legislature is clearly to reserve in every establishment under the appropriate Government, not less than 3% of the vacancies for the persons or class of persons with disability, of which 1% each shall be reserved for each of the three categories of disability. [para 35] [1059-C-D]

1.8 The Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfill its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision. Court only interprets the law and cannot legislate it. It is the function of the Legislature to amend, modify or repeal it, if deemed necessary. [para 36 and 44] [1059-E-F; 1064-C-D]

1.9 The heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the

legislative intent. When the Section is clear and unambiguous, there is no need to traverse beyond those words. Therefore, the headings or marginal notes cannot control the meaning of the body of the section. In the instant case, s.33 of the 1995 Act is clear and unambiguous. [para 45] [1064-D-F]

2.1 Section 33 of the 1995 Act does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively. As such, one statutory provision cannot be interpreted and applied differently for the same subject matter. [para 38] [1061-A-B]

2.2 This Court holds that computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the scheme of reservation, as interpreted in the judgment, are struck down and the appropriate Government is directed to issue new Office Memorandum(s) consistent with the decision rendered by this Court. [para 51] [1067-B-D]

3. A perusal of Indra Sawhney would reveal that the ceiling of 50% reservation applies only to reservation in favour of other Backward classes under Art. 16(4) of the Constitution of India whereas the reservation in favour of persons with disabilities is horizontal, which is under Art.16(1) of the Constitution. In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 95 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of

the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. and, therefore, Indra Sawhney is not applicable with respect to the disabled persons. It is also reiterated that the decision in R.K. Sabharwal is not applicable to the reservation for the persons with disabilities because in the said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation, whereas reservation in favour of persons with disabilities is horizontal. [para 41, 52 and 53] [1062-A-D; 1067-D-F]

Indra Sawhney v. Union of India and Others **1992 (2) Suppl. SCR 454 = AIR 1993 SC 477; and** *R. K. Sabharwal and Others v. State of Punjab and Others* **1995 (2) SCR 35 = (1995) 2 SCC 745 - held inapplicable.**

4.1 Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. Therefore, bringing them in the society based on their capabilities is the need of the hour. The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today. [para 20, 49 and 50] [1050-A-B; 1066-F-G; 1067-A-B]

4.2 In order to ensure proper implementation of the reservation policy for the persons with disability and to protect their rights, it is directed:

(i) The appellant shall issue an appropriate order modifying the OM dated 29.12.2005 and the subsequent OMs consistent with this Court's judgment within three months.

(ii) The "appropriate Government" shall compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months and implement the same without default.

(iii) The appellants shall issue instructions to all the departments/public sector undertakings/Government companies declaring that non observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default. [para 54] [1067-G-H; 1068-A-D]

Prakash Nath Khanna & Anr. v. Commissioner of Income Tax & Anr. **2004 (2) SCR 434 = (2004) 9 SCC 686 - referred to.**

Case Law Reference:

2010 (7) SCR 851	**referred to**	**para 27**
1992 (2) Suppl. SCR 454	**held inapplicable**	**para 40**
2004 (2) SCR 434	**referred to**	**para 43**
1995 (2) SCR 35	**held inapplicable**	**para 46**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9096 of 2013.

From the Judgment and Order dated 19.12.2008 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 15828 of 2006.

Indira Jaising ASG, S.P. Singh, Rajeev Nanda, Kiran Bhardwaj, B.V. Balram Das, B. Krishna Prasad, Anindita Pujari, Sarad Kumar Singhania, R. Prabhakaran, G.S. Mani, Shunu Chauhan, Rameshwar Prasad Goyal for the appearing parties S.K. Rungta (In person).

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 19.12.2008 passed by the High Court of Delhi at New Delhi in Writ Petition (C) No. 15828 of 2006 wherein the High Court interpreted Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short 'the Act') and issued various directions to be complied with by the appellants herein.

3. Brief facts:

(a) National Federation of the Blind-Respondent No. 1 herein is an apex organization and a society registered under the Societies Registration Act, 1860, having its Head Office at New Delhi and is working for the protection of the rights of the visually challenged.

(b) In the year 2006, Respondent No. 1 herein filed a writ petition before the High Court in public interest seeking implementation of Section 33 of the Act alleging that the appellants herein have failed to provide reservation to the blind and low vision persons and they are virtually excluded from the process of recruitment to the Government posts as stipulated under the said Act.

(c) In the above backdrop, it is relevant to mention that way back in 1977, the erstwhile Ministry of Social Welfare,

Government of India, made reservation in favour of the following three categories of disabled persons in Group C & D posts to the extent of 1 per cent each for the (i) Blind; (ii) Hearing and Speech Impairment; and (iii) persons suffering from locomotor disability. In the year 1986, the Department of Personnel & Training (DoPT), directed all the departments to take into account both identified and unidentified posts for working out the total number of vacancies to be reserved for each of the disabled categories. In spite of the above said executive order, various government departments and public sector undertakings did not give effect to the scheme of reservation which compelled Respondent No. 1 herein to organize a nation wide agitation, as a result of which, an agreement was arrived at between the parties on 27.08.1987 to undertake a Special Recruitment Drive for clearing up the backlog of vacancies.

(d) On 07.02.1996, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was brought into force making reservation of at least 3 percent posts in all government establishments to the extent of 1 per cent each for the persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy. After enactment of the said Act, Union of India issued various orders for ensuring proper implementation of the provisions of the Act for the persons with disabilities.

(e) Respondent No. 1 herein, by filing the above said petition before the High Court asserted that despite statutory provisions and various executive orders, discrimination against the persons with disabilities continued in filling up the vacancies in various government departments whereas it was contended by the other side that the Office Memorandum (OM) dated 29.12.2005, issued by the Department of Personnel & Training, inter alia provides a system for ensuring proper implementation of the provisions of the Act for the persons with disabilities.

(f) Vide order dated 19.12.2008, the High Court disposed of the petition directing the Union of India to modify the OM

dated 29.12.2005 being inconsistent with the provisions of Section 33 of the Act and issued several other directions.

(g) Being aggrieved of the above, the appellants have preferred this appeal by way of special leave before this Court.

(h) Tamil Nadu Handicapped Federation Charitable Trust, Smt S. Rajeswari and Association for Physically Challenged People Ordnance Clothing Factory filed applications for impleadment. Vide order dated 22.07.2011, this Court did not allow them to implead but to act as intervenors in the proceedings.

4. Heard Ms. Indra Jaisingh, learned Additional Solicitor General for the Union of India, Mr. S.K. Rungta, learned senior counsel (R-1) appearing in person and Mr. R. Prabhakaran, learned counsel for Intervenors.

Submissions:

5. Ms. Indra Jaisingh, learned Additional Solicitor General for the Union of India, after taking us through various provisions of the Act and OM(s) issued by the Government of India submitted that the impugned judgment of the High Court is against the provisions of the Act. She further pointed out that the finding of the High Court that in terms of Section 33 of the Act, 3% reservation for the disabled persons has to be computed on the basis of total strength of the cadre, i.e., both identified as well as unidentified posts is erroneous. In any event, according to her, the direction of the High Court to work out backlog vacancies for the disabled persons on the total cadre strength in different establishments within one month from the date of the order is impractical and not executable. It is further highlighted that according to Section 33 of the Act, reservation to the persons with disabilities in an establishment shall be 3% of the vacancies arising in the posts which are identified for the persons with disabilities. The High Court, by the impugned judgment, disturbed the very basic system of the

reservation of posts for the persons with disabilities. She further highlighted that the reservation for Group C and D posts is being calculated on the basis of the vacancies in identified as well as unidentified posts prior to the Act came into existence and in view of the provisions of Section 72 of the Act, continued in the same way, however, reservation for Group A and B posts is being calculated on the basis of the vacancies for identified posts as per the provisions of the Act.

6. On the other hand, Mr. S.K. Rungta, learned senior counsel (R-1) appearing in person submitted that in terms of the provisions of the Act, more particularly, Sections 32 and 33 of the Act, it is obligatory on the part of the Government establishments to provide at least 3% reservation of posts in the total cadre strength and not in the identified vacancies. He further pointed out that though the Act was passed in 1995 since then the provisions have not been strictly implemented. He prayed for further time bound direction for implementation of the same.

7. Mr. R. Prabhakaran, learned counsel for intervenors reiterated the submissions made by Mr. S.K. Rungta.

8. We have perused all the relevant materials and considered the rival submissions.

Relevant Provisions:

9. In order to answer the rival contentions, it is desirable to quote the relevant provision of the Act. Sections 2(a), 2(i), 2(j) and 2(k) of the Act read as under:

"2(a) "appropriate Government" means,-

(i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924 (2 of 1924), the Central Government;

(ii) in relation to a State Government or any establishment wholly or substantially financed by that Government or any local authority, other than a Cantonment Board, the State Government;

(iii) in respect of the Central Co-ordination Committee and the Central Executive Committee, the Central Government;

(iv) in respect of the State Co-ordination Committee and the State Executive Committee, the State Government;

2(i) "Disability" means-

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness;

2(j) "employer" means,-

(i) in relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and

(ii) in relation to an establishment, the Chief Executive Officer of that establishment;

2(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority

or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government;"

10. Among the above definitions, we are more concerned with the definition of "establishment" under Section 2(k) of the Act, which is an exhaustive definition and covers (i) a corporation established by or under a Central, Provincial or State Act, or (ii) an authority or a body owned or controlled or aided by the Government or a local authority, or (iii) a Government company as defined in Section 617 of the Companies Act, 1956 and (iv) Departments of a Government.

11. Chapter VI of the Act deals with the employment of persons with disabilities. The relevant Sections of the said Chapter are as under:-

"32. Identification of posts which can be reserved for persons with disabilities. - Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of Posts - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy,

in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

36. Vacancies not filled up to be carried forward.- Where in any recruitment year any vacancy under section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

12. In exercise of the powers conferred by sub-sections (1) and (2) of Section 73 of the Act, the Central Government enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996.

13. After enactment of the above Act, in order to consolidate the existing instructions in line with the provisions of the Act, on 29.12.2005, Government of India, Department of Personnel and Training, issued certain instructions by way of

an Office Memorandum (OM), with regard to the reservation for the persons with disabilities (physically handicapped persons) in posts and services. The said Office Memorandum specifically states that it shall supersede all previous instructions issued on the subject so far. Respondent No. 1 herein has commended various clauses of the OM dated 29.12.2005. The relevant clauses of the same are extracted hereinbelow:

"2. QUANTUM OF RESERVATION

(i) Three percent of the vacancies, in case of direct recruitment to Group A, B, C and D posts shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability;

(ii) Three percent of the vacancies in case of promotion to Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability.

3. EXEMPTION FROM RESERVATION:

If any Department/Ministry considers it necessary to exempt any establishment partly or fully from the provisions of reservation for persons with disabilities of which one percent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability, it may make a reference to the Ministry of Social Justice and Employment giving full justification

for the proposal. The grant of exemption shall be considered by an Inter-Departmental Committee set up by the Ministry of Social Justice and Empowerment.

4. IDENTIFICATION OF JOBS/POSTS:

The Ministry of Social Justice and Empowerment have identified the jobs/posts suitable to be held by persons with disabilities and the physical requirement for all such jobs/posts vide their notification no. 16-25/99.NII dated 31.5.2001. The jobs/posts given in Annexure II of the said notification as amended from time to time shall be used to give effect to 3 per cent reservation to the persons with disabilities. It may, however, be noted that:

(a) The nomenclature used for any job/post shall mean and include nomenclature used for other comparable jobs/posts having identical functions.

(b) The list of jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive. The concerned Ministries/Departments shall have the discretion to identify jobs/posts in addition to the jobs/posts already identified by the Ministry of Social Justice & Empowerment. However, no Ministry/Department/Establishment shall exclude any identified job/post from the purview of reservation at its own discretion.

(c) If a job/post identified for persons with disabilities is shifted from one group or grade to another group or grade due to change in the pay-scale or otherwise, the job/post shall remain identified.

13. COMPUTATION OF RESERVATION:

Reservation for persons with disabilities in case of Group C and Group D posts shall be computed on the basis of total number of vacancies occurring in all Group C or Group D posts, as the case may be, in the establishment, although

the recruitment of the persons with disabilities would only be in the posts identified suitable for them. The number of vacancies to be reserved for the persons with disabilities in case of direct recruitment to Group C posts in an establishment shall be computed by taking into account the total number of vacancies arising in Group C posts for being filled by direct recruitment in a recruitment year both in the identified and non-identified posts under the establishment. The same procedure shall apply for Group D posts. Similarly, all vacancies in promotion quota shall be taken into account while computing reservation in promotion in Group C and Group D posts. Since reservation is limited to identified posts only and number of vacancies reserved is computed on the basis of total vacancies (in identified posts as well as unidentified posts), it is possible that number of persons appointed by reservation in an identified posts may exceed 3 percent.

14. Reservation for persons with disabilities in Group A posts shall be computed on the basis of vacancies occurring in direct recruitment quota in all the identified Group A posts in the establishment. The same method of computation applies for Group B posts.

15. EFFECTING RESERVATION - MAINTENANCE OF ROSTERS:

(a) all establishments shall maintain separate 100 point reservation roster registers in the format given in Annexure II for determining/effecting reservation for the disabled - one each for Group A posts filled by direct recruitment, Group B posts filled by direct recruitment, Group C posts filled by direct recruitment, Group C posts filled by promotion, Group D posts filled by direct recruitment and Group D posts filled by promotion.

(b) Each register shall have cycles of 100 points and each cycle of 100 points shall be divided into three blocks,

comprising the following points :

1st Block - point No.1 to point No.33

2nd Block - point No.34 to point No.66

3rd Block - point No.67 to point No.100

(c) Points 1, 34, and 67 of the roster shall be earmarked reserved for persons with disabilities - one point for each of the three categories of disabilities. The head of the establishment shall decide the categories of disabilities for which the points 1, 34 and 67 will be reserved keeping in view all relevant facts.

(d) All the vacancies in Group C posts falling in direct recruitment quota arising in the establishment shall be entered in the relevant roster register. If the post falling at point No.1 is not identified for the disabled or the head of the establishment considers it desirable not to fill up by a disabled person or it is not possible to fill up that post by the disabled for any other person, one of the vacancies falling at any of the points from 2 to 33 shall be treated as reserved for the disabled and filled as such. Likewise a vacancy falling at any of the points from 34 to 66 or from 67 to 100 shall be filled by the disabled. The purpose of keeping points 1, 34 and 67 as reserved is to fill up the first available suitable vacancy from 1 to 33, first available suitable vacancy from 34 to 66 and first available suitable vacancy from 67 to 100 persons with disabilities.

(e) There is a possibility that none of the vacancies from 1 to 33 is suitable for any category of the disabled. In that case two vacancies from 34 to 66 shall be filled as reserved for persons with disabilities. If the vacancies from 34 to 66 are also not suitable for any category, three vacancies shall be filled as reserved from the third block containing points from 67 to 100. This means that if no vacancy can be reserved in a particular block, it shall be

carried into the next block.

(f) After all the 100 points of the roster are covered, a fresh cycle of 100 points shall start.

(g) If the number of vacancies in a year is such as to cover only one block or two, discretion as to which category of the disabled should be accommodated first shall vest in the head of the establishment, who shall decide on the basis of the nature of the post, the level of representation of the specific disabled category in the concerned grade/ post etc.

(h) A separate roster shall be maintained for Group C posts filled by promotion and procedure as explained above shall be followed for giving reservation to persons with disabilities. Likewise two separate rosters shall be maintained for Group D posts, one for the posts filled by direct recruitment and another for posts filled by promotion.

(i) Reservation in Group A and Group B posts is determined on the basis of vacancies in the identified posts only. Separate rosters for Group A posts and Group B posts in the establishment shall be maintained. In the rosters maintained for Group A and Group B posts, all vacancies of direct recruitment arising in identified posts shall be entered and reservation shall be effected the same way as explained above.

16. INTER SE EXCHANGE AND CARRY FORWARD OF RESERVATION IN CASE OF DIRECT RECRUITMENT

(a) Reservation for each of the three categories of persons with disabilities shall be made separately. But if the nature of vacancies in an establishment is such that a person of a specific category of disability cannot be employed, the vacancies may be interchanged among the three

categories with the approval of the Ministry of Social Justice and Empowerment and reservation may be determined and vacancies filled accordingly.

(b) If any vacancy reserved for any category of disability cannot be filled due to non-availability of a suitable person with that disability or, for any other sufficient reason, such vacancy shall not be filled and shall be carried forward as a 'backlog reserved vacancy' to the subsequent recruitment year.

(c) In the subsequent recruitment year the backlog reserved vacancy shall be treated as reserved for the category of disability for which it was kept reserved in the initial year of recruitment. However, if a suitable person with that disability is not available, it may be filled by interchange among the three categories of disabilities. In case no suitable person with disability is available for filling up the post in the subsequent year also, the employer may fill up the vacancy by appointment of a person other than a person with disability. If the vacancy is filled by a person with disability of the category for which it was reserved or by a person of other category of disability by inter se exchange in the subsequent recruitment year, it will be treated to have been filled by reservation. But if the vacancy is filled by a person other than a person with disability in the subsequent recruitment year, reservation shall be carried forward for a further period upto two recruitment years whereafter the reservation shall lapse. In these two subsequent years, if situation so arises, the procedure for filling up the reserved vacancy shall be the same as followed in the first subsequent recruitment year.

19. HORIZONTALITY OF RESERVATION FOR PERSONS WITH DISABILITIES:

Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the

reservation for categories such as persons with disabilities and ex- servicemen is called horizontal reservation. Horizontal reservation cuts across vertical reservation (in what is called interlocking reservation) and person selected against the quota for persons with disabilities have to be placed in the appropriate category viz. SC/ST/ OBC/General candidates depending upon the category to which they belong in the roster meant for reservation of SCs/STs/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with disabilities and out of two persons with disabilities appointed, one belongs to a Scheduled Caste and the other to general category then the disabled SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate against unreserved point in the relevant reservation roster. In case none of the vacancies falls on point reserved for the SCs, the disabled candidate belonging to SC shall be adjusted in future against the next available vacancy reserved for SCs.

20. Since the persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/ General in the roster meant for reservation of SCs/STs/OBCs, the application form for the post should require the candidates applying under the quota reserved for persons with disabilities to indicate whether they belong to SC/ST/OBC or General category."

14. Clauses 21 and 22 of the said OM enable the Government for relaxation in age limit as well as standard of suitability.

15. After the OM dated 29.12.2005, based on the representations made by Respondent No. 1 herein, another OM dated 26.04.2006 came to be issued. The details and the directions contained in the said OM are as follows:

"Dated the 26th April, 2006

OFFICE MEMORANDUM

Sub: Reservation for the Persons with Disabilities

The undersigned is directed to say that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which came into existence on 01.01.1996 provides for reservation for persons with disability in the posts identified for three categories of disabilities namely (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy. Instructions have also been issued by this Department for providing reservation for such persons. In spite of the Act and the instructions of this Department, vacancies were not earmarked reserved or were not filled by reservation in some establishments.

2. The matter has been considered carefully and it has been decided that reservation for persons with disabilities should be implemented in right earnest and there should be no deviation from the scheme of reservation, particularly after the Act came into effect. In order to achieve this objective, all the establishments should prepare the reservation roster registers as provided in this Department's O.M. No. 36035/3/2004-Estt (Res) dated 29.12.2005 starting from the year 1996 and reservation for persons with disabilities be earmarked as per instructions contained in that OM. If some or all the vacancies so earmarked had not been filled by reservation and were filled by able bodied persons either for the reason that points of reservation had not been earmarked properly at the appropriate time or persons with disabilities did not become available, such unutilized reservation may be treated as having been carried forward to the first recruitment year occurring after issue of this O.M. and be filled as such. If it is not possible to fill up such reserved

vacancies during the said recruitment year, reservation would be carried forward for further two years, whereafter it may be treated as lapsed.

3. It has been observed that some recruiting agencies declare in their advertisements that blind/partially blind candidates need not apply and that separate examinations would be conducted for visually handicapped candidates. Attention is invited to para 7 of this Department's O.M. No. 36035/3/2004-Estt (Res) dated 29.12.2005 which provides that persons with disabilities selected on their own merit will not be adjusted against the reserved share of vacancies. It means that persons with disabilities who are selected on their own merit have to be adjusted against the unreserved vacancies and reservation has to be given in addition. If visually handicapped candidates or any other category of handicapped candidates are debarred from applying on the ground that a separate examination would be conducted for them, chances of handicapped candidates being selected on their own merit would be eliminated. Thus, debarring of any category of handicapped candidates in the above manner is against the provisions contained in the aforesaid O.M. It is, therefore, requested that persons with disabilities should not be debarred from applying for the posts identified suitable for them and should be provided opportunity to compete for the unreserved vacancies as well by holding a common examination.

4. Contents of this O.M. may be brought to the notice of all concerned.

Sd/-
(K.G.Verma)
Deputy Secretary to the Govt. of India"

16. Another OM dated 10.12.2008, issued by the Department of Personnel and Training, was also brought to our

notice whereunder a Special Recruitment Drive to fill up the backlog reserved vacancies for the persons with disabilities was initiated. The said OM mainly speaks about filling up of "backlog reserved vacancies". Relevant portion of the said OM is extracted hereinbelow:

"Dated the 10th December, 2008

OFFICE MEMORANDUM

Sub: Special Recruitment Drive to fill up the backlog reserved vacancies for Persons with Disabilities

The undersigned is directed to say that this Department's O.M. No. 36035/3/2004-Estt(Res) dated 29.12.2005 provides that if any vacancy reserved for any category of disability cannot be filled due to non-availability of a suitable person with that disability or for any other sufficient reason, such vacancy is not filled and is carried forward as a 'backlog reserved vacancy' to the subsequent recruitment year. In the subsequent recruitment year, the 'backlog reserved vacancy' is treated as reserved for the category of disability for which it was kept reserved in the initial year of recruitment and filled as such. However, if a suitable person with that disability is not available in the subsequent recruitment also, it may be filled by interchange among the three categories of disabilities, failing which by appointment of a person other than a person with disability. It may, thus, be seen that if a vacancy is earmarked reserved for any category of disability and a suitable person with that disability is not available to fill it up in the initial year of recruitment, it becomes a 'backlog reserved vacancy' for first subsequent recruitment year.

2. As per instructions existing prior to issue of O.M. dated 29.12.2005, if in any year, suitable physically handicapped candidates were not available to fill up a reserved vacancy, the vacancy was filled by an other category

candidate and reservation was carried forward for a period of upto three recruitment years. In the event of non-availability of suitable persons with disabilities, the reserved vacancies were not kept unfilled. Thus there was no provision of backlog reserved vacancies of persons with disabilities prior to 29.12.2005. Nevertheless, it is possible that some Ministries/Departments/ establishments might have kept some vacancies earmarked reserved for the persons with disability unfilled due to non-availability of persons with disability. If there exist such vacancies, these will be treated as backlog reserved vacancies for the current recruitment year"

17. By issuing such directions, the Department of Personnel and Training directed all the Ministries/Departments to launch a Special Recruitment Drive and fixed target dates for fulfilling various stages.

Discussion:

18. In the light of the above statutory provisions as well as various clauses of the OM dated 29.12.2005, let us analyze whether the High Court was justified in passing the impugned judgment.

19. Before adverting to the rival contentions submitted by the appellants and the respondents, it is relevant to comprehend the background and the objective of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

20. India as a welfare State is committed to promote overall development of its citizens including those who are differently abled in order to enable them to lead a life of dignity, equality, freedom and justice as mandated by the Constitution of India. The roots of statutory provisions for ensuring equality and equalization of opportunities to the differently abled citizens in our country could be traced in Part III and Part IV of the

Constitution. For the persons with disabilities, the changing world offers more new opportunities owing to technological advancement, however, the actual limitation surfaces only when they are not provided with equal opportunities. Therefore, bringing them in the society based on their capabilities is the need of the hour.

21. Although, the Disability Rights Movement in India commenced way back in 1977, of which Respondent No. 1 herein was an active participant, it acquired the requisite sanction only at the launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002, which gave a definite boost to the movement. The main need that emerged from the meet was for a comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995 viz., the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which empowers persons with disabilities and ensures protection of their rights. The Act, in addition to its other prospects, also seeks for better employment opportunities to persons with disabilities by way of reservation of posts and establishment of a Special Employment Exchange for them.

22. For the same, Section 32 of the Act stipulates for identification of posts which can be reserved for persons with disabilities. Section 33 provides for reservation of posts and Section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. The difference of opinion between the appellants and the respondents arises on the point of interpretation of these sections.

23. It is the stand of the Union of India that the Act provides for only 3% reservation in the vacancies in the posts identified for the disabled persons and not on the total cadre strength of the establishment whereas Mr. S.K. Rungta, learned senior counsel (R-1) appearing in person submitted that accepting the

interpretation proposed by the Union of India will flout the policy of reservation encompassed under Section 33 of the Act. He further submitted that the High Court has rightly held that the reservation of 3% for differently abled persons in conformity with the Act should have to be computed on the basis of the total strength of a cadre and not just on the basis of the vacancies available in the posts that are identified for differently abled persons, thereby declaring certain clauses of the OM dated 29.12.2005 as unacceptable and contrary to the mandate of Section 33 of the Act.

24. Two aspects of the impugned judgment have been challenged before this Court:-

(a) The manner of computing 3% reservation for the persons with the disabilities as per Section 33 of the Act.

(b) Whether post based reservation must be adhered to or vacancy based reservation.

25. Now let us consider the reasoning of the High Court and the submissions made by the parties.

26. Primarily, we would like to clarify that there is a sea of difference in computing reservation on the basis of total cadre strength and on the basis of total vacancies (both inclusive of identified and unidentified) in the cadre strength. At the outset, a reference to the impugned OM dated 29.12.2005 would, in unequivocal terms, establish that the matter in dispute in the given case is whether the latter method of computation of reservation will uniformly apply to the posts in Group A, B, C and D or will it be applicable only to Group C and D. The question pertaining to computation of reservation on the basis of total cadre strength does not even arise in the given circumstance of the case. However, the High Court, in the impugned judgment, went on to uphold the view that the computation of reservation must be on the basis of total cadre

strength which is clearly erroneous on the face of it. Inadvertently, the respondents herein have also adopted the same line of argument in their oral and written submissions. As a result, the point for consideration before this Court is whether the modus of computation of reservation on the basis of total number of vacancies (both inclusive of identified and unidentified) in the cadre strength will uniformly apply to Group A, B, C and D or will it be applicable only to Group C and D.

27. It is the stand of the Union of India that for vivid understanding of the reservation policy laid down under Section 33 of the Act, it is essential to read together Sections 32 and 33 of the Act. It was also submitted that a conjoint reading of the above referred sections, mandates only reservation of vacancies in the identified posts and not in all the posts or against the total number of vacancies in the cadre strength. However, it was also admitted that the computation of reservation is being done in respect of Group C and D posts on the basis of total number of vacancies (both inclusive of identified and unidentified) in the cadre strength since 1977. In fact, the abovesaid contention has been raised in *Govt. of India through Secretary and Anr. vs. Ravi Prakash Gupta & Anr.* (2010) 7 SCC 626 and, therefore, it is no longer res integra.

28. The question for determination raised in this case is whether the reservation provided for the disabled persons under Section 33 of the Act is dependent upon the identification of posts as stipulated by Section 32. In the aforementioned case, the Government of India sought to contend that since they have conducted the exercise of identification of posts in civil services in terms of Section 32 only in the year 2005, the reservation has to be computed and applied only with reference to the vacancies filled up from 2005 onwards and not from 1996 when the Act came into force. This Court, after examining the inter-dependence of Sections 32 and 33 viz., identification of posts and the scheme of reservation, rejected this contention and held as follows:-

"25. .....The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Grade `A' and `B' posts in the I.A.S. was undertaken after the year 2005 is not of much substance.

26. As has been pointed out by the High Court, neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Groups A, B, C and D posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners.

27. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment.

29. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

31. We, therefore, see no reason to interfere with the judgment of the High Court impugned in the Special Leave Petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court."

29. In the light of the above pronouncement, it is clear that the scope of identification comes into picture only at the time of appointment of a person in the post identified for disabled

persons and is not necessarily relevant at the time of computing 3% reservation under Section 33 of the Act. In succinct, it was held in *Ravi Prakash Gupta* (supra) that Section 32 of the Act is not a precondition for computation of reservation of 3% under Section 33 of the Act rather Section 32 is the following effect of Section 33.

30. Apart from the reasoning of this Court in *Ravi Prakash Gupta* (supra), even a reading of Section 33, at the outset, establishes vividly the intention of the legislature viz., reservation of 3% for differently abled persons should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts. There is no ambiguity in the language of Section 33 and from the construction of the said statutory provision only one meaning is possible.

31. A perusal of Section 33 of the Act reveals that this section has been divided into three parts. The first part is "every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability." It is evident from this part that it mandates every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. In this light, the contention of the Union of India that reservation in terms of Section 33 has to be computed against identified posts only is not tenable by any method of interpretation of this part of the Section.

32. The second part of this section starts as follows: "…of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment & locomotor disability or cerebral palsy in the posts identified for each disability." From the above, it is clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. It starts from the word "of which". The word "of which" has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer

to the identified posts. In fact, the contention of the Union of India is sought to be justified by bringing the last portion of the second part of the section viz. "….identified posts" in this very first part which deals with the statutory obligation imposed upon the appropriate Government to "appoint not less than 3% vacancies for the persons or class of persons with disabilities." In our considered view, it is not plausible in the light of established rules of interpretation. The minimum level of representation of persons with disabilities has been provided in this very first part and the second part deals with the distribution of this 3% among the three categories of disabilities. Further, in the last portion of the second part the words used are "in the identified posts for each disability" and not "of identified posts". This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz., blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived.

33. The third part of the Section is the proviso which reads thus: "Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section." The proviso also justifies the above said interpretation that the computation of reservation has to be against the total number vacancies in the cadre strength and not against the identified posts. Had the legislature intended to mandate for computation of reservation against the identified posts only, there was no need for inserting the proviso to Section which empowers the appropriate Government to exempt any establishment either

partly or fully from the purview of the Section subject to such conditions contained in the notification to be issued in the Official Gazette in this behalf. Certainly, the legislature did not intend to give such arbitrary power for exemption from reservation for persons with disabilities to be exercised by the appropriate Government when the computation is intended to be made against the identified posts.

34. In this regard, another provision of the said Act also supports this interpretation. Section 41 of the said Act mandates the appropriate Government to frame incentive schemes for employers with a view to ensure that 5% of their work force is composed of persons with disabilities. The said section is reproduced hereinbelow:

> **"41. Incentives to employers to ensure five per cent of the work force is composed of persons with disabilities.**- The appropriate Government and the local authorities shall, within limits to their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five percent of their work force is composed of persons with disabilities."

Thus, on a conjoint reading of Sections 33 and 41, it is clear that while Section 33 provides for a minimum level of representation of 3% in the establishments of appropriate Government, the legislature intended to ensure 5% of representation in the entire work force both in public as well as private sector.

35. Moreover, the intention of the legislature while framing the Act can also be inferred from the Draft Rights of Persons with Disabilities Bill, 2012, which is pending in the Parliament for approval. In Chapter 6 of the Bill, viz., Special Provisions for Persons with Benchmark Disabilities, similar sections like Sections 32 & 33 in the Act have been incorporated under Sections 38 and 39 which are as under:-

"Section 38. Identification of Posts which can be Reserved for Persons with Benchmark Disabilities:

Appropriate Governments shall - (a) identify posts in establishments under them which can be reserved for persons with benchmark disability as mentioned in section 39;

(b) at periodical intervals not exceeding three years, review and revise the list of identified posts, taking into consideration developments in technology.

Section 39. Reservation of Posts for Persons with Benchmark Disabilities:-

(1) Every appropriate Government shall reserve, in every establishment under them, not less than 5% of the vacancies meant to be filled by direct recruitment, for persons or class of persons with benchmark disability, of which 1% each shall be of all posts reserved for persons with following disabilities:-

i) blindness & low vision (with reservation of 0.5% of the vacancies for each of the two disabilities).

ii) hearing impairment & speech impairment.

iii) locomotor disability including cerebral palsy, leprosy cured and muscular dystrophy.

iv) autism, intellectual disability and mental illness

v) multiple disabilities from among i to iv above including deaf blindness

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

(2) If sufficient number of qualified persons with benchmark disabilities are not available in a particular year, then the reservation may be carried forward for upto the next three recruitment years, and if in such succeeding recruitment years also a suitable person with benchmark disability is not available, then the post in the fourth year may be first filled by interchange among the categories of disabilities; and only when there is no person with any benchmark disability available for the post in that year, the vacancy may be filled by appointment of a person, other than a person with benchmark disability."

A perusal of Sections 38 and 39 of the Bill clarifies all the ambiguities raised in this appeal. The intention of the legislature is clearly to reserve in every establishment under the appropriate Government, not less than 3% of the vacancies for the persons or class of persons with disability, of which 1% each shall be reserved for persons suffering from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy in the posts identified for each disability.

36. Admittedly, the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfill its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision. In the present case, the plain and unambiguous meaning of Section 33 is that every appropriate Government has to appoint a minimum of 3% vacancies in an establishment out of which 1% each shall be reserved for persons suffering from blindness and low vision, persons suffering from hearing impairment and persons suffering from locomotor or cerebral palsy.

37. To illustrate, if there are 100 vacancies of 100 posts in an establishment, the concerned establishment will have to reserve a minimum of 3% for persons with disabilities out of which at least 1% has to be reserved separately for each of

the following disabilities: persons suffering from blindness or low vision, persons suffering from hearing impairment and the persons suffering from locomotor disability or cerebral palsy. Appointment of 1 blind person against 1 vacancy reserved for him/her will be made against a vacancy in an identified post for instance, the post of peon, which is identified for him in group D. Similarly, one hearing impaired will be appointed against one reserved vacancy for that category in the post of store attendant in group D post. Likewise, one person suffering from locomotor disability or cerebral palsy will be appointed against the post of "Farash" group D post identified for that category of disability. It was argued on behalf of Union of India with reference to the post of driver that since the said post is not suitable to be manned by a person suffering from blindness, the above interpretation of the Section would be against the administrative exigencies. Such an argument is wholly misconceived. A given post may not be identified as suitable for one category of disability, the same could be identified as suitable for another category or categories of disability entitled to the benefit of reservation. In fact, the second part of the Section has clarified this situation by providing that the number of vacancies equivalent to 1% for each of the aforementioned three categories will be filled up by the respective category by using vacancies in identified posts for each of them for the purposes of appointment.

38. It has also been submitted on behalf of the appellants herein that since reservation of persons with disabilities in Group C and D has been in force prior to the enactment and is being made against the total number of vacancies in the cadre strength according to the OM dated 29.12.2005 but the actual import of Section 33 is that it has to be computed against identified posts only. This argument is also completely misconceived in view of the plain language of the said Section, as deliberated above. Even, for the sake of arguments, if we accept that the computation of reservation in respect of Group C and D posts is against the total vacancies in the cadre

strength because of the applicability of the scheme of reservation in Group C and D posts prior to enactment, Section 33 does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively. As such, one statutory provision cannot be interpreted and applied differently for the same subject matter.

39. Further, if we accept the interpretation contended by the appellants that computation of reservation has to be against the identified posts only, it would result into uncertainty of the application of the scheme of reservation because experience has shown that identification has never been uniform between the Centre and States and even between the Departments of any Government. For example, while a post of middle school teacher has been notified as identified as suitable for the blind and low vision by the Central Government, it has not been identified as suitable for the blind and low vision in some States such as Gujarat and J&K etc. This has led to a series of litigations which have been pending in various High Courts. In addition, Para 4 of the OM dated 29.12.2005 dealing with the issue of identification of jobs/posts in sub clause (b) states that list of the jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive which further makes the computation of reservation uncertain and arbitrary in the event of acceptance of the contention raised by the appellants.

40. Another contention raised by the appellants is that the computation of reservation against the total vacancies in the cadre strength in Group A & B will violate the rule of 50% ceiling of reservation in favour of SC, ST and OBC as laid down by this Court in *Indra Sawhney vs. Union of India and Others* AIR 1993 SC 477. This contention is also not tenable and is against the abovesaid judgment. It is difficult to understand as to how the computation of reservation against total vacancies in the cadre strength in Group A and B will violate 50% ceiling when its computation on that basis in Group C and D will not violate the said ceiling. There is no rationale of distinguishing between

the manner of computation of reservation with regard to Group A and B posts on the one hand and manner of computation of reservation with regard to Group C and D posts on the other on this ground.

41. A perusal of *Indra Sawhney* (supra) would reveal that the ceiling of 50% reservation applies only to reservation in favour of other Backward classes under Article 16(4) of the Constitution of India whereas the reservation in favour of persons with disabilities is horizontal, which is under Article 16(1) of the Constitution. In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 95 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. Para 95 is reproduced as follows:-

> "95. ……all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will

be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same……"

42. Yet another contention raised by the appellants is that the reservation for persons with disabilities must be vacancy based reservation whereas Respondent No. 1 herein contended that it must be post based reservation as laid down by the High Court in the impugned judgment. Respondent No. 1 herein relied upon the heading of Section 33 of the Act, viz., 'Reservation of Posts', to propose the view that the reservation policy contemplated under Section 33 is post based reservation.

43. It is settled law that while interpreting any provision of a statute the plain meaning has to be given effect and if language therein is simple and unambiguous, there is no need to traverse beyond the same. Likewise, if the language of the relevant section gives a simple meaning and message, it should be interpreted in such a way and there is no need to give any weightage to headings of those paragraphs. This aspect has been clarified in *Prakash Nath Khanna & Anr. vs. Commissioner of Income Tax & Anr.,* (2004) 9 SCC 686. Paragraph 13 of the said judgment is relevant which reads as under:

"13. It is a well-settled principle in law that 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. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage.* The view was reiterated in *Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama* and *Padma Sundara Rao v. State of T.N.*."

44. It is clear that when the provision is plainly worded and unambiguous, it has to be interpreted in such a way that the Court must avoid the danger of a prior determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. While interpreting the provisions, the Court only interprets the law and cannot legislate it. It is the function of the Legislature to amend, modify or repeal it, if deemed necessary.

45. The heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. However, when the Section is clear and unambiguous, there is no need to traverse beyond those words, hence, the headings or marginal notes cannot control the meaning of the body of the section. Therefore, the contention of Respondent No. 1 herein that the heading of Section 33 of the Act is "Reservation of posts" will not play a crucial role, when the Section is clear and unambiguous.

46. Further, the respondents heavily relied on a decision of the Constitution Bench in *R.K Sabharwal and Others vs. State of Punjab and Others* (1995) 2 SCC 745 to substantiate their contention. Para 6 reads as under:-

"6. The expressions "posts" and "vacancies", often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an

appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts, which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation."

47. Adhering to the decision laid by the Constitution Bench in *R.K Sabharwal (*supra), the High Court held as follows:-

16. The Disabilities Act was enacted for protection of the rights of the disabled in various spheres like education, training, employment and to remove any discrimination against them in the sharing of development benefits vis-à-vis non-disabled persons. In the light of the legislative aim it is necessary to give purposive interpretation to section 33 with a view to achieve the legislative intendment of attaining equalization of opportunities for persons with disabilities. The fact that the vacancy-based roster is to be maintained does not mean that 3% reservation has to be computed only on the basis of vacancy. The difference between the posts and vacancies has been succinctly pointed out in the Supreme Court decision in the case of *R.K Sabharwal and Others vs. state of Punjab and Others* AIR 1995 SC 1371 wherein it was held that the word "post" means an appointment, job, office or employment, a position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the vacancy to

occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which from the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation. Therefore, in our opinion, 3 % reservation for disabled has to be computed on the basis of total strength of the cadre i.e. both identified as well as unidentified posts…."

48. However, the decision in *R.K Sabharwal* (supra) is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation whereas reservation in favour of persons with disabilities is horizontal. We harmonize with the stand taken by the Union of India, the appellant herein in this regard. Besides, the judgment in *R.K Sabharwal* (supra) was pronounced before the date on which the Act came into force, as a consequence, the intent of the Act must be given priority over the decision in the above said judgment. Thus, in unequivocal terms, the reservation policy stipulated in the Act is vacancy based reservation.

Conclusion:

49. Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.

50. The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today.

51. Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) in consistent with the decision rendered by this Court.

52. Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, *Indra Sawhney* (supra) is not applicable with respect to the disabled persons.

53. We also reiterate that the decision in *R.K. Sabharwal* (supra) is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation, whereas reservation in favour of persons with disabilities is horizontal.

Directions:

54. In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:

(i) We hereby direct the appellant herein to issue an appropriate order modifying the OM dated

29.12.2005 and the subsequent OMs consistent with this Court's Order within three months from the date of passing of this judgment.

(ii) We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

(iii) The appellant herein shall issue instructions to all the departments/public sector undertakings/ Government companies declaring that the non observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default.

55. Before parting with the case, we would like to place on record appreciation for Mr. S.K Rungta, learned senior counsel for rendering commendable assistance to the Court. The appeal is disposed of with the above terms.

R.P. Appeal disposed of.

A.K. SINGHANIA
v.
GUJARAT STATE FERTILIZER CO. LTD. & ANR.
(Criminal Appeal Nos. 1692-1718 of 2013 etc.)

OCTOBER 17, 2013

[CHANDRAMAULI KR. PRASAD AND KURIAN JOSEPH, JJ.]

NEGOTIABLE INSTRUMENTS ACT, 1881:

s. 141 r/w s. 138 - Complaint against a company, its Chairman, Managing Directors and Directors - Petitions by two directors seeking to quash the proceedings against them - Held: In case of offence by company for dishonour of cheque, culpability of Directors has to be decided with reference to s. 141 -- To bring the Directors within the mischief of s. 138, it shall be necessary to allege that at the relevant time they were in charge of and responsible to the conduct of business of the Company -- It is necessary ingredient to proceed against such Directors -- In the instant case, the averments in the complaints nowhere suggest that the two Directors concerned were incharge and responsible for conduct of business of the company at the time when the offence was committed - Thus, the necessary averment in the complaints is lacking - Therefore, prosecution of two Directors concerned cannot be allowed to continue and their prosecution in all the cases, is quashed.

Respondent no. 1 in Crl. A. No. 1726-1732 of 2013 and the appellant in Crl. A. No. 1692-1718 of 2013 were arraigned as accused Nos. 7 and 9, respectively in Complaint Case No. 331 of 1996 filed against accused Nos. 1 to 13 alleging commission of offence u/s 138 of the Negotiable Instruments Act, 1881. Several other similar complaints were also filed by Gujarat State

Fertilizer Company against Esslon Synthetics Ltd., its Chairman, Managing Directors and other Directors including the said accused Nos. 7 and 9. The Magistrate took cognizance of the offence and issued process to the accused persons. Accused Nos. 7 and 9 in Complaint Case No. 331 of 1996 filed petitions u/s 482 Cr.P.C. before the High Court seeking to quash the proceedings against them. The High Court allowed the petitions of accused No. 7, but rejected those of accused No. 9.

Disposing of the appeals, the Court

HELD: 1.1 In the case of offence by company for dishonour of cheque, culpability of the Directors has to be decided with reference to s. 141 of the Act. To bring the Directors within the mischief of s. 138 of the Act, it shall be necessary to allege that at the time the offence was committed, they were in charge of and responsible to the conduct of the business of the Company. It is necessary ingredient which would be sufficient to proceed against such Directors. If reading of the complaint shows and substance of accusation discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the Directors in charge and responsible to Company "for the conduct of the business of the Company" within the mischief of s. 138 of the Act and not particular business for which the cheque was issued. [para 17-18] [1078-F; 1080-A-D]

S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, **2005 (3) Suppl. SCR 371 = (2005) 8 SCC 89;** *National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal* **2010 (2) SCR 805 = (2010) 3 SCC 330;** *Harshendra Kumar D. v. Rebatilata*

Koley, **2011 (2) SCR 670 = (2011) 3 SCC 351;** *N. Rangachari v. Bharat Sanchar Nigam Ltd.,* **2007 (5) SCR 329 = (2007) 5 SCC 108; and** *K.K. Ahuja v. V.K. Vora,* **(2009) 10 SCC 48 - relied on.**

1.2 On facts, according to the complainant itself, it was accused Nos. 1 to 5 who were taking decisions; and the allegation was that in taking the decisions they used to consult accused nos. 7 and 9 also. From the allegations made in the complaint, it cannot be inferred that there is any averment that these two accused were in-charge of and responsible for the conduct of the business of the company at the time the offence was committed. Therefore, there is no essential averment in the complaints. In this view of the matter, prosecution of accused nos. 7 and 9 cannot be allowed to continue. Accordingly, the order of the High Court quashing the prosecution of the accused No. 7 is not fit to be interfered with. For the same reason the order passed by the High Court declining the prayer of accused no.9 for quashing of the prosecution cannot be sustained, and, as such, is set aside. [para 15, 16 and 22] [1077-E-H; 1078-A; 1082-E-F]

Case Law Reference:

2005 (3) Suppl. SCR 371	**relied on**	**para 19**
2010 (2) SCR 805	**relied on**	**para 20**
2011 (2) SCR 670	**relied on**	**para 21**
2007 (5) SCR 329	**relied on**	**para 21**
2009 (10) SCC 48	**relied on**	**para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1692-1718 of 2013.

From the Judgment and Order dated 07.02.2012 of the

High Court of Gujarat at Ahmedabad in Crl. Misc. Nos. 1566, 1567, 1568, 1569, 1570, 1571 and 1572 of 2012.

WITH

Crl. A. Nos. 1719-1725, 1726-1732 & 1733-1759 of 2013.

Ranjit Kumar, Kavita Wadia, Shashank Tripathi, Khaitan & Co. for the Appellant.

Jayant Bhushan, Ashok Kr. Shrivastava, Nitish Massey, Sanjeev K. Kapoor (for Khaitan & Co.), Shubhada Deshpande (for Hemantika Wahi), Kunal Verma, Vijeta Ohri, Arpita Seth for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. In all these special leave petitions common question of law and facts arise and, therefore, they have been heard together and are being disposed of by this common judgment.

2. Leave granted.

3. In all these cases we are concerned with accused A.K. Singhania and Vikram Prakash. Several complaints were filed by Gujarat State Fertilizer Company against Esslon Synthetics Ltd., its Chairman, Managing Director and other Directors including aforesaid A.K. Singhania and Vikram Prakash alleging commission of an offence under Section 138 of the Negotiable Instruments Act, hereinafter referred to as 'the Act'.

4. In Complaint Case No. 331 of 1996 the allegations which are relevant for the decision of these appeals read as follows:

"3. The accused No. 14 is a Limited Company registered under the Companies Act, 1956 and are doing business of chemicals, synthetics etc. The accused No. 1 is Managing Director of accused company No. 14 and

accused No. 2 is Deputy Managing Director, accused No. 3 is Chairman, accused No. 4 is Whole Time Director, accused No. 5 is Finance Director, accused No. 6 to 12 are the Directors and the accused No. 13 was Senior Manager (Finance) of the accused company No. 14 Esslon Synthetics Ltd.

4. All the business and financial affairs of the accused company No. 14 are decided, organized, administered by accused No. 1 being Managing Director and accused No. 2 being Deputy Managing Director, accused No. 3 Chairman, accused No. 4 Whole Time Director, accused No. 5 Finance Director with consultation of other Directors from accused Nos. 6 to 12 and accused No. 13 was Sr. Manager (Finance) of accused company No. 14. So accused Nos. 1 to 12 and accused No. 13 are also responsible for all the transactions and business affairs done on behalf of accused Company No. 14 and are responsible for all the financial affairs and administration of accused Company No. 14."

5. A.K. Singhania is the accused No. 7 and Vikram Prakash is accused No. 9 in this complaint.

6. In Complaint Case No. 1293 of 1996, the allegations with which we are concerned in these appeals read as follows:

"4. All the business and financial affairs of the accused company No. 1 are decided, organized, administered by the accused No. 2 being Managing Director and accused No. 3 being Managing Director, accused No. 4 Chairman, accused No. 5 Whole Time Director, accused No. 6 Finance Director with consultation of other Directors from accused Nos. 7 to 13 and accused No. 14 was Sr. Manager (Finance) of accused No. 1. At the time the offence was committed, they were incharge of and were responsible to the company for the conduct of the business of the accused company. Therefore, they are responsible

for day to day affairs and all the transactions and business done on behalf of the accused Company No. 1 and they are also responsible for all the financial affairs and administration of accused company No. 1."

7. A.K. Singhania and Vikram Prakash have been arrayed as accused Nos. 8 and 10 in this complaint and in all other complaints, the allegations against A.K. Singhania are identical to what have been alleged in the Complaint Case No. 331 of 1996.

8. Taking into account the allegations made in the respective complaints, the learned Magistrate took cognizance of the offence, issued process to the accused aforesaid besides other accused to face trial for commission of the offence under Section 138 of the Act.

9. Vikram Prakash, aggrieved by the order issuing summons to face trial under Section 138 of the Act in different complaints, filed applications under Section 482 of the Code of Criminal Procedure for quashing the order taking cognizance and issuing process. The applications filed by said Vikram Prakash were registered as Criminal Miscellaneous Application Nos. 13393-13399 of 2007. The High Court by its common order dated January 20, 2012 allowed all the applications and quashed his prosecution. While doing so, the High Court held as follows:

"7……It is to be noted that as such there are general allegations and averments against the applicant in the complaints, however there are no specific allegations and averments in the complaint against the applicant with respect to transaction for which the cheques were issued by the accused no. 14 company. Under the circumstance, on the ground that applicant was non Executive Director of the Company on the board of the company, which is not disputed by the complainant, the applicant cannot be prosecuted for the offence under Sections 138 r/w 141 of

the Negotiable Instruments Act and cannot be held vicariously liable for the offence alleged to have been committed by the accused no. 14 company. Under the circumstance, this Court is of opinion that this is a fit case to exercise the powers under Section 482 of the Code of Criminal Procedure and to quash and set aside the impugned complaint/criminal case qua applicant-original accused no. 9……"

10. It is this common order which has been assailed by the Gujarat State Fertilizer Company Ltd. in the special leave petitions filed by it.

11. A.K. Singhania also, aggrieved by the order issuing process under Section 138 of the Act, filed separate applications for quashing the entire prosecution including the aforesaid order under Section 482 of the Code of Criminal Procedure. All the applications filed by A.K. Singhania were taken together by the High Court for consideration and by the impugned order the applications filed by him have been dismissed. While doing so, the High Court observed as follows:

"9. As the paragraphs of the complaint reproduced in earlier part of decision specifically para 4 and subsequent paragraphs would reveal that the applicant in the capacity of Director was responsible for business affairs and he was in-charge of the Company. Not only that but nowhere it can be said that the applicant was non-Executive Director and even if it is so the said argument is in realm of defence to be decided by Court trying the case under the Negotiable Instruments Act. Since sufficient averments attracting of Section 138 of Negotiable Instrument Act are the foundation of the complaint and it is further averred that cheques were issued with mischievous, dishonest intention, knowingly and willingly to cheat the complainant company. Arguments canvassed by learned advocate for the applicant do not require any further deliberation in exercise of powers under Section

482 of the Code since quashing the complaint would not secure end of justice but would result into miscarriage of justice……."

12. A.K. Singhania, aggrieved by the aforesaid common order, has preferred these special leave petitions.

13. Leave granted.

14. We have heard Mr.Ranjit Kumar, learned Senior Counsel on behalf of the accused A.K. Singhania and Mr.Ashok Kr. Srivastava, learned Senior Counsel on behalf of Vikram Prakash whereas the complainant, Gujarat State Fertilizer Company Ltd. is represented by Mr. Jayant Bhushan, learned Senior Counsel. Mr. Ranjit Kumar appearing on behalf of the accused submits that necessary averments that at the time the offence was committed, the accused were in-charge of and responsible for the conduct of the business of the company have not been averred, which is sine qua non for proceeding against the Directors of the company. He has drawn our attention to the averments made in the complaints, which we have reproduced in the preceding paragraphs of this judgment and submits that mere assertion that these accused persons were the Directors of the company is not sufficient to make them liable under Section 141 of the Act. Mr. Jayant Bhushan however, submits that there is clear averment in the complaint that these accused persons were the Directors of the company and, in fact, in-charge of and responsible for the conduct of the business of the company and, hence, they were rightly summoned to face the trial. He points out that the judgment and order of the High Court quashing the prosecution of accused Vikram Prakash is under challenge in this batch of appeals and accused A.K. Singhania cannot take benefit of the said order and the fate of both the accused shall depend upon the decision in all these appeals. Mr. Ranjit Kumar submits that on same set of facts when the prosecution of the accused Vikram Prakash has been quashed, there does not seem any justification to decline the prayer of the accused A.K. Singhania.

15. In view of rival submissions, we proceed to consider the exact allegations made against the accused A.K. Singhania and accused Vikram Prakash. It is not in dispute that allegations against both the accused in different complaints are one and the same. In Complaint Case No. 331 of 1996, the allegation is that "all business and financial affairs of the accused company are decided, organized, administered by Accused Nos. 1 to 5". It has further been alleged that Accused Nos. 1 to 5 do so with consultation of other Directors namely, Accused Nos. 6 to 12. In view of aforesaid, according to the complainant, accused Nos. 1 to 13 are also responsible for all the transactions and business affairs, financial affairs and administration done on behalf of the accused company. It is relevant here to state that A.K. Singhania and Vikram Prakash are accused Nos. 7 and 9 in this complaint. The averments made in the complaint nowhere suggest that these two accused, at the time the offence was committed, were in-charge of and responsible for the conduct of the business of the company. According to the complainant itself, it was accused Nos. 1 to 5 who were taking decisions and the allegation that in taking the decisions they used to consult these accused also will not mean that these two accused were at the time the offence was committed, were in-charge of and responsible for the conduct of business of the company. In complaint Case No. 1293 of 1996 and all other complaints with which we are concerned in the present appeals the allegation is that "all business and financial affairs of the accused company No.1, are decided, organized, administered by accused Nos. 2 to 6 and in consultation of other directors i.e. from accused Nos. 7 to 13". It has further been averred that at the time the offence was committed "they were in-charge and responsible to the company for the conduct of the business" and, therefore, "they are responsible for day to day affairs and transaction, business and all financial affairs of the accused company." Mr. Ranjit Kumar submits that the aforesaid averments are not sufficient and from that it cannot be inferred that accused A.K. Singhania and accused Vikram Prakash

have been alleged to be in-charge and responsible for the conduct of the business of the company at the time the offence was committed. He points out that A.K. Singhania is accused No. 8 whereas accused Vikram Prakash is accused No. 10 in these complaints. Mr. Jayant Bhushan, however, joins issue and submits that the substance of the accusation clearly indicates that the two accused were in-charge and responsible for the conduct of the business of the company at the time of the offence.

16. We have perused the complaints and, in fact, the relevant portions of the allegations have been reproduced in the foregoing paragraphs of the judgment. From that it is difficult to infer that there is any averment that these two accused were in-charge of and responsible for the conduct of the business of the company at the time the offence was committed. The allegations in the complaints in sum and substance mean that business and financial affairs of the company used to be decided, organized and administered by accused Nos. 2 to 6 and while doing so, other Directors including the two accused herein were consulted. The inference drawn by the complainant on that basis that these two accused, therefore, are in-charge and responsible to the company for the conduct of its business, is absolutely misconceived. We are, therefore, of the opinion that essential averment in the complaints is lacking.

17. In case of offence by company for dishonour of cheque, the culpability of the Directors has to be decided with reference to Section 141 of the Act, same reads as follows:

> **"141. Offences by companies.**-(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

18. Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

> Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> Explanation.- For the purposes of this section,-
>
> (a) "company" means any body corporate and includes a firm or other association of individuals; and
>
> (b) "director", in relation to a firm, means a partner in the firm."

19. From a plain reading of the aforesaid provision it is evident that every person who at the time the offence was committed is in charge of and responsible to the Company shall be deemed to be guilty of the offence under Section 138 of the Act. In the face of it, will it be necessary to specifically state in the complaint that the person accused was in charge of and

responsible for the conduct of the business of the Company? In our opinion, in the case of offence by Company, to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were in charge of and responsible to the conduct of the business of the Company. It is necessary ingredient which would be sufficient to proceed against such Directors. However, we may add that as no particular form is prescribed, it may not be necessary to reproduce the words of the section. If reading of the complaint shows and substance of accusation discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the Directors in charge and responsible to Company "for the conduct of the business of the Company" within the mischief of Section 138 of the Act and not particular business for which the cheque was issued. We cannot read more than what has been mandated in Section 141 of the Act.

20. A large number of authorities of this Court have been cited by the counsel representing the party to bring home their point. We deem it inexpedient to refer to all of them. Suffice it to say that this question has been answered eloquently by a three-Judge Bench decision of this Court in the case of *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla,* (2005) 8 SCC 89, in the following words:

> "19. In view of the above discussion, our answers to the questions posed in the reference are as under:
>
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in-charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made

in a complaint, the requirements of Section 141 cannot be said to be satisfied."

21. This Court in the case of *National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal,* (2010) 3 SCC 330, after reviewing all its earlier judgments summarized the legal position as follows:

"39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their

position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

In *Harshendra Kumar D. v. Rebatilata Koley,* (2011) 3 SCC 351, after referring to its earlier decisions in *S.M.S. Pharmaceuticals Ltd.* (supra), *National Small Industries Corpn. Ltd.* (supra), *N. Rangachari v. Bharat Sanchar Nigam Ltd.,* (2007) 5 SCC 108 and *K.K. Ahuja v. V.K. Vora,* (2009) 10 SCC 48, this Court reiterated the same view.

22. We have found on fact that there is no averment that the two accused herein were in charge of and responsible for the conduct of the business of the company at the time the offence was committed. Hence, there is no essential averment in the complaints. In view of what we have observed above, the prosecution of accused A.K. Singhania and accused Vikram Prakash cannot be allowed to continue. Accordingly, the order of the High Court quashing the prosecution of the accused Vikram Prakash is not fit to be interfered with. For the same reason the order passed by the High Court declining the prayer of A.K. Singhania for quashing of the prosecution cannot be sustained and the appeals preferred by him deserve to be allowed.

23. In the result, we dismiss the appeals preferred by the complainant Gujarat State Fertilizers Company Ltd. and allow the appeals preferred by A.K. Singhania and quash his prosecution in all these cases.

R.P. Appeals disposed of.

B. AMRUTHA LAKSHMI
v.
STATE OF ANDHRA PRADESH AND ORS.
(Civil Appeal No. 9193 of 2013 etc.)

OCTOBER 18, 2013

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

INDIAN ADMINISTRATIVE SERVICE (APPOINTMENT BY SELECTION) REGULATIONS, 1997:

Regulation 4 r/w Regulation 3 – Selection to I.A.S. under non-State Civil Services category for the year 2011 – State Government to send proposals for consideration of Committee – Held: Names of officers from the cadre of Assistant Commissioner of Commercial Taxes and above, who were of outstanding merit and were eligible, were to be forwarded, but names which were sent for consideration were, only of Joint Commissioners and Additional Commissioners and not Assistant Commissioners -- Appellants were very much eligible for being considered, and there were so many similar eligible candidates -- Once a candidate comes into the zone of consideration, and satisfies all the requirements, including that of outstanding merit and ability, he cannot be told that merely because he is junior in the seniority, his name will not be forwarded for consideration -- When there is a criteria laid down for selection, Administration has to confine to the same, and it cannot impose an additional criterion, as it will mean treating similarly situated employees dissimilarly, and denying equal opportunity to some of them in the matter of public employment on the basis of a criterion which is not laid down, resulting into violation of Arts. 14 and 16(1) of the Constitution -- The decision of respondents not to consider appellants for selection was violative of Art. 14 and Art. 16(1) of the Constitution, since it was arrived at on the basis of a criterion which was not laid down -- Indian Administrative

Service (Promotion by Appointment) Regulations,1955 – Constitution of India, 1950 – Arts.14 and 16(1).

JUDGMENT:

Prospective operation of judgment – Names of appellants not sent by department for selection to IAS -- Held: Since the selection for the year 2011 had been over even before the interim application in CAT was decided, setting aside the selection conducted some two years back, and asking the respondents to re-do the exercise after considering the appellants and other similarly situated candidates, would create lot of uncertainty, in as much as appellants and such other similarly situated candidates, might or might not finally succeed in the selection process -- Therefore, it will not be proper to set aside the selections made -- Though the declaration is being granted that the appellants and persons situated like them were entitled to be considered by the Committee, no further relief in that behalf can be granted to them -- The opinion rendered by the Court will have to operate prospectively in the matter of application of the relevant rules, for the future selections.

ADMINISTRATIVE LAW:

Public employment – Non-consideration of claim of candidates on unjust grounds -- Damages – Held: Even though appellants cannot get the relief sought, they must get damages for non-consideration on unjust grounds, as Commissioner for Commercial Tax had acted to reduce the zone of consideration, contrary to the rules, and instructions -- The award of damages is necessary also as those who are responsible for administration cannot trample upon rights of others on the grounds which are unsustainable in law -- Therefore, State Government is directed to pay to appellants the damages and litigation costs, as ordered in the judgment and may recover the amounts from erring officer(s) – Damages.

The appellant in C. A. No. 9193 of 2013, an Assistant Commissioner of Sales Tax, filed an O.A. before the Central Administrative Tribunal challenging the action of the State Government in not considering her case for being proposed for appointment to I. A. S. in the non-State Civil Services category. The appellant prayed for an ad interim order, inter alia "to direct, the 2nd respondent not to convene the meeting of the Committee and not to consider the case of any other candidate(s) proposed by the 3rd respondent for appointment to I.A.S. by selection (of A.P. State Non-SCS Officers), pending disposal of O.A". The interim relief having been declined both by the Tribunal as also the High Court, the instant appeals were filed.

Allowing the appeals in part, the Court

HELD: 1.1 Regulation Nos. 3 and 4 of the Indian Administrative Services (Promotion by Appointment) Regulations 1955 make it evident that the Central Government has to determine the number of vacancies for which recruitment may be made each year, which is to be done in consultation with the State Government. Regulation No. 4 lays down, that the State Government has to send the proposal for consideration of the committee. It is important to note that while sending the recommendations from Non Civil Services section, the Government has to see that (i) the person concerned is a person of outstanding merit and ability, (ii) he holds a Gazetted post in a substantive capacity, (iii) he has completed at least 8 years of continuous service on the first day of January of the year in which his case is being considered, (iv) the person must belong to a post which has been declared equivalent to the post of Deputy Collector in the State Civil Service, (v) the number of persons proposed for consideration of the committee shall not exceed five times the number of vacancies, and

(vi) the persons to be recommended should not have attained the age of 54 years on the first day of January of that year in which the names are considered by the committee. [para 10] [1094-D-E, F-H; 1095-A]

1.2 It is evident from the letter dated 1.7.2010 from the Principal Secretary, of the Revenue (CT-I) Department, that the names of officers from the cadre of Assistant Commissioner of Commercial Taxes and above, who were of outstanding merit and were eligible, were to be forwarded, but the names which were sent for consideration were, however, only of the Joint Commissioners and Additional Commissioners and not Assistant Commissioners. [para 13] [1096-G-H; 1097-A]

1.3 It is not disputed that the appellant was very much eligible for being considered, and there were so many similar eligible candidates. It is to be noted that the eligible officers concerned have a limited right of being considered, though they do not have a right of promotion. What the State Government had to do first was to find out as to who fulfilled the criteria. Undoubtedly, a large number of persons will fulfill the criteria, being Gazetted Officers with more than 8 years of service, and less than 54 years of age on the relevant date. They would also have to be in the required pay scale. However, as stated in paragraph 4 of the Principal Secretary's letter, while considering the outstanding merit and ability, those with adverse remarks and those facing departmental enquiries were to be excluded. Therefore, there was no difficulty in excluding such persons on those grounds. Thereafter, what remained to be seen was as to who were the persons with outstanding ability and merit amongst them. The State Government maintains their annual appraisal reports.It is for the State Government to lay down by rules as to how the outstanding merit and ability is to be assessed, and over how much period. After all

these tests are applied, the number of persons to be recommended will not be very large. However, once a candidate comes into the zone of consideration, and satisfies all the requirements, including that of outstanding merit and ability, he cannot be told that merely because he is junior in the seniority, his name will not be forwarded for consideration. The rule requires that from amongst the outstanding officers, 15 names are to be forwarded to the Central Government and, therefore, it is possible that amongst these 15, a junior officer may as well figure, depending upon the assessment of his merit. He cannot be eliminated merely on the ground that he is a junior officer. [para 17] [1099-A-C, D-H; 1100-A-C]

Shankarsan Dash Vs. Union of India **1991 (2) SCR 567 = 1991 (3) SCC 47- referred to.**

1.4 If the rules for selection contain a requirement, the same has to be applied uniformly and strictly, and none from the eligible group can be eliminated from being considered on any criteria, other than those which are provided in the rules. If there is a criteria laid down for selection, the Administration has to confine to the same, and it cannot impose an additional criterion over and above whatever has been laid down, as it will no longer remain an exercise of discretion, but will result into discrimination. It will mean treating similarly situated employees dissimilarly, and denying equal opportunity to some of them in the matter of public employment on the basis of a criterion which is not laid down, resulting into violation of Arts. 14 and 16(1) of the Constitution. In the instant case, the decision of the respondents cannot be justified. [para 18] [1100-D-G]

1.5 The prayers in the O.A. filed by the appellant were negatively worded viz. to declare that the action of the respondents not to consider the case of the appellant,

and not to forward her name, was illegal. In a way it was a prayer for a positive declaration viz., that the appellant and persons situated like her were entitled to be considered by the committee, if they are otherwise eligible. This Court is of the view that, the appellant is entitled to such a positive declaration, which order takes care of the prayer as made in the Original Application. In the circumstances, the impugned judgment and order of the High Court as well as of the Central Administrative Tribunal, are set-aside and the relief as prayed in the O.A. is modified, and it is held that the decision of the respondents not to consider the appellant for the selection, amounted to her being treated dissimilarly, though she was situated similarly to the recommended officers. The decision was violative of Art. 14 and Art. 16(1) of the Constitution, since it was arrived at on the basis of a criterion which was not laid down. [para 19-20] [1100-H; 1101-A-D]

1.6 However, the selection for the year 2011 had been over, even before the interim application in the CAT was decided. Setting aside the selection conducted some two years back, and asking the respondents to re-do the exercise after considering the appellant and other similarly situated candidates, would create lot of uncertainty, in as much as the appellant and such other similarly situated candidates, might or might not finally succeed in the selection process. Therefore, it will not be proper now to set aside the selections made. Therefore, though this declaration is being granted, viz. that the appellant and persons situated like her were entitled to be considered by the Committee, no further relief in that behalf can be granted to them. The opinion rendered by this Court will have to operate prospectively in the matter of application of the rules, for the future selections. [para 20] [1101-D-G]

2.1 The appellants had to resort to this litigation for no

fault of theirs. The non consideration of their claim was totally unjust. Therefore, even though the appellants cannot get the relief sought, they must get the damages for non-consideration on unjust grounds. This is because, the Commissioner for Commercial Tax had acted to reduce the zone of consideration, contrary to the rules, and in spite of a letter dated 1.7.2010 from the Principal Secretary Revenue (CT-I) Department, which had clarified that the Commissioner may send the proposals of the eligible candidates of the cadre of Assistant Commissioners and above, who were of outstanding merit. The award of damages is necessary also, as those who are responsible for administration of the State cannot trample upon the rights of others on the grounds which are unsustainable in law. Therefore, the State Government is directed to pay to the appellants the damages with the litigation cost as ordered in the judgment. It will be open to the State Government to recover the said amounts from officer(s) who were responsible for the non-consideration of the claim of both the appellants. [para 21 and 23] [1101-G-H; 1102-A-D, G-H]

Case Law Reference:

1991 (2) SCR 567 referred to para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9193 of 2013.

From the Judgment and Order dated 31.12.2010 of the High Court of Andhra Pradesh in W.P. No. 32290 of 2010.

WITH

C.A. No. 9194 of 2013.

P.P. Malhotra ASG, P.S. Narashimha, ATM Rangaramanujam, K. Radhakrishan, T.V. Ratnam, Munnawwar Naseem, Yasir Rauf, B.V. Balram Das, G.N. Reddy, B. Debojit,

Bala Shivudu M., Aadithya, Kiran Bhardwaj, S.U.K. Sagar (for Lawyer's Knit & Co.) for the appearing parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave Granted.

2. We will first deal with the facts and legal submissions of the first SLP (C) 23761 of 2011. This appeal by Special Leave seeks to challenge the judgment and order dated 31.12.2010, rendered by a Division Bench of the Andhra Pradesh High Court in Writ Petition No. 32290/2010, dismissing the same. The said Writ Petition sought to challenge the order passed by the Central Administrative Tribunal (CAT) Hyderabad, dated 20.12.2010, on the Interim Application moved by the appellant in her Original Application No. 1291/2010, wherein, the CAT rejected the said Interim Application.

Facts leading to this appeal are as follows:-

3. The appeal is concerning the right of the appellant for being considered for the selection into the Indian Administrative Services (IAS) from the Non-civil services in the state of Andhra Pradesh. The selection into the IAS is governed by the All India Services Act 1951, and IAS (Recruitment) Rules 1954. There are three sources for being selected into the IAS as per the IAS (Recruitment) Rules 1954. They are:- (i) by direct recruitment; (ii) by promotion of a substantive member of a state civil service and (iii) by selection from amongst those persons who hold gazetted posts in substantive capacity in connection with the affairs of the State, and who are not members of a State Civil Service.

4. The vacancies in the IAS cadre for each particular State are notified by the Central Government. In the present case, we are concerned with the three vacancies meant for category (iii) above viz. the officers of Non State Civil Services, which were notified for the year 2011. The case of the appellant is that, though she was eligible for being taken into the panel for

consideration, she lost her opportunity due to the erroneous interpretation of the relevant rules by the respondent No. 1, State of Andhra Pradesh. At the relevant time, she was working as the Assistant Commissioner of the Sales Tax, and she satisfied all the eligibility criteria, yet the Principal Secretary, Department of Revenue (Commercial Tax) Department, Hyderabad, Andhra Pradesh, and the Commissioner of Commercial Taxes, Hyderabad, Andhra Pradesh, respondent Nos. 2 and 3 respectively, restricted the zone of consideration only to the higher officers amongst the eligible candidates viz., to the Joint and Additional Commissioners of the Commercial Tax Department.

5. The appellant, therefore, filed Original Application No. 1291 of 2010 before the Central Administrative Tribunal (CAT) and prayed for the following main reliefs:-

"1.) This Hon'ble court may be pleased to declare that the action of the 3rd respondent in not considering the case of the applicant for being proposed for appointment to I.A.S., in terms of I.A.S. (appointment by selection) Regulation 1997 is illegal and is contrary to and violation of Regulation 4 of I.A.S. (appointment by selection) Regulation 1997 and is also violative of Article 14, 16 and 21 of the Constitution of India.

2). This Hon'ble Tribunal may be pleased to declare the action of the 5th respondent in not forwarding the name of the applicant to 3rd respondent is illegal and contrary to G.O.Ms NO. 634 dated 24.8.2007 and is also contrary to Regulation No. 4 (1) of I.A.S. (appointment by selection) Regulation 1997.

3). This Hon'ble Tribunal may be pleased to declare that applicant is entitled to be considered by the Committee (as constituted under Regulation 3) by 2nd respondent for appointment to I.A.S., by selection based on her outstanding merit and ability and pass such other order or orders as this Hon'ble Tribunal may deem fit and proper

in the circumstance of the case."

6. The appellant prayed for the interim order which read as follows:-

"In the above circumstances this Hon'ble Tribunal may be pleased to direct the 2nd respondent not to convene the meeting of the Committee and not to consider the case of any other candidate(s) proposed by the 3rd respondent for appointment to I.A.S. by selection (of A.P. State Non-SCS Officers), pending disposal of O.A., and pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.

In the alternative direct the 3rd respondent to consider and propose the name of the applicant for consideration by the 2nd respondent for appointment by selection to I.A.S. before the cases of other candidates are considered and pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

7. The CAT, however, declined to grant the interim relief that the appellant had prayed for. The appellant therefore, carried the matter to the Andhra Pradesh High Court, where the High Court has held the restriction of the zone of consideration to be valid. Being aggrieved by this order, the appellant has filed this appeal by Special Leave.

8. Mr. P.S. Narshimha, learned senior counsel appeared for the appellant, Mr. A.T.M. Rangaramanujam, learned senior counsel appeared for the first respondent State of Andhra Pradesh, and the Principal Secretary to the Department of Revenue (Commercial Taxes) Andhra Pradesh, and the Commissioner of Commercial Tax, Andhra Pradesh. Mr. P.P. Malhotra, Additional Solicitor General has appeared for respondent No. 4 Union of India and Mr. Radhakrishnan, learned senior counsel for respondent No. 5 Union Public Service Commission.

9. It was pointed out by Mr. Narshimha, learned counsel for the appellant, that the relevant regulations for our purpose are the I.A.S. (Appointment by Selection) Regulations, 1997. Clause No. 3, regulation Nos. 3 and 4 thereof, are relevant for our purpose. Regulation 3 deals with the determination of vacancies to be filled. Regulation No. 4 lays down the provisions for the State Government to send proposals for consideration of the committee referred to in regulation No. 3, which is the committee constituted under regulation No. 3 of the Indian Administrative Services (Promotion by Appointment) Regulations 1955. These two regulations Nos. 3 and 4 read as follows:-

"3. Determination of vacancies to be filled:

The Central Government shall, in consultation with the State Government concerned, determine the number of vacancies for which recruitment may be made under these regulations each year. The number of vacancies shall not exceed the number of substantive vacancies, as on the first day of January of the year, in which the meeting of the Committee to make the selection is held.

4. State Government to send proposals for consideration of the Committee:-

(1) The State Government shall consider the case of a person not belonging to the State Civil Service but serving in connection with the affairs of the State who,

i) is of outstanding merit and ability; and

ii) holds a Gazetted post in a substantive capacity; and

iii) has completed not less than 8 years of continuous service under the State Government on the first day of January of the year in which his case is being considered in any post which has been declared equivalent to the post

of Deputy Collector in the State Civil Service and propose the person for consideration of the Committee. The number of persons proposed for consideration of the Committee shall not exceed five times the number of vacancies proposed to be filled during the year.

Provided that the State Government shall not consider the case of a person who has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for the consideration of the Committee.

Provided also that the State Govt shall not consider the case of a person who, having been included in an earlier Select List, has not been appointed by the Central Government in accordance with the provisions of regulation 9 of these regulations."

10. As can be seen from these two regulations, the Central Government has to determine the number vacancies for which recruitment may be made each year, which is to be done in consultation with the State Government. The number of vacancies to be determined, shall not exceed the number of substantive vacancies, as on the first day of January of the year, in which the meeting of the selection committee is held. Regulation No. 4 lays down, that the State Government has to send the proposal for consideration of the committee. It is important to note that while sending the recommendations from Non Civil Services section, the Government has to see that (i) the person concerned is a person of outstanding merit and ability, (ii) he holds a Gazetted post in a substantive capacity, (iii) he has completed at least 8 years of continuous service on the first day of January of the year in which his case is being considered, (iv) the person must belong to a post which has been declared equivalent to the post of Deputy Collector in the State Civil Service, (v) the number of persons proposed for consideration of the committee shall not exceed five times the number of vacancies, and (vi) the persons to be recommended

should not have attained the age of 54 years on the first day of January of that year in which the names are considered by the committee.

11. As far as the equivalence with the post of Deputy Collector is concerned, the Andhra Pradesh Government came out with a G.O.Ms No. 634 of the General Administration (Special Department) dated 24.8.2007, which provided as follows:-

"NOTIFICATION

In supersession of the order issued in G.O.Ms, General Administration (Special.A) Department, Dated: 08.06.2006, G.O.Ms. No. 807, General Administration (Special A) Department, Dated: 23.12.2006, read with G.O.Ms No. 63 General Administration (Special A) Department, Dated: 08.02.2007, and in the exercise of powers conferred under sub-regulation (iii) of regulation 4(1) of the Indian Administrative Service (Appointment by Selection) Regulations, 1997, the Government hereby declare that, all the post carry the scale of pay of Rs. 10,845-22,995 and above (revised scales of 2005) in all the departments under the Govt. of Andhra Pradesh, barring the services viz. (i) State Police Service, (ii) State Forest Services, and (iii) Judicial Service, are equivalent to the post of Deputy Collector in the State Civil Service for the limited purpose in regulation ibid. Officers who have completed 8 years of continuous service in the said scale as on 1st January of the year for which selection is made and are substantive in the above scale of pay as stipulated in IAS (Appointment by Selection) Regulations 1997, are eligible for consideration.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

J.HARI NARYAN
CHIEF SECRETARY TO GOVERNMENT

12. Thus, as can be seen, sub-regulation (iii) of regulation 4 (1), referred to above, includes all the posts which carry the scale of pay of Rs. 10,845-22,995 and above, and (ii) persons from all the departments under the Government of Andhra Pradesh except State Police Service, State Forest Service and Judicial Service are eligible to be considered. The notification declared such posts to be equivalent to the post of Deputy Collector in the State Civil Service, for the limited purpose specified in the Regulations. The Principal Secretary to the Government accordingly, wrote to the different departmental heads to send the full particulars of eligible Non Civil Services officers who fulfill the criteria. In para 4 of this letter he specifically stated as follows:-

"4. The Regulations stipulate that the Non-SCS Officers to be considered for selection should be of outstanding merit and ability. This aspect should be thoroughly ensured before sending the proposals. An Officer who is facing disciplinary enquiries and against whom adverse remarks are recorded in the ACR or whose integrity is not certified, cannot unequivocally be said to be of outstanding merit and ability."

13. The Commissioner of Commercial Tax, Andhra Pradesh by his letter dated 18.6.2010 sought a clarification whether all the eligible officers in the cadre of Assistant Commissioner and above would be considered as eligible, if they were of substantive ability, had completed the minimum years of service, and had not crossed the age of 54 years as on 1.1.2010. The Commissioner got a reply that the necessary instructions may be adhered to scrupulously. He subsequently got another letter dated 1.7.2010 from the Principal Secretary, of the Revenue (CT-I) Department, that the names of officers from the cadre of Assistant Commissioner of Commercial Taxes and above, who are of outstanding merit and are eligible, may be forwarded. It so happened, that the names which were sent for consideration were, however, only of the Joint Commissioners and Additional Commissioners and not

Assistant Commissioners. It is, therefore, that the appellant filed the above Original Application and applied for interim relief which came to be declined, and the order of the CAT was left undisturbed by the High Court. This has led to the present Civil appeal.

14. According to Mr. Narshimha, the relevant rules were very clear, and the appellant satisfied all those requirements. The appellant was a Gazetted Officer in a substantive capacity, and she had completed more than 8 years of continuous service as an Assistant Commissioner of Sales Tax which was a post declared to be equivalent to the post of Deputy Collector. She had not completed the age of 54 years, and there was no dispute about her outstanding merit and ability. The CAT, however, rejected the prayer for interim relief, solely on the ground that by the time the matter was considered by the CAT, the selection had already been completed, and therefore, the interim prayer as sought could not be granted. In the High Court, it was however contended on behalf of the Commissioner for Commercial Tax, that if the criterion was to be applied as it is, the number of officers to be considered from the Commercial Tax Department itself would be more than 300. It was submitted that there are in all 30 departments in the State Government, and therefore, the Commissioner and other heads of department were well within their power to restrict the zone of consideration up to a particular level, from which the names may be forwarded. It was also pointed out on behalf of the Government that, if the criterion as insisted by the appellant was applied, some of the persons of the rank of Assistant Commissioners or Deputy Commissioners will get selected, they will become superior to Joint and Additional Commissioners, and will write the Annual Confidential Reports of such officers who were presently holding posts higher to them. The High Court posed the question, as to whether the names of these junior officers should be mechanically forwarded. In paragraph 19 of the judgment the High Court held as follows:-

> "19. In the present case, the Commissioner did not strictly go by rule of seniority among the eligible officers in the Commercial Taxes Department. The course adopted by him is that since a large number of officers have to be forwarded going by the criteria of eligibility as per Regulation 4 (iii) and G.O.Ms No. 634, he restricted the zone or level of officers for consideration upto the level of Additional Commissioners and Joint Commissioners. Thus this is a case where the seniority rule has not been followed but the zone of consideration has been restricted upto a particular level……."

15. Again, in paragraph 23, the High Court observed that just because the appellant officers satisfy the criteria and are eligible officers, their names could not be forwarded. This is because the number of vacancies to be filled was 3, and the number of candidates to be recommended will be 5 times that number i.e. 15 only. The High Court therefore, held that the Commissioner of Commercial Taxes had the power to restrict the zone of consideration in sending the names above the level of Additional Commissioners and Joint Commissioners. The Writ Petition filed by the appellant was, therefore, dismissed.

16. It is material to note, that a counter affidavit has been filed on behalf Government of Andhra Pradesh, where in para 4 it is stated as follows:-

> "4. I say and submit that there may be large number of officers who will meet above eligibility but number has to be restricted to five times the vacancies for consideration from all departments put together. Commercial Taxes Department is one of departments in the State. There are more than 30 departments in the State. There were only (3) vacancies. Hence maximum number that could be considered by the Committee was (15) for all departments put together. In order to have healthy competition and to avoid unhealthy competition, out of all eligible persons having outstanding merit and ability, persons having highest seniority were recommended. …"

17. The question for our consideration is whether such a restriction of the candidates to be considered, who were otherwise eligible, was permissible under the rules. It is not disputed that the petitioner was very much eligible for being considered, and there were so many similar eligible candidates. It was being portrayed by the respondents that from every department 300 persons were eligible, and there are 30 departments and therefore, the number would go to some 9,000 and above. Now, what is to be noted is that all that the eligible officers concerned have, is a limited right of being considered, though they do not have a right of promotion, as held in *Shankarsan Dash Vs. Union of India* 1991 (3) SCC 47. Mr. Narshimha submitted that this limited right should not be denied to the candidates like the appellant, on the basis of the ground that in such a case a large number of names will have to be forwarded. That apart, he submitted that there was no substance in this justification, and it was merely a bogie. This is because what the State Government had to do first was to find out as to who fulfilled the criteria. Undoubtedly, a large number of persons will fulfill the criteria, being Gazetted Officers with more than 8 years of service, and less than 54 years of age on the relevant date. They would also have to be in the required pay scale. However, as stated in paragraph 4 of the Principal Secretary's letter, while considering the outstanding merit and ability, those with adverse remarks and those facing departmental enquiries were to be excluded. Therefore, there was no difficulty in excluding such persons on those grounds. Thereafter, what remained to be seen was as to who were the persons with outstanding ability and merit amongst them? The State Government maintains their annual appraisal reports, and for such selection it lays down some criteria of maintaining the outstanding merit and ability over certain period viz. that in previous five years the officer must have 3 outstanding reports, or that in the previous 3 years the officer concerned must have all throughout an outstanding rating etc. It is for the State Government to lay down by rules as to how the outstanding merit and ability is to be assessed, and over how much period.

After all these tests are applied, the number of persons to be recommended will not be very large. However, once a candidate comes into the zone of consideration, and satisfies all the requirements, including that of outstanding merit and ability, he cannot be told that merely because he is junior in the seniority, his name will not be forwarded for consideration. The rule requires that from amongst the outstanding officers, 15 names are to be forwarded to the Central Government, and hence it is possible that amongst these 15, a junior officer may as well figure, depending upon the assessment of his merit. He cannot be eliminated merely on the ground that he is a junior officer, and that if selected he will write the ACRs of his superiors.

18. We have got to accept that, if the rules for selection contain a requirement, the same has to be applied uniformly and strictly, and none from the eligible group can be eliminated from being considered on any criteria, other than those which are provided in the rules. If there is a criteria laid down for selection, the Administration has to confine to the same, and it cannot impose an additional criterion over and above whatever has been laid down. If that is done, it will no longer remain an exercise of discretion, but will result into discrimination. It will mean treating similarly situated employees dissimilarly, and denying equal opportunity to some of them in the matter of public employment on the basis of a criterion which is not laid down, resulting into violation of Articles 14 and Article 16(1) of the Constitution of India. If the rules were to provide that in the event of large number of persons coming into the zone of consideration, the names of the senior most alone will be forwarded, then it would have been a different situation. In the absence any such restrictive rule, as in the present case, the decision of the respondents cannot be justified.

19. In view of the reasons stated above, we accept the submissions canvassed on behalf of the appellant. The prayers in the O.A. filed by the appellant were negatively worded viz. to declare that the action of the respondents not to consider

the case of the appellant, and not to forward her name, was illegal. In a way it was a prayer for a positive declaration viz., that the appellant and persons situated like her were entitled to be considered by the committee, if they are otherwise eligible. We are of the view that, the appellant is entitled to such a positive declaration, which order takes care of the prayer as made in the Original Application.

20. In the circumstances we allow this appeal, set-aside the impugned judgment and order of the High Court as well as of the Central Administrative Tribunal, modify the relief as prayed in the O.A., and hold that the decision of the Respondents not to consider the appellant for the selection, amounted to her being treated dissimilarly, though she was situated similarly to the recommended officers. The decision was violative of Article 14 and Article 16(1) of the Constitution, since it was arrived at on the basis of a criterion which was not laid down. However, the selection for the year 2011 was over, even before the interim application in the CAT was decided. Setting aside the selection conducted some two years back, and asking the respondents to re-do the exercise after considering the appellant and other similarly situated candidates, would create lot of uncertainty, in as much as the appellant and such other similarly situated candidates, might or might not finally succeed in the selection process. Hence, it will not be proper now to set aside the selection of the selected candidates. Therefore, though this declaration is being granted, viz. that the appellant and persons situated like her were entitled to be considered by the committee, no further relief in that behalf can be granted to them. The opinion rendered by us will have to operate prospectively in the matter of application of the concerned rules, for the future selections. Hence, this appeal is being allowed in part.

21. We cannot, however, ignore that the appellant had to resort to this litigation for no fault of hers. The non consideration of her claim was totally unjust. Hence, even though for the reasons that we have stated earlier, the appellant can not get

the relief in the nature of a direction to consider her for the selection which she had sought, she must get the damages for non-consideration on unjust grounds. This is because, the Commissioner for Commercial Tax had acted to reduce the zone of consideration, contrary to the rules, and inspite of a letter dated 1.7.2010 from the Principal Secretary Revenue (CT-I) Department, which had clarified that the Commissioner may send the proposals of the eligible candidates of the cadre of Assistant Commissioners and above, who were of outstanding merit. The award of damages is necessary also because, a message must go down that those who are responsible for administration of the State cannot trample upon the rights of others on the grounds which are unsustainable in law. We, therefore, direct the State of Andhra Pradesh to pay the damages of rupees fifty thousand to the appellant. This will be over and above the litigation cost of rupees twenty five thousand, which we hereby award.

22. The issue involved in the appeal arising from the second SLP (C) No. 16042/2012 is same as the one in the earlier matter. We have heard Mr. Jayant Bhushan, learned senior counsel for the petitioner in the second matter, as well as, the counsel for the respondents. For the reasons stated in the first matter, we grant leave in this matter and pass the same order, as in the first one. This appeal will also stand allowed, accordingly, with damages quantified at rupees fifty thousand, and cost of rupees twenty five thousand to be paid by the first respondent.

23. We direct that the amounts towards the damages and the cost be paid to both the appellants within six weeks from the receipt of a copy of this order. In both these appeals, it will be open to the State Government to recover these amounts from the then Commissioner of Commercial Tax, and/or whoever were the officers responsible for the non-consideration of the claim of both the appellants.

R.P. Appeals partly allowed.

CENTRE FOR PUBLIC INTEREST LITIGATION
v.
UNION OF INDIA AND OTHERS
(Writ Petition (Civil) No. 681 of 2004)

OCTOBER 22, 2013.

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

PUBLIC HEALTH:

Food articles injurious to public health -- Held: Art. 21 of the Constitution of India guarantees the right to live with dignity - Any food article which is hazardous or injurious to public health is a potential danger to fundamental right to life guaranteed under Art.21 - Children and infants are uniquely susceptible to the effects of pesticides because of their physiological immaturity and greater exposure to soft drinks, fruit based or otherwise - A paramount duty is cast on the State and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Art. 21 read with Art. 39(e) and (f) and Art. 47 of the Constitution - Therefore, provisions of FSS Act and PFA Act and the rules and regulations framed thereunder have to be interpreted and applied in the light of the Constitutional principles, and endeavour has to be made to achieve an appropriate level of protection of human life and health - Considerable responsibility is cast on the Authorities as well as the other officers functioning under the Acts to achieve the desired results - Constitution of India, 1950 - Ars. 21, 39(e)(f) and 47 -- Food Supply and Standards Act, 2006 -- Prevention of Food Adulteration Act, 1954.

PUBLIC INTEREST LITIGATION:

Writ petition before Supreme Court - For constituting a Committee of Experts to evaluate harmful effects of soft drinks

on human health particularly on health of children, and to take regulatory measures - Held: Adequate provisions have already been made in various Acts, Rules and Regulations -- By and large, the various grievances raised by the petitioner are covered by the legislations - Their enforcement has to be ensured by the authorities concerned -- FSS Act has been enacted to consolidate laws relating to food and to establish the Food Safety and Standards Authority in India for laying down science based standards for articles of food -- It provides for machinery for examining the grievances and if a citizen has got any complaint with regard to the ingredients of any soft drinks, he can approach the machinery -- On the basis of the orders passed by the Court and in exercise of powers conferred u/s 13(4) of the FSS Act, the Food Authority, constituted an expert Scientific Panel on Labelling and Claims/Advertising and that Panel, after examining the various grievances raised by the petitioner and giving an opportunity of being heard, passed an order on 12.9.2012 - Food and Safety Standards Authority of India is, further directed to gear up their resources with their counterparts in all the States and Union Territories and conduct periodical inspections and monitoring of major fruits and vegetable markets, so as to ascertain whether they conform to such standards set by the Act and the Rules - Respondents shall strictly follow the provisions of the FSS Act as well as the Rules and Regulations framed thereunder - Constitution of India, 1950 - Arts.21, 39(e), (f) and 47 - Food Supply and Standards Act, 2006 -- Prevention of Food Adulteration Act, 1954, Food Safety and the Standards (Food Products Standards and Food Additives) Regulations, 2011 -- Food Safety and Standards (Packaging and Labelling) Regulations, 2011-- Fruit Products Order, 1955.

The petitioner in the instant writ petition filed in public interest, sought for constituting an independent Expert/ Technical Committee to evaluate the harmful effects of soft drinks on human health, particularly on the health of

children and for a direction to the Union of India to take regulatory measures in this regard. It was mainly submitted that there was no proper regulatory regime in place to evaluate the harmful effects of soft drinks on human health, particularly on the health of children and also there was no mechanism to control and check the contents in particular, chemical additives in food, including soft drinks.

Disposing of the petition, the Court

HELD: 1.1 The manufacture and sale of carbonated soft drinks is regulated by the Prevention of Food Adulteration Act, 1954 (PFA Act), the PFA Rules and the Fruit Products Order, 1955 issued under the Essential Commodities Act, 1955. Adequate provisions have already been made and Rules and Regulations are in force for prescribing labelling requirements as per Rule 32 to Rule 44 of PFA Rules, 1955. As per Rule 32 of PFA Rules, as amended by notification GSR (E) dated 19.9.2008, declaration of all the ingredients of the food products and in particular soft drinks, is required to be made in the descending order and Nutritional Information is also required to be declared. Adequate provisions are also in place under PFA together with the Rules and Regulations made in that behalf to deal with misleading advertisements. Reference may also be made to Rule 43A of PFA Rules, 1955. [para 16 & 18] [1121-G; 1122-F-H; 1123-A]

1.3 By and large, the various grievances raised by the petitioner are covered by the legislations, namely, the Food Suuply and Standards Act, 2006(FSS Act), the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, the Food Safety and Standards (Packaging and Labelling) Regulations, 2011, Prevention of Food Adulteration Act and the Rules framed thereunder, etc. Most of the situations have already been

taken care of by the provisions of the FSS Act as well as the Regulations, so as to achieve an appropriate level of protection of human life and health and protection of consumers' interest, including fair practices in all counts of food trade with reference to food safety standards and practices. Their enforcement has to be ensured by the authorities functioning under the said legislations. [para 3 and 15] [1110-D-E; 1121-E-F]

1.4 FSS Act has been enacted to consolidate laws relating to food and to establish the Food Safety and Standards Authority in India for laying down science based standards for articles of food. It provides for machinery for examining the grievances and if a citizen has got any complaint with regard to the ingredients of any soft drinks, he can approach the machinery. Section 40 of FSS Act also enables the purchaser of any article of food to get analyzed such food from the Food Analyst. The Act is also intended to regulate the manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption. The Act is based on international legislations, instrumentalities and Codex Alimentarius Commission (CAC). "Codex India" the National Codex Contact Point (NCCP) for India, coordinates and promotes Codex activities in India in association with the National Codex Committee and facilitates India's input to the work of Codex through an established consultation process. The Act empowered the Central Government to constitute the Food Safety and Standards Authority of India u/s 4 of the FSS Act. The Food Authority is also authorised to constitute a Central Advisory Committee, so also Scientific Panels. [para 7-9] [1112-H; 1113-A-B, C-D, F-H]

1.5 On the basis of the orders passed by this Court on 8.2.2011 and 15.4.2011 and in exercise of powers conferred u/s 13(4) of the FSS Act, the Food Authority,

constituted an expert Scientific Panel on Labelling and Claims/Advertising and that Panel, after examining the various grievances raised by the petitioner and giving an opportunity of being heard, passed an order on 12.9.2012. [para 6] [111-F-G]

1.6 The General Principles of Food Safety in Chapter III of the Act are to be followed in the administration of the Act, by the Central Government, the Food Authority, the State Governments and other agencies, while implementing the regulations and specifying food safety standards or while enforcing or implementing the provisions of the FSS Act. The Food Authority, while discharging its functions, shall take into account the prevailing practices and conditions in the country, including agricultural practices and handling, storage and transport conditions, including international standards and practices. The Food Authority shall be guided by the general principles of food safety, such as, risk analysis, risk assessment, risk management, risk communication, transparent public consultation, protection of consumers' interest, etc. [para 11] [1118-B-E]

1.7 Art. 21 of the Constitution of India guarantees the right to live with dignity. Any food article which is hazardous or injurious to public health is a potential danger to the fundamental right to life guaranteed under Art.21 of the Constitution. Children and infants are uniquely susceptible to the effects of pesticides because of their physiological immaturity and greater exposure to soft drinks, fruit based or otherwise. A paramount duty is cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Art. 21 read with Art. 39(e) and (f) and Art. 47 of the Constitution. [para 21 and 23] [1124-B-D; 1125-A-B]

1.8 This Court is, therefore, of the view that the provisions of the FSS Act and PFA Act and the rules and regulations framed thereunder have to be interpreted and applied in the light of the Constitutional principles, and endeavour has to be made to achieve an appropriate level of protection of human life and health. Considerable responsibility is cast on the Authorities as well as the other officers functioning under the Acts to achieve the desired results. Authorities are also obliged to maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food safety surveillance and other monitoring activities covering all stages of food business. [para 22] [1124-D-F]

1.9 The Food and Safety Standards Authority of India is, therefore, directed to gear up their resources with their counterparts in all the States and Union Territories and conduct periodical inspections and monitoring of major fruits and vegetable markets, so as to ascertain whether they conform to such standards set by the Act and the Rules. [para 24] [1125-B-C]

1.10 Penal provisions are also provided in the Act. It is, therefore, of utmost importance that the provisions of the Acts are properly and effectively implemented so that the State can achieve an appropriate level of human life and health, safeguarding the right to life guaranteed under Art. 21 of the Constitution of India. The respondents shall strictly follow the provisions of the FSS Act as well as the Rules and Regulations framed thereunder. [para 25-26] [1125-D-E]

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 681 of 2004.

Under Article 32 of the Constitution of India.

Prashant Bhushan, Rohit Kumar, Sumit Sharma, for the Petitioner Pallav (Appellant-in-person).

Mukul Rohatgi, Amit Sibal, R.N. Karanjawala, Ruby Singh Ahuja, Deepti Sarin, Udit Mendiratta, Ishan Gaur (for Manik Karanjawala, Binu Tamta, A. Deb Kumar D.S. Mahra, Sushma Suri, Ravinder Narain, Kanika Gomber, Namita Kaul, Amrita Chatterjee, Rajan Narain, Ankur Talwar, S. Hariharan, Rajeshwari H., Kunal Chandra Agrawal for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The writ petition was preferred for constituting an independent Expert/Technical Committee to evaluate the harmful effects of soft drinks on human health, particularly on the health of the children, and also for a direction to respondent No. 1 - Union of India - to put in place a regulatory regime which could control and check the contents in a particular chemical additive in foods, including soft drinks. Further, direction was also sought for against respondent no. 1 to make it mandatory for the soft drinks manufacturers to disclose the contents and their specific quantity on the labels of soft drinks, including appropriate warnings, qua a particular ingredient, and its harmful effects on the people. Petitioner has also sought for a direction to respondent no. 1 to check and control the misleading advertising of soft drinks, particularly advertisements targeted at children, unwary uneducated and illiterate people.

2. The Union of India and other respondents have maintained the stand that the Food Supply and Standards Act, 2006 (the FSS Act), along with its Rules and Regulations framed thereunder, constitute a vigorous regulatory regime, which takes care of all the above mentioned situations and provisions of the FSS Act and the Rules and Regulations are being enforced scrupulously and meticulously. Over and above, it was pointed, in pursuance to the orders passed by this Court

on 8.2.2011 and 15.4.2011, the Food and Safety Standards Authority of India (for short "the Food Authority") examined the various grievances raised by the petitioner and passed the order on 12.9.2012. The findings recorded in the order dated 12.9.2012 passed by the Food Authority would allay all the fears and apprehensions raised by the writ petitioner and in any view the same could be taken care of by the authorities functioning under the provisions of the FSS Act as well as the Rules and Regulations framed thereunder. Further, it was also pointed out that if the petitioner or any other citizen has any grievance, he can always approach the statutory authorities functioning under the FSS Act and, hence, no further directions are called for from this Court under Article 32 of the Constitution of India.

3. We have gone through the various provisions of the FSS Act, the Food Safety and the Standards (Food Products Standards and Food Additives) Regulations, 2011, the Food Safety and Standards (Packaging and Labelling) Regulations, 2011, Prevention of Food Adulteration Act and the Rules framed thereunder, etc. In our view, by and large, the various grievances raised by the petitioner are seen covered by the above mentioned legislations, but the question is only with regard to their enforcement by the authorities functioning under these legislations.

4. We have already indicated that the main apprehension of the petitioner is that there is no proper regulatory regime in place to evaluate the harmful effects of soft drinks on human health, particularly on the health of children and also there is no mechanism to control and check the contents in particular chemical additive in food, including soft drinks. Petitioner also submitted that, though two separate scientific panels for additives, labelling and advertising were constituted on the basis of the directions given by this Court, the petitioner's grievances regarding the ingredients of soft drinks were considered by the scientific panel on labelling and advertising and not by the scientific panel on food additives. Petitioner

submitted that the issue could have been considered by the scientific panel for food additives only and not by the panel which has been constituted to consider issues of labelling and advertising. The petitioner also submitted that even the recommendations made by the Ganguly Committee were not followed by the above mentioned committees. Ganguly Committee has recommended for a "well controlled studies to assess effects of consumption of carbonated water on health" and also an independent cell for "risk analysis". Petitioner has pointed out that consumption of large amount of Caffeine (methylated xanthine) can cause diseases and disorders, such as, insomnia, nervousness, anxiety and so on, which has been used as an additive in soft drinks and is harmful to human life. In support of this contention, reference has been made to various research papers which have highlighted the harmful effects of consumption of Caffeine.

5. Petitioner has also highlighted the harmful effects on children created through misleading advertising, for which reference has been made on the study conducted by the World Health Organisation (WHO) and also on various study papers published in the several International journals, highlighting the impact of advertising on children and its harmful effects.

6. We have already indicated that on the basis of the orders passed by this Court on 8.2.2011 and 15.4.2011 and in exercise of powers conferred under Section 13(4) of the FSS Act, the Food Authority, constituted an expert Scientific Panel on Labelling and Claims/Advertising and that Panel, after examining the various grievances raised by the petitioner and giving an opportunity of being heard, passed an order on 12.9.2012, the operative portion of the same reads as under:

> "a) Soft drinks as referred in the representation (Petitioner's representation dated 18.03.2011), are regulated as carbonated water in accordance with the standards under Food Safety and Standard Regulation, 2011." "(W)ith the existing consumption pattern prevalent in the country as reported in the above referred data, the ingredients present in the beverage do not appear to pose any health hazard."
>
> b) The labelling of soft drinks is governed by the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. "(T)he labelling provisions of carbonated beverages is in compliance with the Food Safety and Standards (Packaging and Labelling) Regulations, 2011."
>
> c) The advertisement of carbonated beverages is governed inter alia by the Prevention of Food Adulteration Act, 1954, Food Safety and Standards (Restriction of Advertisement) and Regulation, 2011 and the Advertising Standards Council of India (ASCI) Code. The advertisement of carbonated beverages complies with the provisions of the Prevention of Food Adulteration Act, 1954, the Food Safety and Standards (Restriction of Advertisement) Regulation 2011 and the ASCI Code."

7. We find that the scientific panel consists of eminent food scientists, chemical engineers, nutritionists, public health experts, toxicologists etc. Petitioner raised the contention that the objection raised by it was considered by the Committee whose title is the Scientific Panel on Labelling and Claims/ Advertising, even though the Food Authority has a panel with the words "Food Additives" in its title. We find not much force in this contention, when we examine the credentials of the members of the scientific panel on labelling/advertising. Further, we notice that the grievances were examined by the experts who are scientific experts, not by the members of the panel chosen, who are only conversant with labelling/advertising etc. In any view, we notice that the Act provides for a machinery for examining the grievances and if a citizen has got any

complaint with regard to the ingredients of any soft drinks, he can approach the machinery. Section 40 of FSS Act also enables the purchaser of any article of food to get analyzed such food from the Food Analyst after informating the food business operator at the time of purchase of his intention to have such article so analyzed. The Statute also provides penal provisions in case there is a contravention or non-compliance of the regulations framed.

8. FSS Act has been enacted to consolidate laws relating to food and to establish the Food Safety and Standards Authority in India for laying down science based standards for articles of food. The Act is also intended to regulate the manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption. The Act is based on international legislations, instrumentalities and Codex Alimentarius Commission (CAC). CAC was created in 1961/62 by the Food and Agricultural Organization of United Nations (FAO) and WHO to develop the food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. The main purpose this programme is to protect the health of consumers, ensure fair practices in the food trade, and promote coordination of all food standards work undertaken by international governmental and non-governmental organizations. "Codex India" the National Codex Contact Point (NCCP) for India, coordinates and promotes Codex activities in India in association with the National Codex Committee and facilitates India's input to the work of Codex through an established consultation process.

9. The Act empowered the Central Government to constitute the Food Safety and Standards Authority of India (hereinafter being referred to as "the Food Authority") under Section 4 of the FSS Act. The Food Authority is also authorised to constitute a Central Advisory Committee, so also Scientific Panels. Section 13 of the FSS Act states that the

Food Authority shall establish scientific panels which shall consist of independent scientific experts with representatives of industry and consumer organisations in its deliberations. The Food Authority may also establish as many scientific panels, as it considers necessary, in addition to panels on food additives, flavourings, processing aids and materials in contact with food; pesticides and antibiotics residues. The Food Authority, under Section 14 of the FSS Act, can also constitute Scientific Committee consisting of Chairpersons of Scientific Panels and six independent scientific experts not belonging to any of the scientific panels. The Committee shall be responsible for providing the scientific opinions to the Food Authority and shall have the powers for organising public hearings. The Scientific Committee shall provide opinion on multi-sectoral issues falling within the competence of more than one Scientific Panel and set up working groups on issues which does not fall under scientific panels. The duties and functions of the Food Authority have been elaborately dealt with in Section 16 of the FSS Act, which states that it shall be the duty of the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food, and shall specify, by regulations, the standards and guidelines in relation to articles of food, mechanisms and guidelines for accreditation of certification bodies engaged in certification of food safety management systems for food businesses and notify the accredited laboratories etc.

10. Chapter III deals with the general principles of food safety. The said provisions are extracted hereunder for an easy reference:

"CHAPTER III

GENERAL PRINCIPLES OF FOOD SAFETY

18. General principles to be followed in administration of Act.- The Central Government, the State Governments, the Food Authority and other

agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following principles, namely:-

(1) (a) endeavour to achieve an appropriate level of protection of human life and health and the protection of consumers' interests, including fair practices in all kinds of food trade with reference to food safety standards and practices;

(b) carry out risk management which shall include taking into account the results of risk assessment, and other factors which in the opinion of the Food Authority are relevant to the matter under consideration and where the conditions are relevant, in order to achieve the general objectives of regulations;

(c) where in any specific circumstances, on the basis of assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure appropriate level of health protection may be adopted, pending further scientific information for a more comprehensive risk assessment;

(d) the measures adopted on the basis of clause (c) shall be proportionate and no more restrictive of trade than is required to achieve appropriate level of health protection, regard being had to technical and economic feasibility and other factors regarded as reasonable and proper in the matter under consideration;

(e) the measures adopted shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health being identified and the

type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment;

(f) in cases where there are reasonable grounds to suspect that a food may present a risk for human health, then, depending on the nature, seriousness and extent of that risk, the Food Authority and the Commissioner of Food Safety shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or type of food, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk; and

(g) where any food which fails to comply with food safety requirements is part of a batch, lot or consignment of food of the same class or description, it shall be presumed until the contrary is proved, that all of the food in that batch, lot or consignment fails to comply with those requirements.

(2) The Food Authority shall, while framing regulations or specifying standards under this Act-

(a) take into account-

(i) prevalent practices and conditions in the country including agricultural practices and handling, storage and transport conditions; and

(ii) international standards and practices, where international standards or practices exist or are in the process of being formulated, unless it is of opinion that taking into account of such prevalent practices and conditions or international standards or practices or any particular part thereof would not

be an effective or appropriate means for securing the objectives of such regulations or where there is a scientific justification or where they would result in a different level of protection from the one determined as appropriate in the country;

(b) determine food standards on the basis of risk analysis except where it is of opinion that such analysis is not appropriate to the circumstances or the nature of the case;

(c) undertake risk assessment based on the available scientific evidence and in an independent, objective and transparent manner;

(d) ensure that there is open and transparent public consultation, directly or through representative bodies including all levels of panchayats, during the preparation, evaluation and revision of regulations, except where it is of opinion that there is an urgency concerning food safety or public health to make or amend the regulations in which case such consultation may be dispensed with: Provided that such regulations shall be in force for not more than six months;

(e) ensure protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume;

(f) ensure prevention of-

(i) fraudulent, deceptive or unfair trade practices which may mislead or harm the consumer; and

(ii) unsafe or contaminated or sub-standard food.

(3) The provisions of this Act shall not apply to any

farmer or fisherman or farming operations or crops or livestock or aquaculture, and supplies used or produced in farming or products of crops produced by a farmer at farm level or a fisherman in his operations."

11. The general principles referred to above are to be followed in the administration of the Act, by the Central Government, the Food Authority, the State Governments and other agencies, while implementing the regulations and specifying food safety standards or while enforcing or implementing the provisions of the FSS Act. The Food Authority, while discharging its functions, shall take into account the prevailing practices and conditions in the country, including agricultural practices and handling, storage and transport conditions, including international standards and practices. The Food Authority shall be guided by the general principles of food safety, such as, risk analysis, risk assessment, risk management, risk communication, transparent public consultation, protection of consumers' interest, etc. Section 19 of the Act stipulates that no article of food shall contain any food additive or processing aid unless it is in accordance with the provisions of the Act and regulations made thereunder.

12. Section 21 is of paramount importance and is extracted hereunder for an easy reference:

"21. Pesticides, veterinary drugs residues, antibiotic residues and micro- biological counts.-(1) No article of food shall contain insecticides or pesticides residues, veterinary drugs residues, antibiotic residues, solvent residues, pharmacological active substances and micro- biological counts in excess of such tolerance limits as may be specified by regulations.

(2) No insecticide shall be used directly on article of food except fumigants registered and approved under the Insecticides Act, 1968.

Explanation.- For the purposes of this section,-

(1) "pesticide residue" means any specified substance in food resulting from the use of a pesticide and includes any derivatives of a pesticide, such as conversion products, metabolites, reaction products and impurities considered to be of toxicological significance and also includes such residues coming into food from environment;

(2) "residues of veterinary drugs" include the parent compounds or their metabolites or both in any edible portion of any animal product and include residues of associated impurities of the veterinary drug concerned."

The above mentioned section provides that no article of food shall contain insecticides or pesticides, veterinary drugs residues, antibiotic residues, solvent residues, pharmacological active substances and micro-biological counts in excess of such tolerance limit as may be specified by the regulations. It also provides that no insecticide shall be used directly on articles of food except fumigants registered and approved under the Insecticide Act, 1968.

13. Section 24 of the FSS Act deals with restrictions of advertisement and prohibition as to unfair trade practices and reads as follows:

"24. Restrictions of advertisement and prohibition as to unfair trade practices.- (1) No advertisement shall be made of any food which is misleading or deceiving or contravenes the provisions of this Act, the rules and regulations made thereunder.

(2) No person shall engage himself in any unfair trade practice for purpose of promoting the sale, supply, use and consumption of articles of food or adopt any unfair or

deceptive practice including the practice of making any statement, whether orally or in writing or by visible representation which-

(a) falsely represents that the foods are of a particular standard, quality, quantity or grade- composition;

(b) makes a false or misleading representation concerning the need for, or the usefulness;

(c) gives to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof:

Provided that where a defence is raised to the effect that such guarantee is based on adequate or scientific justification, the burden of proof of such defence shall lie on the person raising such defence."

The above mentioned Section provides for restrictions on advertising of any food which misleads or contravenes the provisions of the FSS Act or the rules and regulations framed thereunder. It also provides for prohibition as to any unfair trade practice for the purpose of promoting sale, supply, use and consumption of articles of food or adoption of any unfair or deceptive practice to mislead the public regarding the standards, quality, quantity, usefulness or giving of any guarantee of the efficacy that is not based on an adequate or scientific justification thereof.

14. The Food Authority, in exercise of its powers conferred under clause (e) of sub-section (2) of Section 92 read with Section 16 of the FSS Act, made the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011. The same is intended to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure the safe and wholesome food. The contents of soft drinks, in particular, are regulated by

Regulation 2.10.6 of the Regulations under the title "Carbonated Water". Food Authority is also conferred with the powers under clause (k) of sub-section (2) of Section 92 read with Section 23 of FSS Act and in exercise of those powers it framed the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. Section 23 read with the above mentioned regulations provides that no person shall manufacture, distribute, sale or expose for sale or despatch or deliver to any agent or broker for the purpose of sale, any packaged food products which are not marked and labelled in the manner, as may be specified. It further provides that every food business operator shall ensure that the labelling and presentation of food does not mislead the consumers. Section 24, which we have already referred to earlier, provides for restriction on advertisement of any food which misleads or contravenes the provisions of the FSS Act or the rules and regulations made thereunder. Advertisements for carbonated beverages are being monitored by the Advertisement Standards Council of India (ASCI), as per the above mentioned regulations as well as the ASCI Code.

15. We may indicate that most of the situations have already been taken care of by the above mentioned provisions of the FSS Act as well as the regulations mentioned hereinbefore, so as to achieve an appropriate level of protection of human life and health and protection of consumers' interest, including fair practices in all counts of food trade with reference to food safety standards and practices.

16. The manufacture and sale of carbonated soft drinks is regulated by the Prevention of Food Adulteration Act, 1954 (PFA Act), the PFA Rules and the Fruit Products Order, 1955 issued under the Essential Commodities Act, 1955. Section 3 of the PFA Act provides for constitution of a Committee called the Central Committee for Food Standards (CCFS) and the same is already constituted which has very wide powers, to deal with all matTers relating to food items and to advise the

Central Government and the State Governments on all matters relating to Food and to carry out the other functions assigned to it under the Act. Section 23(1) of the PFA Act enjoins a duty upon the Central Government, after consultation with the CCFS, to make rules which, inter alia, prescribes standards of quality for 340 food items in Appendix B and the labelling requirements for all foods in Part VII. Under Rule 44 in Part VIII of the PFA Rules, notifications have been issued from time to time regulating or prohibiting the sale of various ingredients/foods keeping in view the specific nature of those ingredients/foods based upon scientific study. CCFS and its sub-committees on various issues are not only seized of the process of implementing the standards but are also involved in regularly reviewing the standards and various additives that are used in the manufacture/processing of any article of food.

17. The PFA Act, the PFA Rules and the FPO already control and check the contents, in particular chemical additives in food including soft drinks. Section 2(v) of the Act defines "food". This definition also includes in itself any flavouring matter or condiments. The Central Government has been given the power to notify any other articles which having regard to its use, nature, substance or quality to be declared as food for the purposes of this Act. The Central Government has the power under Section 23 of the Act to take steps under Part VII of the PFA Rules to prohibit and regulate the sale of certain foods.

18. Adequate provisions have already been made and Rules and Regulations are in force for prescribing labelling requirements as per Rule 32 to Rule 44 of PFA Rules, 1955. As per Rule 32 of PFA Rules, as amended vide notification GSR (E) dated 19.9.2008, declaration of all the ingredients of the food products and in particular soft drinks, is required to be made in the descending order and Nutritional Information is also required to be declared.

Adequate provisions are also in place under PFA together

with the Rules and Regulations made in that behalf to deal with misleading advertisements. Reference may also be made to Rule 43A of PFA Rules, 1955.

19. Article 21 of the Constitution of India guarantees the right to live with dignity. The right to live with human dignity denies the life breach from the Directive Principles of the State Policy, particularly clauses (e) and (f) of Article 39 read with Article 47 of the Constitution of India. Article 47 reads as follows:

> **"47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.**- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

20. Article 12 of the International Covenant on Economics, Social and Cultural Rights, 1966 reads as follows:

> "12.- (1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;

> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions which would assure to a medical service and medical attention in the event of sickness."

21. We may emphasize that any food article which is hazardous or injurious to public health is a potential danger to the fundamental right to life guaranteed under Article 21 of the Constitution of India. A paramount duty is cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Article 21 read with Article 47 of the Constitution of India.

22. We are, therefore, of the view that the provisions of the FSS Act and PFA Act and the rules and regulations framed thereunder have to be interpreted and applied in the light of the Constitutional Principles, discussed above and endeavour has to be made to achieve an appropriate level of protection of human life and health. Considerable responsibility is cast on the Authorities as well as the other officers functioning under the above mentioned Acts to achieve the desired results. Authorities are also obliged to maintain a system of control and other activities as appropriate to the circumstances, including public communication on food safety and risk, food safety surveillance and other monitoring activities covering all stages of food business.

23. Enjoyment of life and its attainment, including right to life and human dignity encompasses, within its ambit availability of articles of food, without insecticides or pesticides residues, veterinary drugs residues, antibiotic residues, solvent residues, etc. But the fact remains, many of the food articles like rice, vegetables, meat, fish, milk, fruits available in the market contain insecticides or pesticides residues, beyond the tolerable limits, causing serious health hazards. We notice, fruit based soft

drinks available in various fruit stalls, contain such pesticides residues in alarming proportion, but no attention is made to examine its contents. Children and infants are uniquely susceptible to the effects of pesticides because of their physiological immaturity and greater exposure to soft drinks, fruit based or otherwise.

24. We, therefore, direct the Food and Safety Standards Authority of India, to gear up their resources with their counterparts in all the States and Union Territories and conduct periodical inspections and monitoring of major fruits and vegetable markets, so as to ascertain whether they conform to such standards set by the Act and the Rules.

25. Penal provisions are also provided in the Act. It is, therefore, of utmost importance that the provisions of the Acts are properly and effectively implemented so that the State can achieve an appropriate level of human life and health, safeguarding the right to life guaranteed under Article 21 of the Constitution of India.

26. The Writ Petition is disposed of with the above directions, leaving its respondents, as already indicated, to strictly follow the provisions of the FSS Act as well as the Rules and Regulations framed thereunder.

R.P. Writ Petition disposed of.

MARY

v.

STATE OF KERALA AND ORS.

(Civil Appeal No. 9466 of 2003)

OCTOBER 22, 2013.

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

KERALA ABKARI SHOPS (DISPOSAL IN AUCTION) RULES, 1974:

rr. 5 (10), (15) and (19) - Auction purchaser failing to execute the agreement - Forfeiture of deposit - Held: In terms of sub-r. (15) of r. 5, security money deposited by auction purchaser is liable to be forfeited.

CONTRACT ACT, 1872:

s. 56 - Contract to do act, afterwards becoming impossible - Doctrine of frustration - Statutory contract - Auction purchaser finding impossible to run abkari shops due to resistance by local residents, the area being a holy place - State also found it impossible to re-sell or re-dispose of arrack shops -- Held: Doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible -- However, in a statutory contract in which party takes absolute responsibility, it cannot escape liability whatever may be the reason -- In such a situation, events will not discharge the party from the consequence of non-performance of contractual obligation -- Further, in a case in which consequence of non-performance of contract is provided in statutory contract itself, parties shall be bound by that and cannot take shelter behind s. 56 - In the instant case, by reason of sub-r. (15) of r. 5 of 1974 Rules,

State was entitled to forfeit the security money -- In the face of specific consequences having been provided, appellant shall be bound by it and could not take benefit of s.56 - Kerala Abkari Shops (Disposal in Auction) Rules, 1974 -- r. 5(15) - Doctrines/ Principles -- Doctrine of frustration - Doctrine of fairness.

ADMINISTRATIVE LAW:

Doctrine of fairness - Held: It is a doctrine developed in the administrative law field to ensure rule of law and to prevent failure of justice where an action is administrative in nature -- Where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action -- But, it certainly cannot be invoked to amend, alter, or vary an express term of the contract between the parties -- This is so even if the contract is governed by a statutory provision - Sub-r.(15) of r.5 of 1974 Rules cannot be struck down on the ground of reasonableness and fairness -- Kerala Abkari Shops (Disposal in Auction) Rules, 1974 - r.5(15).

The appellant, being the successful bidder in an auction conducted for sale of privilege to vend arrack in two shops, deposited 30% of the bid amount and executed a temporary agreement in terms of r. 5(10) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, which was subject to confirmation by the Board of Revenue. The area being the holy place, the local residents objected to the running of any abkari shop in the area. A large number of people collected and offered physical resistance to the opening of the abkari shops and the law and order enforcing agency could not assure smooth conduct of business. However, the appellant was asked to deposit the balance amount payable by her, together with interest at the rate of 18% thereon. Revenue recovery notice was also issued for realisation of the amount. The appellant challenged the notices in a writ petition before the High Court contending that rr.5(15) and

5(16) were arbitrary and violative of Art. 14 of the Constitution of India. The appellant filed another writ petition, inter alia, praying for direction to the State authorities to refund the amount paid by her as initial deposit. The writ petitions were allowed by the single Judge and the notices and all the proceedings initiated against the appellant were quashed. The amount deposited by the appellant was directed to be refunded along with interest. However, the single Judge did not strike down rr. 5(15) and 5(16). The writ appeal filed as regards the recovery of the balance amount was dismissed whereas the writ appeal against the direction for refund of the initial deposit was allowed by the Division Bench.

In the instant appeal filed by the bidder, the appellant contended, inter alia, that r. 5(15) did not meet the requirement of the doctrine of reasonableness or fairness and on this ground alone the rule would be invalid. However, such a plea was not raised before the High Court. In relation to the validity of the part of the judgment whereby the Division Bench held that the State was entitled to forfeit the entire deposited amount, the question for consideration before the Court was: whether the appellant could invoke the doctrine of frustration or impossibility or whether she was bound by the terms of the statutory contract.

Dismissing the appeal, the Court

HELD: 1. Rule 5(15) of the Kerala Abkari Shops (Disposal In Auction) Rules, 1974 makes it evident that on the failure of the auction purchaser to execute the agreement whether temporary or permanent, the deposit already made by auction purchaser towards earnest money and security money shall be forfeited. Undisputedly, the appellant was declared as auction purchaser and, in fact, she had deposited 30% of the bid

amount in terms of r.5(10) of the Rules. It is further an admitted position that the appellant did not execute a permanent agreement or for that matter, did not execute the privilege. Therefore, in terms of sub-r. (15) of r. 5, the money deposited by her is liable to be forfeited. [para 12] [1139-E-G]

2.1 It is not the case of the State that appellant has purposely, or for any oblique motive, or as a device to avoid any loss, refused to execute the agreement. It appears that the State was helpless because of the public upsurge against the sale of arrack at the holy place. Consequently, the State also found it impossible to re-sell or re-dispose of the arrack shops. [para 13] [1140-B-C]

2.2 In view of second paragraph of s. 56 of the Contract Act, a contract to do an act which after the contract is made, by reason of some event which the promissory could not prevent becomes impossible, is rendered void. Therefore, the forfeiture of the security amount may be illegal. But in the instant case, the consequence for non-performance of contract is provided in the statutory contract itself. The doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. However, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind s. 56 of the Contract Act. Rule 5(15) in no uncertain terms provides that "on the failure of the auction purchaser to make such deposit referred to in

sub-rule (10)" or "execute such agreement temporary or permanent", "the deposit already made by him towards earnest money and security shall be forfeited to Government". In the instant case, the appellant had not carried out several obligations as provided in sub-r. (10) of r. 5 and consequently, by reason of sub-r. (15), the State was entitled to forfeit the security money. In the face of the specific consequences having been provided, the appellant could not take benefit of s.56 of the Contract Act to resist forfeiture of the security money. [para 13] [1140-C-H; 1141-A]

Sushila Devi v. Hari Singh **(1971) 2 SCC 288;** *Har Prasad Choubey v. Union of India* **(1973) 2 SCC 746 - distinguished.**

3.1 The duty to act fairly is sought to be imported into the statutory contract to avoid forfeiture of the bid amount. The doctrine of fairness is nothing but a duty to act fairly and reasonably. It is a doctrine developed in the administrative law field to ensure rule of law and to prevent failure of justice where an action is administrative in nature. Where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action. But, it certainly cannot be invoked to amend, alter, or vary an express term of the contract between the parties. This is so even if the contract is governed by a statutory provision i.e. where it is a statutory contract. In a contract under the Abkari Act and the Rules made thereunder, the licensee undertakes to abide by the terms and conditions of the Act and the Rules made thereunder which are statutory and in such a situation, the licensee cannot invoke the doctrine of fairness or reasonableness. [para 18 and 20] [1144-D-E; 1146-B-C]

Delhi Transport Corporation v. D.T.C.Mazdoor Congress and Another **1990 (1) Suppl. SCR 142=1991 Supp (1) SCC 600; and** *Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another etc.* **1986 (2)**

SCR 278 = (1986) 3 SCC 156 - referred to.

3.2 Therefore, this Court holds that r. 5(15) of the Rules cannot be struck down on the ground urged by the appellant and a statutory contract cannot be varied, added or altered by importing the doctrine of fairness. In such a contract, the licensee takes a calculated risk. The appellant cannot be relieved of the obligations undertaken by her under the contract. [para 18] [1144-G-H]

Assistant Excise Commissioner and Others v. Issac Peter and Others **= 1994 (2) SCR 67 = (1994) 4 SCC 104 - relied on.**

Case Law Reference:

(1971) 2 SCC 288	**distinguished**	**para 8**
(1973) 2 SCC 746	**distinguished**	**para 9**
1986 (2) SCR 278	**referred to**	**Para 15**
1990 (1) Suppl. SCR 142	**referred to**	**para 16**
1994 (2) SCR 67	**relied on**	**para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9466 of 2003.

From the Judgment and Order dated 13.06.2002 of the High Court of Kerala at Ernakulam in W.A. No. 1734 of 1995A.

Neha Aggarwal, Shyam D. Nandan, Subramonium Prasad for the Appellant.

Mukti Chowdhary, Ramesh Babu M.R., G. Prakash for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. The appellant, aggrieved by the judgment and order dated 13.6.2002 passed by the Division Bench of the Kerala High Court in Writ Appeal

No.1734 of 1995 setting aside the judgment and order dated 4.8.1995 passed by learned Single Judge of the said High Court in Original Petition No.12514 of 1994; whereby it had directed for refund of an amount of Rs.7,68,600/- along with interest, is before us with the leave of the Court.

2. The appellant, Mary was a successful bidder in an auction conducted on 24.3.1994 for sale of privilege to vend arrack in Shop Nos. 47 to 55 and 57 in Kalady Range -III for the period 1.4.1994 to 31.3.1995. Her bid was for a sum of Rs.25,62,000/-. The sale of the privilege to vend arrack is governed by the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 (hereinafter referred to as 'the Rules'). The officer conducting the sale declared the appellant to be the 'auction purchaser' in terms of Rule 5(8) of the Rules. Being declared as auction purchaser, she deposited 30% of the bid amount i.e. Rs.7,68,600/- on the same date and executed a temporary agreement in terms of Rule 5(10) which was subject to confirmation by the Board of Revenue. Rule 5(19) makes this deposit as security for due performance of the conditions of licence. Kalady is the holy birth place of Adi Sankaracharya and adjoining thereto existed a Christian pilgrim centre associated with St. Thomas. The residents of those areas objected to the running of any abkari shop. A large number of people collected and offered physical resistance to the opening of the abkari shops and the law and order enforcing agency could not assure smooth conduct of business. The aforesaid circumstances led the appellant to believe that it was impossible for her to run the arrack shop in the locality in question. The appellant, therefore, by her letter dated 3.4.1994 addressed to the Board of Revenue, District Collector and Assistant Commissioner of Excise, informed them that because of mass movement it was not possible for her to open and run the shops. Accordingly, she requested them not to confirm the sale in her favour as it was impossible for her to execute the privilege for the reasons beyond her control. She also requested that the proposed contract may be treated as rescinded. She further reserved her

right to claim refund of the security amount. There is nothing on record to show that after the appellant refused to carry out her obligations, the State Government took any step to re-sell or re-dispose the arrack shops in question.

3. Notwithstanding that, the Excise Inspector of Kalady Range sent a notice dated 8.4.1994 to the appellant, inter alia, stating that the sale has already been confirmed in her favour. The appellant was asked to accept the confirmation notice and enter into a permanent agreement. By the said notice the Excise Inspector also called upon the appellant to show cause as to why further proceedings as contemplated under the Rules should not be initiated against her. The appellant filed her reply to show cause on 17.4.1994 reiterating her inability to run the arrack shops and further requested that all proceedings pursuant to the auction held on 24.3.1994 be cancelled and the amount already deposited by her be refunded to her. It seems that the cause shown by the appellant did not find favour with the authority and the Assistant Excise Commissioner, by notice dated 20.4.1995, called upon the appellant to pay a sum of Rs.33,41,400/- towards the balance amount payable by her, together with interest at the rate of 18% thereon. Revenue recovery notice dated 30.6.1995 was also issued for realisation of the aforesaid amount. The appellant challenged the aforesaid notices issued to her in a writ petition filed before the Kerala High Court which was registered as Original Petition No.9976 of 1995 (Mary vs. State of Kerala & Others). While challenging the aforesaid notices and further proceedings, the appellant contended that Rule 5(15) and 5(16) are arbitrary and violative of Article 14 of the Constitution of India. The appellant filed another writ petition, inter alia, praying for direction to the State authorities to refund an amount of Rs.7,68,600/- paid by her as initial deposit. This writ petition was registered as Original Petition No.12514 of 1994 (Mary vs. State of Kerala & Others).

4. Both the writ petitions were heard together and the learned Single Judge vide judgment dated 4.8.1995 allowed

both the writ petitions. The learned Single Judge quashed the notices and all the proceedings initiated against the appellant and further directed the refund of the amount of Rs.7,68,600/- deposited by her along with interest. However, learned Single Judge did not strike down Rule 5(15) and 5(16). While doing so, learned Single Judge observed as follows:

> "15. The undisputed and uncontroverted facts as appearing above clearly attract the doctrine of frustration and impossibility leading to the conclusion that the contract from its inception becomes void and discharged. Consequently, it is needless to consider and decide other contentions urged as regards excesses of delegated legislation in the forms of the rules, as they are unnecessary altogether in view of the above conclusion. Both these petitions succeed accordingly."

5. The State of Kerala and its functionaries, aggrieved by the aforesaid judgment, preferred separate appeals. Both the appeals were heard together and disposed of by a common judgment. Writ Appeal No.1722 of 1995, filed against the recovery of the balance amount was dismissed. While allowing Writ Appeal No.1734 of 1995 which was against the direction of the learned Single Judge for refund of the initial deposit, the Division Bench held that the State is justified in forfeiting the said amount in view of Rule 5(15). While doing so, the Division Bench observed as follows:

> "8……However, where there are statutory provisions, the contractual terms are defined by the statutory provisions which must govern the relationship between the parties. Where the statute governs the relationship, it is the statutory terms which have to be applied for deciding the disputes between the parties. In this view of the matter, particularly when the contention of invalidity of sub-rule (15) and (16) of Rule 5 was negatived by the learned Single Judge, we are of the view that the rights and liabilities between the parties have to be worked out purely in accordance with

the applicable rules."

6. Accordingly, the Division Bench found that the offer of the appellant having been accepted, same could not have been withdrawn. For coming to the aforesaid conclusion, the High Court placed reliance on sub-rules (10)&(15) of Rule 5 and observed as follows:

> "10. It is on the basis of these rules that the rights of the parties have to be determined. These rules really form the substratum of the contract between the parties, though all disputes arising between the parties have to be resolved in accordance with the principles of contract law, taking the rules as forming the basic contract between the parties. That the accepted offer is incapable of being withdrawn, is clear from the provisions under sub-rule(10) of Rule 5. The first respondent, therefore, could not have purported to withdraw the offer or rescind the contract by letter dated 3.4.1994. That the first respondent did not carry out several obligations as provided in sub-rule (10) of Rule 5 is also beyond dispute. Consequently, by reason of sub-rule(15) of Rule 5 of the Rules, the State was entitled to forfeit the entire deposit amount of Rs.7,68,600/-. Thus far, there is no difficulty. "

7. In the present appeal, we have been called upon to examine the validity of this part of the judgment whereby the Division Bench held that the State was entitled to forfeit the entire deposited amount of Rs. 7,68,600/-.

8. We have heard Ms. Neha Aggarwal for the appellant and Ms. Mukta Chowdhary for respondents. Ms. Aggarwal contends that the appellant could not carry out her obligation as it became impossible in view of the mass movement and resistance which State could not contain. In this connection, she has drawn our attention to Section 56 of the Contract Act. In support of the submission reliance has also been placed on a decision of this Court in the case of *Sushila Devi v. Hari*

Singh, (1971) 2 SCC 288, and our attention has been drawn to Paragraph 11 of the judgment which reads as follows:

> "11. In our opinion on this point the conclusion of the appellate court is not sustainable. But in fact, as found by the Trial Court as well as by the appellate court, it was impossible for the plaintiffs to even get into Pakistan. Both the Trial Court as well as the appellate court have found that because of the prevailing circumstances, it was impossible for the plaintiffs to either take possession of the properties intended to be leased or even to collect rent from the cultivators. For that situation the plaintiffs were not responsible in any manner. As observed by this Court in Satyabrata Ghose v. Mugneeram Bangur and Co.,(1954) SCR 310, the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract."

9. Yet another decision on which Ms. Aggarwal has placed reliance is the decision of this Court in *Har Prasad Choubey v. Union of India,* (1973) 2 SCC 746, in Paragraph 9 whereof

it has been held as follows:

> "9. This elaborate narration would make it clear that the appellant had bid for the coal under the honest and reasonable impression that he would be allowed to transport the coal to Ferozabad, that this was thwarted by the attitude of the Coal Commissioner, that later on the parties proceeded on the basis that the auction sale was to be cancelled and the appellant refunded his money. But apparently because by that time much of the coal had been lost and the Railways would have been in difficulty to explain the loss they chose to deny the appellant's claim. We can see no justification on facts for such a denial and the defendants cannot refuse to refund the plaintiff's amount. The contract had become clearly frustrated. We must make it clear that we are not referring to the refusal to supply wagons but the refusal of the Coal Commissioner to allow the movement of coal to Ferozabad in spite of the fact that it was not one of the conditions of the auction. The appellant is, therefore, clearly entitled to the refund of his money. Furthermore, the contract itself not being in accordance with Section 175 of the Government of India Act is void and the appellant is entitled to the refund of his money. We are unable to understand the reasoning of the High Court when it proceeds as though the appellant was trying to enforce the contract. We can see no justification for the lower Court refusing to allow interest for the plaintiff's amount at least from the date of his demand, or the latest from the date of suit."

10. Ms. Chowdhary, however, contends that in the case in hand, the terms and conditions for grant of privilege is governed by the Rules and in view of specific consequences provided for non-compliance of the terms and conditions of the contract i.e. forfeiture of the security money, the Division Bench of the High Court has not committed any error in holding that the State

was entitled to forfeit the entire deposit.

11. In view of the rival submission we deem it expedient to go through the relevant rules. Rule 2(a) defines Abkari shop to include an arrack shop with which we are concerned in the present appeal. Chapter IV of the Rules provides for general conditions applicable to sale of Abkari shops. It consists of only one Rule i.e. Rule 5 but it has 22 sub-rules. Sub-rule 15 of Rule 5 reads as follows:

> 5. xxx xxx xxx
>
> (15) In addition to the solvency certificate and cash security mentioned in sub-rule(10) the auction purchaser shall furnish such personal sureties as may be required of him to the satisfaction of the Assistant Excise Commissioner. The Board of Revenue may, if in their opinion it is necessary, require the auction purchaser to furnish additional cash security as may be fixed by them at the time of confirmation. The auction purchaser shall also execute a permanent agreement in Form No. 11 appended to these rules and take out necessary licence before installation of the shop or shops. On the failure of the auction purchaser to make such deposit referred to in sub-rule (10) or take out such licence or execute such agreement temporary or permanent or furnish such personal surety or additional cash security as aforesaid, the deposit already made by him towards earnest money and security shall be forfeited to Government and the shop resold or otherwise disposed of by the Assistant Excise Commissioner subject to confirmation by the Board of Revenue. Disposal otherwise includes closure or departmental management. In the case of death of an auction purchaser before the execution of the permanent agreement, the same shall be obtained from the heirs of the deceased unless the Assistant Excise Commissioner subject to the confirmation by the Board of Revenue cancels the contract. In the case of death of an auction

purchaser after confirmation of the sale of the shop or shops, his heirs, if any, shall be required to produce the necessary legal evidence in support of their claim and on production of the same the shop shall be transferred to them and pending such transfer the shop shall be run on departmental management. It is open to the Assistant Excise Commissioner to call upon them to furnish additional security, if in his opinion it is necessary for the successful working of the contract. If the heirs fail to produce within a period of one month from the date of death of the auction purchaser the necessary evidence in support of their claim or to deposit the additional security required, the Assistant Excise Commissioner shall order the re-sale of the shop or shops or otherwise dispose of the shop or shops at the risk of the original purchaser subject to confirmation by the Board of Revenue.

xxx xxx xxx"

(underlining ours)

12. From a plain reading of the aforesaid provision it is evident that on the failure of the auction purchaser to execute the agreement whether temporary or permanent, the deposit already made by auction purchaser towards earnest money and security money shall be forfeited. Undisputedly, the appellant was declared as auction purchaser and, in fact, she had deposited 30% of the bid amount, that is, 7,68,600/- in terms of Rule 5(10) of the Rules. It is further an admitted position that the appellant did not execute a permanent agreement or for that matter, did not execute the privilege. Hence, in terms of sub-rule (15) of Rule 5, the money deposited by her is liable to be forfeited. However, as stated above, the appellant's plea is that it was due to the facts beyond her control that she could not derive benefit from the privilege granted to her and hence did not run the shop. Therefore, the security amount deposited by her is not fit to be forfeited. In view of the aforesaid, what falls for our determination is as to whether the appellant could invoke

the doctrine of frustration or impossibility or whether she will be bound by the terms of the statutory contract. In other words, in case of a statutory contract, will it necessarily destroy all the incidents of an ordinary contract that are otherwise governed by the Contract Act?

13. It is not the case of the State that appellant has purposely, or for any oblique motive, or as a device to avoid any loss, refused to execute the agreement. It appears to us that the State was helpless because of the public upsurge against the sale of arrack at Kaladi, the birth place of Adi Shankaracharya as, in their opinion, the same will render the soil unholy. Consequently, the State also found it impossible to re-sell or re-dispose of the arrack shops. In view of second paragraph of Section 56 of the Contract Act, a contract to do an act which after the contract is made, by reason of some event which the promissory could not prevent becomes impossible, is rendered void. Hence, the forfeiture of the security amount may be illegal. But what would be the position in a case in which the consequence for non-performance of contract is provided in the statutory contract itself? The case in hand is one of such cases. The doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. However, in our opinion, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act. Rule 5(15) in no uncertain terms provides that "on the failure of the auction purchaser to make such deposit referred to in sub-rule 10" or "execute such agreement temporary or permanent" "the deposit already made by him towards earnest money and security shall

be forfeited to Government". When we apply the aforesaid principle we find that the appellant had not carried out several obligations as provided in sub-rule (10) of Rule 5 and consequently, by reason of sub-rule (15), the State was entitled to forfeit the security money.

14. Now reverting to the decisions of this Court in the cases of *Sushila Devi* (supra) and *Har Prasad Choubey* (supra), we are of the opinion that they are clearly distinguishable. In those cases the contract itself did not provide for the consequences for its non-performance. On the face of the same, relying on the doctrine of frustration, this Court came to the conclusion that the parties shall not be liable. As stated earlier, in the face of the specific consequences having been provided, the appellant shall be bound by it and could not take benefit of Section 56 of the Contract Act to resist forfeiture of the security money.

15. Confronted with this, Ms. Aggarwal raises the issue of validity of Rule 5(15). The learned Single Judge had allowed the writ petition filed by the appellant but negatived her challenge to the validity of Rule 5(15) and 5(16) of the Rules. In an appeal preferred by the State, it does not seem that the appellant had raised the plea of invalidity of the Rules but before us it is the contention of the appellant that Rule 5(15) does not meet the requirement of the doctrine of reasonableness or fairness and on this ground alone the rule is invalid. As a corollary, the forfeiture made is illegal. It is pointed out that in a contract of the present nature, the relative bargaining power of the contracting parties cannot be overlooked. Viewed from this angle, the rule is opposed to public policy, contends the learned counsel. Reference in this connection has been made to a decision of this Court in the case of *Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another etc.* (1986) 3 SCC 156. In this case, the terms in the contract of employment as also service rules provided for termination of service of permanent employees without assigning any reason on three months' notice or pay in

lieu thereof on either side was under challenge. Taking into account unequal bargaining power between the employer and the employee, the term in contract and the rules were held to be unconscionable, unfair, unreasonable and against the public policy. On these grounds, this Court struck down the termination as void. The relevant portion of the judgment reads as follows:

> "100……The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (i) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9(i) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a clause similar to Rule 9(i) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several government companies apart from the Corporation (which is the first appellant before us) must be having it. There are 970 government companies with paid-up capital of Rs.16,414.9 crores as stated in the written arguments submitted on behalf of the Union of India. The government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a

contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under Section 23 of the Indian Contract Act."

16. Reference has also been made to a Constitution Bench judgment of this Court in the case of *Delhi Transport Corporation v. D.T.C.Mazdoor Congress and Another* 1991 Supp (1) SCC 600. In this case, Brojo Nath Ganguly (supra) has elaborately been discussed and while endorsing the view by majority this Court held as follows:

"338. Accordingly I hold that the ratio in *Brojo Nath Ganguly* case, (1986) 3 SCC 156 was correctly laid and requires no reconsideration and the cases are to be decided in the light of the law laid above. From the light shed by the path I tread, I express my deep regrets for my inability to agree with my learned brother, the Hon'ble Chief Justice on the applicability of the doctrine of reading down to sustain the offending provisions. I agree with my brethren B.C.Ray and P.B.Sawant,JJ. with their reasoning and conclusions in addition to what I have laid earlier."

17. However, it has been contended by learned counsel representing the respondent-State that doctrine of fairness or reasonableness is not capable to be invoked in a statutory contract. Strong reliance has been placed on a decision of this Court in the case of *Assistant Excise Commissioner and Others v. Issac Peter and Others* (1994) 4 SCC 104, and our attention has been drawn to the following passage.

"26.……We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the

contract(State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts."

18. We have given our most anxious consideration to the submission advanced and we do not find any substance in the submission of the learned counsel for the appellant and the decision relied on by her, in fact, carves out an exception in case of a commercial transaction. The duty to act fairly is sought to be imported into the statutory contract to avoid forfeiture of the bid amount. The doctrine of fairness is nothing but a duty to act fairly and reasonably. It is a doctrine developed in the administrative law field to ensure rule of law and to prevent failure of justice where an action is administrative in nature. Where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action. But, in our opinion, it certainly cannot be invoked to amend, alter, or vary an express term of the contract between the parties. This is so even if the contract is governed by a statutory provision i.e. where it is a statutory contract. It is one thing to say that a statutory contract or for that matter, every contract must be construed reasonably, having regard to its language. But to strike down the terms of a statutory contract on the ground of unfairness is entirely different. Viewed from this angle, we are of the opinion that Rule 5(15) of the Rules cannot be struck down on the ground urged by the appellant and a statutory contract cannot be varied, added or altered by importing the doctrine of fairness. In a contract of the present nature, the licensee takes a calculated risk. Maybe the appellant was not wise enough but

in law, she can not be relieved of the obligations undertaken by her under the contract. *Issac Peter* (supra) supports this view and says so eloquently in the following words:

> "26……In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language…"

19. Now, referring to the decision of this Court in the case of *Brojo Nath Ganguly* (supra), the same related to terms and conditions of service and the decision in the said case has been approved by this Court in the case of *D.T.C. Mazdoor Congress* (supra). But while doing so, the Constitution Bench explicitly observed in unequivocal terms that doctrine of reasonableness or fairness cannot apply in a commercial transaction. It is not possible for us to equate a contract of employment with a contract to vend arrack. A contract of employment and a mercantile transaction stand on a different footing. It makes no difference when the contract to vend arrack is between an individual and the State. This would be evident

from the following text from the judgment:

> "286. ……This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen and the contract is a commercial transaction."

(underlining ours)

20. Accordingly, we are of the opinion that in a contract under the Abkari Act and the Rules made thereunder, the licensee undertakes to abide by the terms and conditions of the Act and the Rules made thereunder which are statutory and in such a situation, the licensee cannot invoke the doctrine of fairness or reasonableness. Hence, we negative the contention of the appellant.

21. In the result, we do not find any merit in the appeal and it is dismissed accordingly but without any order as to costs.

R.P. Appeal dismissed.