HARDEEP SINGH
v.
STATE OF PUNJAB & ORS.
(Criminal Appeal No. 1750 of 2008 etc.)

JANUARY 10, 2014

[P. SATHASIVAM, CJI, DR. B.S. CHAUHAN, RANJANA PRAKASH DESAI, RANJAN GOGOI, AND S.A. BOBDE, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.319 - Power to proceed against other person appearing to be guilty of offence - Stage of excise of power - Held: Power u/s 319(1) can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment - s. 319 uses the expressions 'inquiry' and 'trial' -- Stage of inquiry commences, insofar as the court is concerned, with filing of charge-sheet and consideration of material collected by prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused -- As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry -- Inquiries u/ss 200, 201, 202 and u/s 398 are species of the inquiry contemplated by s. 319 -- In order to invoke the power u/s 319, it is only a Court of Session or a Court of Magistrate performing the duties as a court under Cr.P.C. that can utilize the material before it for the purpose of the said Section -- The stage of committal is neither an inquiry nor a trial -The view in Dharamp Pal (CB) that after committal, cognizance of an offence can be taken by Court of Session u/s 193 Cr.P.C against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation and Sessions Judge need not wait till 'evidence' u/s 319 Cr.P.C. becomes available for summoning an additional accused, is concurred with -- 'Trial' commences only on charges being framed -- The view that in a criminal case, trial commences on cognizance being taken, is not approved -- The interpretation given by the Constitution Bench in Dharam Pal (CB) that s. 193 Cr.P.C. confers power of original jurisdiction upon the Court of Session to add an accused once the case has been committed to it, is concurred with -- Maxims 'judex damnatur cum nocens absolvitur' and 'a verbis legis non est recedendum' - Interpretation of statutes.

s.319 r/w s. 227 - 'Evidence' for the purpose of s.319 - Connotation of - Held: For exercise of power u/s 319, the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise -- Word "evidence" in s.319 means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents It is only such evidence that can be taken into account by the Magistrate or the court to decide whether power u/s 319 is to be exercised and not on the basis of material collected during investigation.

s.319 - Exercise of power u/s 319 on the basis of examination-in-chief - Held: Once examination-in-chief is conducted, the statement becomes part of the record -- It is evidence as per law and in the true sense, though, it may be rebuttable --Power u/s 319 can be exercised at the stage of completion of examination-in- chief and court need not wait till said evidence is tested on cross-examination for it is the satisfaction of court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence - Evidence Act, 1872 - s.3.

s.319 - Nature of satisfaction required to invoke power u/s 319 - Held: Though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of

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complicity of person concerned - The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction - In the absence of such satisfaction, the court should refrain from exercising power u/s 319 Cr.P.C.

s.319 - Power to proceed against other person - Scope of - Held: s.319 is an enabling provision, it empowers the court to proceed against any person who is not an accused in a case before it - A person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers u/s 193, can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled -- Further, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by ss.300(5) and 398 -- If during or after such inquiry, there appears to be an evidence against such person, power u/s 319 can be exercised.

s.319 r/w ss.398, 300(5) and 258 - Power to proceed against a person who has been discharged - Held: A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted - Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there was not even a prima facie case to proceed against such person - If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with s. 398 Cr.P.C. without resorting to the provision of s. 319 Cr.P.C. directly.

WORDS AND PHRASES:

Words, 'course', 'inquiry' and 'trial' as occurring in s. 319 Cr.P.C. - Connotation of.

The instant reference arose out of different views expressed by the Supreme Court and High Courts on the scope and extent of the powers of the courts under the criminal justice system to arraign any person as an accused during the course of inquiry or trial as contemplated u/s 319 of the Code of Criminal Procedure, 1973(Cr.P.C.). The questions to be answered by the Court were: "(i)What is the stage at which power u/s 319 Cr.P.C. can be exercised? (ii) Whether the word "evidence" used in s. 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned? (iii) Whether the word "evidence" used in s. 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial? (iv) What is the nature of the satisfaction required to invoke the power u/s 319 Cr.P.C. to arraign an accused? Whether the power u/s 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted? (v) Does the power u/s 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

Answering the reference, the Court

HELD: 1.1 In Dharam Pal (CB)*, it has already been held that after committal, cognizance of an offence can be taken by the Court of Session against a person not named as an accused but against whom materials are available from the papers filed [illegible] **r**

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completion of investigation. Such cognizance can be taken u/s 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' u/s 319 Cr.P.C. becomes available for summoning an additional accused.Thus, the powers so far as the Court of Session is concerned, to invoke s. 319 Cr.P.C. at the stage of committal, has stood answered finally. [para 4 and 110] [23-G; 68-D]

Dharam Pal & Ors. v. State of Haryana & Anr.,* **AIR 2013 SC 3018 - relied on.

1.2 Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of s.319 Cr.P.C. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. [para 12] [28-D-E]

Raghubans Dubey v. State of Bihar, **1967 SCR 423 =AIR 1967 SC 1167 - referred to.**

Question No.(i)

1.3 Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) 'inquiry' and (2) 'trial'. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of s. 2(g) Cr.P.C. [para 25 and 110] [33-F; 68-E]

State of U.P. v. Lakshmi Brahman & Anr. **1983 (2) SCR 537 =AIR 1983 SC 439;** *Raj Kishore Prasad v. State of Bihar & Anr.* **1996 (2) Suppl. SCR 125 = AIR 1996 SC 1931- referred to.**

1.4 As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries u/ss 200, 201, 202 Cr.P.C.; and u/s 398 Cr.P.C. are species of the inquiry contemplated by s. 319 Cr.P.C. In order to invoke the power u/s 319 Cr.P.C., it is only a Court of Session or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section. The stage of committal is neither an inquiry nor a trial. [para 14, 21 and 110] [29-G-H; 32-E; 68-E-F]

Kishun Singh & Ors v. State of Bihar, **(1993) 2 SCC 16 and** *Ranjit Singh v. State of Punjab,* **AIR 1998 SC 3148;** *Elachuri Venkatachinnayya & Ors. v. King-Emperor* **(1920) ILR 43 Mad 511;** *Moly & Anr. v. State of Kerala* **2004 (3) SCR 346 = AIR 2004 SC 1890;** *The State of Bihar v. Ram Naresh Pandey & Anr.* **1957 SCR 279 = AIR 1957 SC 389;** *Ratilal Bhanji Mithani v. State of Maharashtra & Ors.* **1979 (1) SCR 993 =AIR 1979 SC 94;** *V.C. Shukla v. State through C.B.I.* **1980 SCR 380 = AIR 1980 SC 962;** *Union of India & Ors. v. Major General Madan Lal Yadav (Retd.)* **1996 (3) SCR 785 = AIR 1996 SC 1340;** *"Common Cause", A Registered Society thr. its Director v. Union of India & Ors.* **1996 (9) Suppl. SCR 296 = AIR 1997 SC 1539- referred to.**

1.5 The law can be summarised to the effect that as 'trial' means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the 'trial' commences only on charges being framed. Thus, the view that in a criminal case, trial commences on cognizance being taken, is not approved. [para 35] [38-C-D]

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Sriramulu v. Veerasalingam, **(1914) I.L.R. 38 Mad. 585b - referred to.**

In Re: Narayanaswamy Naidu v. Unknown **1 Ind Cas 228 - referred to.**

Dagdu Govindshet Wani v. Punja Vedu Wani **(1936) 38 Bom.L.R. 1189;** *Sahib Din v. The Crown* **(1922) I.L.R. 3 Lah. 115;** *Fakhruddin v. The Crown,* **(1924) I.L.R. 6 Lah. 176;** *Labhsing v. Emperor* **(1934) 35 Cr.L. J. 1261 - disapproved.**

1.6 Section 2(g) Cr.P.C. and the case law clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under Cr.P.C. by the Magistrate or the court. The word 'inquiry' is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial. [para 36] [38-E-F]

1.7 Even the word "course" occurring in s. 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. [para 37] [38-G-H]

Commissioner of Income-tax, New Delhi (Now Rajasthan) v. M/s. East West Import & Export (P) Ltd. (Now known as Asian Distributors Ltd.) Jaipur, **1989 (1) SCR 570 = AIR 1989 SC 836** *State of Travancore-Cochin & Ors. v. Shanmugha Vilas Cashewnut Factory, Quilon,* **1954 SCR 53 = AIR 1953 SC 333 - referred to.**

1.8 To say that powers u/s 319 Cr.P.C. can be exercised only during trial, would be reducing the impact of the word 'inquiry' by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim 'a verbis legis non est recedendum' which means, "from the words of law, there must be no departure" has to be kept in mind. [para 39] [39-E-F]

Patel Chunibhai Dajibha etc. v. Narayanrao Khanderao Jambekar & Anr., **AIR 1965 SCR 328 =1965 SC 1457;** *The Martin Burn Ltd. v. The Corporation of Calcutta,* **1966 SCR 543 = AIR 1966 SC 529;** *M.V. Elisabeth & Ors. v. Harwan Investment & Trading Pvt. Ltd. Hanoekar House, Swatontapeth, Vasco-De-Gama,Goa* **1992 (1) SCR 1003 = AIR 1993 SC 1014;** *Sultana Begum v. Prem Chand Jain,* **1996 (9) Suppl. SCR 707 = AIR 1997 SC 1006;** *State of Bihar & Ors. etc.etc. v. Bihar Distillery Ltd. etc. etc.* **1996 (9) Suppl. SCR 479 = AIR 1997 SC 1511;** *Institute of Chartered Accountants of India v. M/s. Price Waterhouse & Anr.* **1997 (2) Suppl. SCR 267 = AIR 1998 SC 74; and** *The South Central Railway Employees Co-operative Credit Society Employees Union, Secundrabad v. The Registrar of Co-operative Societies & Ors.* **1998 (1) SCR 85 = AIR 1998 SC 703;** *Rohitash Kumar & Ors. v. Om Prakash Sharma & Ors.* **2012 (13) SCR 47 = AIR 2013 SC 30- referred to.**

1.9 Thus, by no means it can be said that provisions of s. 319 Cr.P.C. cannot be pressed into service during the course of 'inquiry'. The word 'inquiry' is not surpulsage in the said provision. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences and, therefore, the pow[illegible]C.

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can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment. [para 42-43] [41-F-H]

1.10 The stage of s.207/208 Cr.P.C., committal etc. is only a pre-trial stage, and the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance of ss.207 and 208 Cr.P.C., and committing the matter if it is exclusively triable by Court of Session. Therefore, it would be legitimate to conclude that the Magistrate at the stage of ss. 207 to 209 Cr.P.C. is forbidden, by express provision of s.319 Cr.P.C., to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power u/s 319 Cr.P.C. cannot be exercised. [para 44 and 49] [42-B-D; 44-C]

M/s. SWIL Ltd. v. State of Delhi & Anr. **2001 (1) Suppl. SCR 527 = AIR 2001 SC 2747 - referred to.**

1.11 The interpretation given by the Constitution Bench in Dharam Pal (CB) that s. 193 Cr.P.C. confers power of original jurisdiction upon the Court of Session to add an accused once the case has been committed to it, is concurred with. [para 49] [44-D-E]

Question No.(iii)

2.1 The word 'evidence' in s. 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial. Materials coming before the court in course of enquiries u/ss 200, 201, 202 and 378 can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power u/s 319 Cr.P.C., and also to add an accused whose name

has been shown in Column 2 of the chargesheet. [para 110] [68-F-H]

Tomlin's Law Dictionary; Wigmore on Evidence **- referred to.**

2.2 The definition of 'evidence' in s.3 of the Evidence Act starts with the words, "Evidence means and includes". Wherever the words "means and includes" are used, it is an indication of the fact that the definition 'is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression. The definition of word "evidence" under the Evidence Act is exhaustive. Materials available in the charge-sheet or the case diary do not constitute evidence. [para 55, 57, 58 and 61] [47-A, G-H; 48-A, F; 49-H; 50-A]

M/s. Mahalakshmi Oil Mills v. State of A.P. **1988 (2) Suppl. SCR 1088 = AIR 1989 SC 335;** *Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors.,* **(1990) 3 SCC 682;** *P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors.* **1995 (2) SCR 1061 =AIR 1995 SC 1395;** *Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner & Ors.* **2007 (5) SCR 873 = AIR 2008 SC 968; and** *Ponds India Ltd. (merged with H.L. Limited) v. Commissioner of Trade Tax, Lucknow* **2008 (9) SCR 496 = (2008) 8 SCC 369;** *Feroze N. Dotivala v. P.M. Wadhwani & Ors.* **2002(4) Suppl. SCR 416 = (2003) 1 SCC 433;** *Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr.* **2011(1) SCR 796 = AIR 2011 SC 760;** *Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd.* **2003 (5) Suppl. SCR 634 = AIR 2004 SC 355;** *Omkar Namdeo Jadhao & Ors v. Second Additional Sessions Judge Buldana & Anr.* **1996 SCR 158 = AIR 1997**

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SC 331; and *Ram Swaroop & Ors. v. State of Rajasthan* **AIR 2004 SC 2943;** *Podda Narayana & Ors. v. State of A.P.,* **1975 (0) Suppl. SCR 84 = AIR 1975 SC 1252;** *Sat Paul v. Delhi Administration,* **1976 (2) SCR 11 = AIR 1976 SC 294; and** *State (Delhi Administration) v. Laxman Kumar & Ors.* **1985 (2) Suppl. SCR 898 = AIR 1986 SC 250;** *Lok Ram v. Nihal Singh & Anr.,* **2006 (3) SCR 1018 = AIR 2006 SC 1892;** *Sunil Mehta & Anr. v. State of Gujarat & Anr.,* **JT 2013 (3) SC 328;** *Guriya @ Tabassum Tauquir & Ors. v. State of Bihar & Anr.* **2007 (10) SCR 385 = AIR 2008 SC 95;** *Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand* **2008 (17) SCR 1059 = (2009) 2 SCC 696;** *Rajendra Singh v. State of U.P. & Anr.* **2007 (8) SCR 834 = AIR 2007 SC 2786 - referred to.**

2.3 Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of s.227 Cr.P.C. would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word 'evidence' as appearing in s.319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided u/s 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power u/s 319 Cr.P.C., the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person u/s 319 Cr.P.C. [para 69] [52-E-H; 53-A]

2.4 With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of s. 3 of the Evidence Act as well as the decision of the Constitution Bench*, that a document is required to be produced and proved according to law to be called

evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial. [para 70] [53-B-C]

Ramnarayan Mor & Anr. v. The State of Maharashtra **1964 SCR 1034 = AIR 1964 SC 949 - relied on.**

2.5 It is, therefore, clear that the word "evidence" in s.319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether power u/s 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation. [para 71] [53-C-D]

Question No. (ii)

3.1 Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence. Therefore, even on the basis of examination-in-chief, the court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. [para 82-83] [56-H; 57-A-B, G-H]

3.2 Thus, this Court holds that power u/s 319 Cr.P.C. can be exercised at the stage of completion of examination-in-chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which c[...]n

the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence. [para 85] [58-E-F]

Harbhajan Singh & Anr. v. State of Punjab & Anr. **2009 (11) SCR 1015 = (2009) 13 SCC 608; and** *Mohd. Shafi v. Mohd. Rafiq & Anr.,* **2007 (4) SCR 1023 = AIR 2007 SC 1899 - referred to.**

Question No. 4

4.1 Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case. [para 86-87] [58-G-H; 59-C-D]

Pyare Lal Bhargava v. The State of Rajasthan **1963 Suppl. SCR 689 =AIR 1963 SC 1094,** *Ram Singh & Ors. v. Ram Niwas & Anr.* **2009 (8) SCR 878 = (2009) 14 SCC 25;** *Vikas v. State of Rajasthan,* **2013 (11) SCALE 23;** *Sarabjit Singh & Anr. v. State of Punjab & Anr.* **2009 (8) SCR 762 = AIR 2009 SC 2792;** *Brindaban Das & Ors. v. State of West Bengal,* **2009 (1) SCR 87 = AIR 2009 SC 1248;** *Michael Machado & Anr. v. Central Bureau of Investigation & Ors.,* **2000 (1) SCR 981 = AIR 2000 SC 1127;** *State of Karnataka v. L. Munishwamy & Ors.* **1977 (3) SCR 113 = AIR 1977 SC 1489;** *All India Bank Officers' Confederation etc. v. Union of India & Ors.* **1989 (3) SCR 850 = AIR 1989 SC 2045;** *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia* **1989 (1) SCR 560 = (1989) 1 SCC 715;** *State of M.P. v. Dr. Krishna Chandra Saksena,* **1996 (7) Suppl. SCR 503 = (1996) 11**

SCC 439; and *State of M.P. v. Mohan Lal Soni,* **AIR 2000 SC 2583;** *Dilawar Babu Kurane v. State of Maharashtra* **2002 (1) SCR 75 = AIR 2002 SC 564;** *Union of India v. Prafulla Kumar Samal & Anr.* **1979 (2) SCR 229 = AIR 1979 SC 366;** *Suresh v. State of Maharashtra,* **AIR 2001 SC 1375;** *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya* **1990 (3) SCR 633 = AIR 1990 SC 1962 and** *State of Maharashtra v. Priya Sharan Maharaj* **1997 (2) SCR 933 = AIR 1997 SC 2041;** *State of Bihar v. Ramesh Singh,* **1978 (1) SCR 257 = AIR 1977 SC 2018;** *Palanisamy Gounder & Anr. v. State, represented by Inspector of Police,* **(2005) 12 SCC 327 - referred to.**

4.2 Though u/s 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person u/s 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore, the degree of satisfaction for summoning the accused (original and subsequent) has to be different. [para 110] [69-E-H]

4.3 Power u/s 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence ... **rt**

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that such power should be exercised and not in a casual and cavalier manner. [para 98] [63-E-F]

4.4 Thus, this Court holds that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of cross examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power u/s 319 Cr.P.C. In s.319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the court acting u/s 319 Cr.P.C. to form any opinion as to the guilt of the accused. [para 99] [63-G-H; 64-A-B]

Question No. V

5.1 Section 319 Cr.P.C. is an enabling provision, it empowers the court to proceed against any person who is not an accused in a case before it. A person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers u/s 193 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled. Further, a person who has been discharged can be summoned u/s 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the

accused already facing trial. However, in such a case, the requirement of ss. 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh. [para 103 and 110] [65-F-G; 70-B-C]

Anju Chaudhary v. State of U.P. & Anr. **2012 (13) SCR 901 = (2013) 6 SCC 384;** *Suman v. State of Rajasthan & Anr.*, **AIR 2010 SC 518 - referred to.**

5.2 There is a great difference with regard to a person who has been discharged, he stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there was not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and, therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. If after careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with s. 398 Cr.P.C. without resorting to the provision of s. 319 Cr.P.C. directly. [para 104] [65-G-H; 66-A-D]

Sohan Lal & Ors. v. State of Rajasthan **1990 (3) SCR 809 = (1990) 4 SCC 580; and** *Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors.* **1983 (1) SCR 884 = AIR 1983 SC 67 - referred to.**

5.3 The expression "any person not being the accused" occurring in s. 319 Cr.P.C. clearly covers any person who is not being tried alrea[illegible]d

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the very purpose of enacting such a provision like s.319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression. [para 100] [64-D, E-F]

Joginder Singh & Anr. v. State of Punjab & Anr., **[1979] 2 SCR 306 = AIR 1070 SC 339 - referred to.**

5.4 Power u/s 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to s.300 (5) Cr.P.C., a person discharged u/s 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first-mentioned court is subordinate. Further, s. 398 Cr.P.C. provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. Section 319 Cr.P.C. can also be invoked at the stage of inquiry. Inquiry as contemplated by s.300(5) Cr.P.C. and s.398 Cr.P.C. can also be an inquiry u/s 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by ss.300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be anevidence against such person, power u/s 319 Cr.P.C. can be exercised. [para 107-108] [66-H; 67-A-E]

Rakesh v. State of Haryana, **2001(1) Suppl. SCR 1 = AIR 2001 SC 2521;** *Dharam Pal & Ors. v. State of Haryana & Anr.* **(2004) 13 SCC 9;** *Hardeep Singh vs. State of Punjab* **2008 (15) SCR 735 - cited.**

Case Law Reference:

2008 (15) SCR 735	cited	para 2
2001 (1) Suppl. SCR 1	cited	para 2
2007 (4) SCR 1023	referred to	para 2
2004 (13) SCC 9	referred to	para 3
AIR 2013 SC	relied on	para 4
(1920) ILR 43 Mad 511	referred to	para 21
1967 SCR 423	referred to	Para 24
1983 (2) SCR 537	referred to	Para 26
1996 (2) Suppl. SCR 125	referred to	Para 26
2004 (3) SCR 346	referred to	Para 27
1957 SCR 279	referred to	Para 27
1979 (1) SCR 993	referred to	Para 28
1980 SCR 380	referred to	Para 29
1996 (3) SCR 785	referred to	Para 30
1996 (9) Suppl. SCR 296	referred to	Para 31
1 Ind Cas 228	referred to	Para 33
(1914) I.L.R. 38 Mad. 585	disapproved	Para 33
(1936) 38 Bom.L.R. 1189	disapproved	Para 34
(1922) I.L.R. 3 Lah. 115	disapproved	Para 34
(1924) I.L.R. 6 Lah. 176	disapproved	Para 34
(1934) 35 Cr.L. J. 1261	disapproved	Para 34
1989 (1) SCR 570	referred to	Para 37

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1954 SCR 53	**referred to**	**Para 38**
1965 SCR 328	**referred to**	**Para 41**
1966 SCR 543	**referred to**	**Para 41**
1992 (1) SCR 1003	**referred to**	**Para 41**
1996 (9) Suppl. SCR 707	**referred to**	**Para 41**
1996 (9) Suppl. SCR 479	**referred to**	**Para 41**
1997(2) Suppl. SCR 267	**referred to**	**Para 41**
1998 (1) SCR 85	**referred to**	**Para 41**
2012 (13) SCR 47	**referred to**	**Para 42**
2001 (1) Suppl. SCR 527	**referred to**	**Para 46**
1988 (2) Suppl. SCR 1088	**referred to**	**para 57**
1995 (2) SCR 1061	**referred to**	**para 57**
(1990) 3 SCC 682	**referred to**	**para 57**
2007 (5) SCR 873	**referred to**	**para 57**
2008 (9) SCR 496	**referred to**	**para 57**
2002 (4) Suppl. SCR 416	**referred to**	**para 58**
2011 (1) SCR 796	**referred to**	**para 59**
2003 (5) Suppl. SCR 634	**referred to**	**Para 60**
1996 SCR 158	**referred to**	**Para 60**
AIR 2004 SC 2943	**referred to**	**Para 60**
1975 (0) Suppl. SCR 84	**referred to**	**Para 60**
1976 (2) SCR 11	**referred to**	**Para 60**
1985 (2) Suppl. SCR 898	**referred to**	**Para 60**

2006 (3) SCR 1018	**referred to**	**para 61**
2006 (3) SCR 1018	**referred to**	**para 62**
1964 SCR 1034	**relied on**	**para 62**
2007 (10) SCR 385	**referred to**	**para 67**
2008 (17) SCR 1059	**referred to**	**para 67**
2007 (8) SCR 834	**referred to**	**para 68**
2009 (11) SCR 1015	**referred to**	**para 81**
1963 Suppl. SCR 689	**referred to**	**para 87**
2009 (8) SCR 878	**referred to**	**para 87**
2013 (11) SCALE 23	**referred to**	**para 88**
2009 (8) SCR 762	**referred to**	**para 91**
1996 (7) Suppl. SCR 503	**referred to**	**para 93**
AIR 2000 SC 2583	**referred to**	**para 93**
2002 (1) SCR 75	**referred to**	**para 94**
1979 (2) SCR 229	**referred to**	**para 94**
AIR 2001 SC 1375	**referred to**	**Para 95**
1990 (3) SCR 633	**referred to**	**Para 95**
1997 (2) SCR 933	**referred to**	**Para 95**
1978 (1) SCR 257	**referred to**	**para 96**
(2005) 12 SCC 327	**referred to**	**para 97**
1979 (2) SCR 306	**referred to**	**para 100**
2012 (13) SCR 901	**referred to**	**para 101**
AIR 2010 SC 518	**referred to**	**para 102**

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1990 (3) SCR 809	**referred to**	**Para 105**
1983 (1) SCR 884	**referred to**	**para 106**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1750 of 2008.

From the Judgment and Order dated 23.10.2006 of the High Court of Punjab and Haryana at Chandigarh in Criminal Revision No. 773 of 2006.

WITH

Crl. A. No. 1751 of 2008 & SLP (Crl.) No. 9184 of 2008.

7209 of 2010, 5724, 5975 of 2009, 9040 of 2010, 5331, 9157 of 2009 and 4503-4504 of 2012.

Sidharth Luthra, ASG, Ranjit Kumar, Dr. J.N. Dubey, P.S. Narasimha, S.R. Singh, Rajiv Dhavan, Huzefa Ahmadi, Shekhar Naphade, Jitendera, Mohan Sharma, Ratnakar Das, Devender Hooda, Sr. AAG, V. Madhukar, Deep Karan Dalal, Dr. Manish Singhvi, AAG, Vijay Kr. Jain, Vibhakar Mishra, Ajay Garg, Amit Kishor Sinha, Sunil Kumar Verma, Abhisth Kumar, Kamaldeep Gulati, Aniruddha P. Mayee, Charudatta Mahindrakar, Rucha A. Mayee, Pratibha Jain, Kaushal Yadav, Anurag Dubey, Meenesh Dubey, D.P. Pande, Rajesh Pandey, Anu Sawhney, Upasana D. Tiwari, S.R. Setia, Anshuman Ashok, Allanki Ramesh, C.S.N. Mohan Rao, Rajesh Kumar, Shilpi Gupta, G. Madhvi, K.V. Mohan, Ankur Yadav, Ujjabal Pandey, Sushant Kumar Yadav, Asha Gopalan Nair, Manish Mohan, Aditya Kr. Choudhary, Aditya Pratap Singh, Parveen Kumar, Anita Mohan, Umang Shankra, Shahsi Pathak, Sanjai Kumar Pathak, R.K. Gupta, S.K. Gupta, M.K. Singh. Anand Kumar Singh, Shekhar Kumar, Ejaz Maqbool, B.M. Mangukiya, V.H. Kanara, Mrigank Prabhakar, Tanima, Kishore, Rohan Sharma, Satinder S. Gulati, Dinesh Sharma, Paritosh Anil, Anvita Cowshish, Kuldip Singh, Kunwar C.M. Khan, Aftab Ali Khan, Hemantika Wahi, Pinky Behera, Shubangi Tuli, Meenkshi Arora, Jetendra Singh, Priyanka Singh, S.K. Sabharwal, C.D. Singh, Supriya

Juneja, Sunny Chaudhary, Abhimanyu Singh, Gurmohan Singh Bedi, Sakshi, Anshuman Shrivastava, Sameer Singh, Nitin Singh, Pahlad Singh Sharma, Kamal Mohan Gupta, Ramesh Kumar, Harkesh, Naresh Bakshi, Dr. Sukhdev Sharma, V.K. Vasdev, P.S. Tripathi, R.C. Prakash, Filza Moonis, Anshuman Ashok, Dr. Kailash Chand, Abhisth Kumar, Gaurav, Vikrant Yadav, Adarsh Upadhyay, Anis Ahmed Khan, Shoaib Ahmad Khan, Amit Lubhaya, Ram Naresh Yadav, Pragati Neekhra for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This reference before us arises out of a variety of views having been expressed by this Court and several High Courts of the country on the scope and extent of the powers of the courts under the criminal justice system to arraign any person as an accused during the course of inquiry or trial as contemplated under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the `Cr.P.C.').

2. The initial reference was made by a two-Judge Bench vide order dated 7.11.2008 in the leading case of Hardeep Singh (Crl. Appeal No. 1750 of 2008) where noticing the conflict between the judgments in the case of *Rakesh v. State of Haryana,* AIR 2001 SC 2521; and a two-Judge Bench decision in the case of *Mohd. Shafi v. Mohd. Rafiq & Anr.,* AIR 2007 SC 1899, a doubt was expressed about the correctness of the view in the case of *Mohd. Shafi* (Supra). The doubts as categorised in paragraphs 75 and 78 of the reference order led to the framing of two questions by the said Bench which are reproduced hereunder:

"(1) When the power under sub-section (1) of Section 319 of the Code of addition of accused can be exercised by a Court? Whether application under Section 319 is not maintainable unless the cross-exa[illegible] s

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is complete?

(2) What is the test and what are the guidelines of exercising power under sub-section (1) of Section 319 of the Code? Whether such power can be exercised only if the Court is satisfied that the accused summoned in all likelihood would be convicted?

3. The reference was desired to be resolved by a three-Judge Bench whereafter the same came up for consideration and vide order dated 8.12.2011, the Court opined that in view of the reference made in the case of *Dharam Pal & Ors. v. State of Haryana & Anr.,* (2004) 13 SCC 9, the issues involved being identical in nature, the same should be resolved by a Constitution Bench consisting of at least five Judges. The Bench felt that since a three-Judge Bench has already referred the matter of *Dharam Pal* (Supra) to a Constitution Bench, then in that event it would be appropriate that such overlapping issues should also be resolved by a Bench of similar strength.

4. Reference made in the case of *Dharam Pal* (Supra) came to be answered in relation to the power of a Court of Sessions to invoke Section 319 Cr.P.C. at the stage of committal of the case to a Court of Sessions. The said reference was answered by the Constitution Bench in the case of *Dharam Pal & Ors. v. State of Haryana & Anr.,* AIR 2013 SC 3018 [hereinafter called *'Dharam Pal* (CB)'], wherein it was held that a Court of Sessions can with the aid of Section 193 Cr.P.C. proceed to array any other person and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.

Thus, after the reference was made by a three-Judge Bench in the present case, the powers so far as the Court of Sessions is concerned, to invoke Section 319 Cr.P.C. at the stage of committal, stood answered finally in the aforesaid background.

5. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:

(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

6. In this reference what we are primarily concerned with, is the stage at which such powers can be invoked and, secondly, the material on the basis whereof the invoking of such powers can be justified. To add as a corollary to the same, thirdly, the manner in which such power has to be exercised, also has to be considered.

7. The Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 (hereinafter referred to as the 'Constitution') provides a protective un[illegible] h

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administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Cr.P.C. indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty.

8. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Cr.P.C.

9. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the above mentioned avowed object and purpose to try the person to the satisfaction

of the court as an accomplice in the commission of the offence that is subject matter of trial.

10. In order to answer the aforesaid questions posed, it will be appropriate to refer to Section 351 of the Criminal Procedure Code, 1898 (hereinafter referred to as `Old Code'), where an analogous provision existed, empowering the court to summon any person other than the accused if he is found to be connected with the commission of the offence. However, when the new Cr.P.C. was being drafted, regard was had to 41th Report of the Law Commission where in the paragraphs 24.80 and 24.81 recommendations were made to make this provision more comprehensive. The said recommendations read:

> "24.80 It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is proper that Magistrate should have the power to call and join him in proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in Section 351 for summoning such a person if he is not present in court. Such a provision would make Section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.
>
> 24.81 Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in Section 190, and are apparently exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrates own information under Section 190(1), or only in the mann[illegible]e

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was first taken of the offence against the accused. The question is important, because the methods of inquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is that the whole case against all known suspects should be proceeded with expeditiously and convenience requires that cognizance against the newly added accused should be taken in the same manner against the other accused. We, therefore, propose to recast Section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must he reheard in the presence of the newly added accused."

11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. -Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence

which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

13. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court.

This has to be understood in the co 9

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Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression 'magistrate of first class' and 'any magistrate' to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

14. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2(g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

15. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

16. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

17. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.

18. Coming to the stage at which power under Section 319 Cr.P.C. can be exercised, in *Dharam Pal* (Supra), this Court had noticed the conflict in the decisions of *Kishun Singh & Ors v. State of Bihar,* (1993) 2 SCC 16 and *Ranjit Singh v. State of Punjab,* AIR 1998 SC 3148, and referred the matter to the Constitution Bench. However, while re[illegible] a

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Constitution Bench, this Court affirmed the judgment in *Kishun Singh* (Supra) and doubted the correctness of the judgment in *Ranjit Singh* (Supra). In *Ranjit Singh* (Supra), this Court observed that from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 Cr.P.C., that court can deal with only the accused referred to in Section 209 Cr.P.C. and there is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused, while in *Kishun Singh* (Supra), this Court came to the conclusion that even the Sessions Court has power under Section 193 Cr.P.C. to take cognizance of the offence and summon other persons whose complicity in the commission of the trial can prima facie be gathered from the materials available on record and need not wait till the stage of Section 319 Cr.P.C. is reached. This Court in *Dharam Pal* (Supra) held that the effect of *Ranjit Singh* (Supra) would be that in less serious offences triable by a Magistrate, the said Court would have the power to proceed against those who are mentioned in Column 2 of the charge-sheet, if on the basis of material on record, the Magistrate disagrees with the conclusion reached by the police, but, as far as serious offences triable by the Court of Sessions are concerned, that court will have to wait till the stage of Section 319 Cr.P.C. is reached.

19. At the very outset, we may explain that the issue that was being considered by this Court in *Dharam Pal* (CB), was the exercise of such power *at the stage of committal of a case* and the court held that even if Section 319 Cr.P.C. could not be invoked at that stage, Section 193 Cr.P.C. could be invoked for the said purpose. We are not delving into the said issue which had been answered by the five-Judge Bench of this Court. However, we may clarify that the opening words of Section 193 Cr.P.C. categorically recite that the power of the Court of Sessions to take cognizance would commence only after committal of the case by a magistrate. The said provision opens with a non-obstante clause "except as otherwise expressly provided by this code or by any other law for the time

being in force". The Section therefore is clarified by the said opening words which clearly means that if there is any other provision under Cr.P.C., expressly making a provision for exercise of powers by the court to take cognizance, then the same would apply and the provisions of Section 193 Cr.P.C. would not be applicable.

20. In our opinion, Section 319 Cr.P.C. is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial. It is this part which is under reference before this Court and therefore in our opinion, while answering the question referred to herein, we do not find any conflict so as to delve upon the situation that was dealt by this Court in *Dharam Pal* (CB).

21. In *Elachuri Venkatachinnayya & Ors. v. King-Emperor* (1920) ILR 43 Mad 511, this Court held that an inquiry is a stage before the committal to a higher court. In fact, from a careful reading of the judgments under reference i.e. *Ranjit Singh* (Supra) and *Kishun Singh* (Supra), it emerges that there is no dispute even in these two cases that the stage of committal is neither an inquiry nor a trial, for in both the cases, the real dispute was whether Section 193 Cr.P.C. can be invoked at the time of committal to summon an accused to face trial who is not already an accused. It can safely be said that both the cases are in harmony as to the said stage neither being a stage of inquiry nor a trial.

22. Once the aforesaid stand is clarified in relation to the stage of committal before the Court of Sessions, the answer to the question posed now, stands focussed only on the stage at which such powers can be exercised by the court other than the stage of committal and the material on the basis whereof such powers can be invoked by the court.

<u>Question No.</u>(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

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23. The stage of inquiry and trial upon cognizance being taken of an offence, has been considered by a large number of decisions of this Court and that it may be useful to extract the same hereunder for proper appreciation of the stage of invoking of the powers under Section 319 Cr.P.C. to understand the meaning that can be attributed to the word 'inquiry' and 'trial' as used under the Section.

B

24. In *Raghubans Dubey v. State of Bihar,* AIR 1967 SC 1167, this Court held :

C

> *"…once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."*

D

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25. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of Section 2(g) Cr.P.C., which defines an inquiry as follows:

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> "2(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."

26. In *State of U.P. v. Lakshmi Brahman & Anr.,* AIR 1983 SC 439, this Court held that from the stage of filing of charge-sheet to ensuring the compliance of provision of Section 207 Cr.P.C., the court is only at the stage of inquiry and no trial can be said to have commenced. The above view has been held to be per incurium in *Raj Kishore Prasad v. State of Bihar & Anr.,* AIR 1996 SC 1931, wherein this Court while observing

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that Section 319 (1) Cr.P.C. operates in an ongoing inquiry into, or trial of, an offence, held that at the stage of Section 209 Cr.P.C., the court is neither at the stage of inquiry nor at the stage of trial. Even at the stage of ensuring compliance of Sections 207 and 208 Cr.P.C., it cannot be said that the court is at the stage of inquiry because there is no judicial application of mind and all that the Magistrate is required to do is to make the case ready to be heard by the Court of Sessions.

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27. Trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led in this behalf. In Moly & Anr. v. State of Kerala, AIR 2004 SC 1890, this Court observed that though the word 'trial' is not defined in the Code, it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial. A three-Judge Bench of this Court in The *State of Bihar v. Ram Naresh Pandey & Anr.,* AIR 1957 SC 389 held:

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> *"The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular context in which they are used and with regard to the scheme and purpose of the provision under consideration."* (Emphasis added)

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28. In *Ratilal Bhanji Mithani v. State of Maharashtra & Ors.,* AIR 1979 SC 94, this Court held :

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> *"Once a charge is framed, the Ma* [illegible] *er*

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under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end." (Emphasis added)

29. In *V.C. Shukla v. State through C.B.I.,* AIR 1980 SC 962, this Court held:

"…The proceedings starting with Section 238 of the Code including any discharge or framing of charges under Section 239 or 240 amount to a trial…"

30. In *Union of India & Ors. v. Major General Madan Lal Yadav (Retd.),* AIR 1996 SC 1340, a three-Judge Bench while dealing with the proceedings in General Court Martial under the provisions of the Army Act 1950, applied legal maxim "nullus commodum capere potest de injuria sua propria" (no one can take advantage of his own wrong), and referred to various dictionary meanings of the word 'trial' and came to the conclusion:

"It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial. (Emphasis supplied)

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Our conclusion further gets fortified by the scheme of the trial of a criminal case under the Code of Criminal Procedure, 1973, viz., Chapter XIV "Conditions requisite for initiation of proceedings" containing Sections 190 to 210, Chapter XVIII containing Sections 225 to 235 and dealing with "trial before a Court of Sessions" pursuant to committal order under Section 209 and in Chapter XIX "trial of warrant cases by Magistrates" containing Sections 238 to 250 etc. It is settled law that under the said Code trial commences the moment cognizance of the offence is taken and process is issued to the accused for his appearance etc. Equally, at a sessions trial, the court considers the committal order under Section 209 by the Magistrate and proceeds further. It takes cognizance of the offence from that stage and proceeds with the trial. The trial begins with the taking of the cognizance of the offence and taking further steps to conduct the trial." (Emphasis supplied)

31. In *"Common Cause", A Registered Society thr. its Director v. Union of India & Ors.,* AIR 1997 SC 1539, this Court while dealing with the issue held:

"(i) In case of trials before Sessions Court the trials shall be treated to have commenced when charges are framed under Section 228 of the Code of Criminal Procedure, 1973 in the concerned cases.

(ii) In cases of trials of warrant cases by Magistrates if the cases are instituted upon police reports the trials shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure, 1973, while in trials of warrant cases by Magistrates when cases are instituted otherwise than on police report such trials shall be treated to have commenced when charges are framed against the concerned accused under Section 246 of the Code of Criminal Procedure, 1973.

(iii) In cases of trials of summons … *s*

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the trials would be considered to have commenced when the accused who appear or are brought before the Magistrate are asked under Section 251 whether they plead guilty or have any defence to make."(Emphasis added)

32. In *Raj Kishore Prasad* (Supra), this Court said that as soon as the prosecutor is present before the court and that court hears the parties on *framing of charges and discharge,* trial is said to have commenced and that there is no intermediate stage between committal of case and framing of charge.

33. In *In Re: Narayanaswamy Naidu v. Unknown* 1 Ind Cas 228, a Full Bench of the Madras High Court held that "Trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged." A similar view has been taken by Madras High Court subsequently in *Sriramulu v. Veerasalingam,* (1914) I.L.R. 38 Mad. 585.

34. However, the Bombay High Court in *Dagdu Govindshet Wani v. Punja Vedu Wani* (1936) 38 Bom.L.R. 1189 referring to *Sriramulu* (Supra) held :

"There is no doubt that the Court did take the view that in a warrant case the trial only commences from the framing of the charge .....But, according to my experience of the administration of criminal justice in this Presidency, which is not inconsiderable, the Courts here have always accepted the definition of trial which has been given in Gomer Sirda v. Queen-Empress, (1898) I.L.R. 25 Cal. 863, that is to say, trial has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and, defence, if the accused be defended, present in Court for the hearing of the case."

A similar view has been taken by the Lahore High Court in *Sahib Din v. The Crown,* (1922) I.L.R. 3 Lah. 115, wherein it was held that for the purposes of Section 350 of the Code, a trial cannot be said to commence only when a charge is framed. The trial covers the whole of the proceedings in a warrant case. This case was followed in *Fakhruddin v. The Crown,* (1924) I.L.R. 6 Lah. 176; and in *Labhsing v. Emperor,* (1934) 35 Cr.L. J. 1261.

35. In view of the above, the law can be summarised to the effect that as 'trial' means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the 'trial' commences only on charges being framed. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken.

36. Section 2(g) Cr.P.C. and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under Cr.P.C. by the Magistrate or the court. The word 'inquiry' is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial.

37. Even the word "course" occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word "course" therefore, allows the court to invoke this power to proceed agains [illegible] e

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initial stage of inquiry upto the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time; duration and not a fixed point of time. (See: *Commissioner of Income-tax, New Delhi (Now Rajasthan) v. M/s. East West Import & Export (P) Ltd. (Now known as Asian Distributors Ltd.) Jaipur,* AIR 1989 SC 836).

38. In a somewhat similar manner, it has been attributed to word "course" the meaning of being a gradual and continuous flow advanced by journey or passage from one place to another with reference to period of time when the movement is in progress. (See: *State of Travancore-Cochin & Ors. v. Shanmugha Vilas Cashewnut Factory, Quilon,* AIR 1953 SC 333).

39. To say that powers under Section 319 Cr.P.C. can be exercised only during trial would be reducing the impact of the word 'inquiry' by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim "A Verbis Legis Non Est Recedendum" which means, "from the words of law, there must be no departure" has to be kept in mind.

40. The court cannot proceed with an assumption that the legislature enacting the statute has committed a mistake and where the language of the statute is plain and unambiguous, the court cannot go behind the language of the statute so as to add or subtract a word playing the role of a political reformer or of a wise counsel to the legislature. The court has to proceed on the footing that the legislature intended what it has said and even if there is some defect in the phraseology etc., it is for

others than the court to remedy that defect. The statute requires to be interpreted without doing any violence to the language used therein. The court cannot re-write, recast or reframe the legislation for the reason that it has no power to legislate.

41. No word in a statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced to a "dead letter" or "useless lumber". An interpretation which renders a provision an otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in "an exercise in futility" and the product came as a "purposeless piece" of legislation and that the provision had been enacted without any purpose and the entire exercise to enact such a provision was "most unwarranted besides being uncharitable." (Vide: *Patel Chunibhai Dajibha etc. v. Narayanrao Khanderao Jambekar & Anr.,* AIR 1965 SC 1457; *The Martin Burn Ltd. v. The Corporation of Calcutta,* AIR 1966 SC 529; *M.V. Elisabeth & Ors. v. Harwan Investment & Trading Pvt. Ltd. Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa,* AIR 1993 SC 1014; *Sultana Begum v. Prem Chand Jain,* AIR 1997 SC 1006; *State of Bihar & Ors. etc.etc. v. Bihar Distillery Ltd. etc. etc.,* AIR 1997 SC 1511; *Institute of Chartered Accountants of India v. M/s. Price Waterhouse & Anr.,* AIR 1998 SC 74; and *The South Central Railway Employees Co-operative Credit Society Employees Union, Secundrabad v. The Registrar of Co-operative Societies & Ors.,* AIR 1998 SC 703).

42. This Court in *Rohitash Kumar & Ors. v. Om Prakash Sharma & Ors.,* AIR 2013 SC 30, after placing reliance on various earlier judgments of this Court held:

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"The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word… A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act……The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause…….under the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation."

Thus, by no means it can be said that provisions of Section 319 Cr.P.C. cannot be pressed into service during the course of 'inquiry'. The word 'inquiry' is not surpulsage in the said provision.

43. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Cr.P.C. can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208

Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind.

44. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance of Sections 207 and 208 Cr.P.C., and committing the matter if it is exclusively triable by Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 Cr.P.C. is forbidden, by express provision of Section 319 Cr.P.C., to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Sessions.

45. It may be pertinent to refer to the decision in the case of *Raj Kishore Prasad* (supra) where, in order to avoid any delay in trial, the court emphasised that such a power should be exercised keeping in view the context in which the words "inquiry" and "trial" have been used under Section 319 Cr.P.C. and came to the conclusion that such a power is not available at the pre-trial stage and should be invoked only at the stage of inquiry or after evidence is recorded.

46. A two-Judge Bench of this Court in *M/s. SWIL Ltd. v. State of Delhi & Anr.,* AIR 2001 SC 2747, held that once the process has been issued, power under Section 319 Cr.P.C. cannot be exercised as at that stage, since it is neither an inquiry nor a trial.

In *Ranjit Singh* (Supra), the Court held :

"So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court can deal with only the accused referred to in Section 209 of the Code. There is no intermediary stage till then for the Sessions Court to [illegible] *n*

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to the array of the accused. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked"

47. In *Kishun Singh* (Supra), the Court while considering the provision of the old Code, the Law Commission's Recommendation and the provisions in the Cr.P.C., held that Section 319 Cr.P.C. is an improved provision upon the earlier one. It has removed the difficulty of taking cognizance as cognizance against the added person would be deemed to have been taken as originally against the other co-accused. Therefore, on Magistrate committing the case under Section 209 Cr.P.C. to the Court of Sessions, the bar of Section 193 Cr.P.C. gets lifted thereby investing the Court of Sessions complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record, though who is not an accused before the court.

48. In *Dharam Pal* (CB), the Constitution Bench approved the decision in *Kishun Singh* (Supra) that the Sessions Judge has original power to summon accused holding that *"the Sessions Judge was entitled to issue summons under Section 193 Code of Criminal Procedure upon the case being committed to him by the Magistrate. The key words in Section 193 are that "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code." The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance*

of the offence exercising original jurisdiction. Although, an attempt has been made to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said Section"

49. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 Cr.P.C. cannot be exercised. In fact, this proposition does not seem to have been disturbed by the Constitution Bench in *Dharam Pal* (CB). The dispute therein was resolved visualizing a situation wherein the court was concerned with procedural delay and was of the opinion that the Sessions Court should not necessarily wait till the stage of Section 319 Cr.P.C. is reached to direct a person, not facing trial, to appear and face trial as an accused. We are in full agreement with the interpretation given by the Constitution Bench that Section 193 Cr.P.C. confers power of original jurisdiction upon the Sessions Court to add an accused once the case has been committed to it.

50. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary [illegible] e

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judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.

Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.

51. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 Cr.P.C. i.e. provisions of Sections 200, 201, 202, etc. Cr.P.C. applicable in the case of Complaint Cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint Cases is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872, (hereinafter referred to as the 'Evidence Act') comes before the court. There does not seem to be any restriction in the provisions of Section 319 Cr.P.C. so as to preclude such evidence as coming before the court in Complaint Cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the Court, such evidence can be used only to corroborate the evidence recorded during the trial for the purpose of Section 319 Cr.P.C., if so required.

52. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried.

Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.

53. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge sheet or any other person who might be an accomplice.

Question No.(iii) : Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

54. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 Cr.P.C., the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that comes up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 Cr.P.C. indicate that the material has to be "where ….it appears from the evidence" before the court.

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55. Before we answer this issue, let us examine the meaning of the word 'evidence'. According to Section 3 of the Evidence Act, 'evidence' means and includes:

> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court, such statements are called documentary evidence;

56. According to Tomlin's Law Dictionary, Evidence is *"the means from which an inference may logically be drawn as to the existence of a fact. It consists of proof by testimony of witnesses, on oath; or by writing or records."* Bentham defines 'evidence' as *"any matter of fact, the effect, tendency or design of which presented to mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact- a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact."* According to Wigmore on Evidence, evidence represents *"any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."*

57. The provision and the above-mentioned definitions clearly suggest that it is an exhaustive definition. Wherever the words "means and include" are used, it is an indication of the fact that the definition 'is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be

attached to these words or expression. (Vide: *M/s. Mahalakshmi Oil Mills v. State of A.P.,* AIR 1989 SC 335; *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh & Ors.,* (1990) 3 SCC 682; *P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors.,* AIR 1995 SC 1395; *Hamdard (Wakf) Laboratories v. Dy. Labour Commissioner & Ors.,* AIR 2008 SC 968; and *Ponds India Ltd. (merged with H.L. Limited) v. Commissioner of Trade Tax, Lucknow,* (2008) 8 SCC 369).

58. In *Feroze N. Dotivala v. P.M. Wadhwani & Ors.,* (2003) 1 SCC 433, dealing with a similar issue, this Court observed as under:

> *"Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive definition. Unless there are compelling reasons to do so, meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined."*

We, therefore proceed to examine the matter further on the premise that the definition of word "evidence" under the Evidence Act is exhaustive.

59. In *Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr.,* AIR 2011 SC 760, while dealing with the issue this Court held :

> *"18. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) [illegible] e*

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material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc."

60. In relation to a Civil Case, this court in *Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd.,* AIR 2004 SC 355, held that the examination of a witness would include evidence-in-chief, cross-examination or re-examination. In *Omkar Namdeo Jadhao & Ors v. Second Additional Sessions Judge Buldana & Anr.,* AIR 1997 SC 331; and *Ram Swaroop & Ors. v. State of Rajasthan,* AIR 2004 SC 2943, this Court held that statements recorded under Section 161 Cr.P.C. during the investigation are not evidence. Such statements can be used at the trial only for contradictions or omissions when the witness is examined in the court.

(See also: *Podda Narayana & Ors. v. State of A.P.,* AIR 1975 SC 1252; *Sat Paul v. Delhi Administration,* AIR 1976 SC 294; and *State (Delhi Administration) v. Laxman Kumar & Ors.,* AIR 1986 SC 250).

61. In *Lok Ram v. Nihal Singh & Anr.,* AIR 2006 SC 1892, it was held that it is evident that a person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added as an accused to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or

the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

62. The majority view of the Constitution Bench in *Ramnarayan Mor & Anr. v. The State of Maharashtra,* AIR 1964 SC 949 has been as under:

"9. It was urged in the alternative by counsel for the appellants that even if the expression "evidence" may include documents, such documents would only be those which are duly proved at the enquiry for commitment, because what may be used in a trial, civil or criminal, to support the judgment of a Court is evidence duly proved according to law. But by the Evidence Act which applies to the trial of all criminal cases, the expression "evidence" is defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry and documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence." (Emphasis added)

63. Similarly, this Court in *Sunil Mehta & Anr. v. State of Gujarat & Anr.,* JT 2013 (3) SC 328, held that "It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof."

64. In *Guriya @ Tabassum Tauquir & Ors. v. State of Bihar & Anr.,* AIR 2008 SC 95, this Court held that in exercise of the powers under Section 319 Cr.P.C., the court can add a new accused only on the basis of evide[obscured] it

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and not on the basis of materials available in the charge sheet or the case diary.

65. In *Kishun Singh* (Supra), this Court held :

"11. On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power (under Section 319(1)), it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by S. 319 of the Code. Therefore, stricto sensu, Section 319 of the Code cannot be invoked in a case like the present one where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution.

12. But then it must be conceded that Section 319 covers the post-cognizance stage where in the course of an inquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision….."

66. A similar view has been taken by this Court in R*aj Kishore Prasad* (Supra), wherein it was held that in order to

apply Section 319 Cr.P.C., it is essential that the need to proceed against the person other than the accused appearing to be guilty of offence arises only on evidence recorded in the course of an inquiry or trial.

67. In *Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand,* (2009) 2 SCC 696, a two-Judge Bench of this Court held that "a court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 Cr.P.C., the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction."

68. A similar view has been reiterated by this Court in *Rajendra Singh v. State of U.P. & Anr.,* AIR 2007 SC 2786, observing that court should not exercise the power under Section 319 Cr.P.C. on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. The word 'evidence' in Section 319 Cr.P.C. contemplates the evidence of witnesses given in the court.

69. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 Cr.P.C. would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word 'evidence' as appearing in Section 319 Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 Cr.P.C., the use of word `evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the

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opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 Cr.P.C.

70. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.

71. It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

72. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the Cr.P.C.

73. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the magistrate or court for the purpose of Section 319 Cr.P.C.?

74. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This

power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case.

75. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensuo, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

76. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material alongwith the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

77. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the

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commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused.

78. This would harmonise such material with the word 'evidence' as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

79. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

80. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial.

Q.(ii) Does the word 'evidence' in Section 319 Cr.P.C. means as arising in Examination-in-Chief or also together with Cross-Examination?

81. The second question referred to herein is in relation to the word `evidence` as used under Section 319 Cr.P.C., which leaves no room for doubt that the evidence as understood

under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In *Rakesh* (Supra), it was held that "It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising the court's power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not." In *Ranjit Singh* (Supra), this Court held that "it is not necessary for the court to wait until the entire evidence is collected," for exercising the said power. In *Mohd. Shafi* (Supra), it was held that the pre-requisite for exercise of power under Section 319 Cr.P.C. was the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the cross examination is over and that there would be no illegality in doing so. A similar view has been taken by a two-Judge Bench in the case of *Harbhajan Singh & Anr. v. State of Punjab & Anr.* (2009) 13 SCC 608. This Court in *Hardeep Singh* (Supra) seems to have misread the judgment in *Mohd. Shafi* (Supra), as it construed that the said judgment laid down that for the exercise of power under Section 319 Cr.P.C., the court has to necessarily wait till the witness is cross examined and on complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 Cr.P.C.

82. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law [illegible] e,

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for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.

83. As held in *Mohd. Shafi* (Supra) and *Harbhajan Singh* (Supra), all that is required for the exercise of the power under Section 319 Cr.P.C. is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The pre-requisite for the exercise of this power is similar to the prima facie view which the magistrate must come to in order to take cognizance of the offence. Therefore, no straight-jacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/Court is convinced even on the basis of evidence appearing in Examination-in-Chief, it can exercise the power under Section 319 Cr.P.C. and can proceed against such other person(s). It is essential to note that the Section also uses the words 'such person could be tried' instead of should be tried. Hence, what is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section 4 of Section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of Examination-in-Chief, the Court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by Cross Examination,

undoubtedly in itself, is an evidence.

84. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s) prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of persons already facing trial. More so, Section 299 Cr.P.C. enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

85. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

Q. (iv) What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.?

86. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court.

The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

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87. In *Pyare Lal Bhargava v. The State of Rajasthan,* AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word 'appear'. The court held that the appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof. In *Ram Singh & Ors. v. Ram Niwas & Anr.,* (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word 'appear' as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

88. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in *Vikas v. State of Rajasthan,* 2013 (11) SCALE 23, held that on the *objective satisfaction* of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

89. In *Rajendra Singh* (Supra), the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion

not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

90. In *Mohd. Shafi* (Supra), this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

91. In *Sarabjit Singh & Anr. v. State of Punjab & Anr.,* AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed:

"….For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned……Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a ca[illegible]c

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sparing) exercise of jurisdiction, would not be satisfied." (Emphasis added)

92. In *Brindaban Das & Ors. v. State of West Bengal,* AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

A similar view has been re-iterated by this Court in *Michael Machado & Anr. v. Central Bureau of Investigation & Ors.,* AIR 2000 SC 1127.

93. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide: *State of Karnataka v. L. Munishwamy & Ors.,* AIR 1977 SC 1489; *All India Bank Officers' Confederation etc. v. Union of India & Ors.,* AIR 1989 SC 2045; *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia,* (1989) 1 SCC 715; *State of M.P. v. Dr. Krishna Chandra Saksena,* (1996) 11 SCC 439; and *State of M.P. v. Mohan Lal Soni,* AIR 2000 SC 2583).

94. In *Dilawar Babu Kurane v. State of Maharashtra,* AIR

2002 SC 564, this Court while dealing with the provisions of Sections 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in *Union of India v. Prafulla Kumar Samal & Anr.,* AIR 1979 SC 366 and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

95. In *Suresh v. State of Maharashtra,* AIR 2001 SC 1375, this Court after taking note of the earlier judgments in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya,* AIR 1990 SC 1962 and State of Maharashtra v. Priya Sharan Maharaj, AIR 1997 SC 2041, held as under:

"9.......at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and n[illegible]*of*

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arriving at the conclusion that it is not likely to lead to a conviction." (Emphasis supplied)

96. Similarly in *State of Bihar v. Ramesh Singh,* AIR 1977 SC 2018, while dealing with the issue, this Court held:

"……If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial….."

97. In *Palanisamy Gounder & Anr. v. State, represented by Inspector of Police,* (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

98. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes

unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?

100. In *Joginder Singh & Anr. v. State of Punjab & Anr.,* AIR 1979 SC 339, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

101. In *Anju Chaudhary v. State of U.P. & Anr.,* (2013) 6 SCC 384, a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even

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at that stage of summoning, no hearing is contemplated under the law.

102. In *Suman v. State of Rajasthan & Anr.,* AIR 2010 SC 518, a two-Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused. In *Lal Suraj* (supra), a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been taken in *Lok Ram* (Supra), wherein it was held that a person, though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

103. Even the Constitution Bench in *Dharam Pal* (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

104. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry

before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.

105. In *Sohan Lal & Ors. v. State of Rajasthan,* (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

106. In *Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors.,* AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or *against whom proceedings have been quashed,* have also committed the offence, the Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused.

107. Power under Section 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case [illegible] o

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Section 300 (5) Cr.P.C., a person discharged under Section 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 Cr.P.C. provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person who has already been discharged.

108. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300(5) Cr.P.C. and Section 398 Cr.P.C. cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319 Cr.P.C. can be exercised. We may clarify that the word 'trial' under Section 319 Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.

109. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

110. We accordingly sum up our conclusions as follows:

Question Nos.1 & III

Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND

Q.III Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

A. In *Dharam Pal's* case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

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Question No. II

Q.II Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. IV

Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No.V

Q.V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove.

R.P. Reference Answered.

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DIPAK BABARIA & ANR.
v.
STATE OF GUJARAT & ORS.
(Civil Appeal No. 836 of 2014)

JANUARY 23, 2014

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

GUJARAT TENANCY AND AGRICULTURAL LANDS (VIDARBHA REGION AND KUTCH AREAS) ACT, 1958:

s.89-A - Sale of agricultural land for industrial purpose - No industry set up - Minister permitting further sale of land for industrial purpose - Held: Where purchaser fails to start industrial activity, s. 89A (5) requires the Collector to hold an enquiry, he is expected to pass an order that the land shall vest in Government Then the land shall be disposed of by Government having regard to the use of the land --In the instant case, Collector did not take any steps - Instead Minister granted permission for sale of land in favour of further purchaser - This is clearly a case of dereliction of duties by Collector and dictation by the Minister - Direction of State Government dated 18.12.2009 and consequent order issued by Collector on 15.1.2010 are arbitrary, and bad in law for being in violation of the scheme and the provisions of ss. 89 and 89A -- Direct sale of land by first purchaser to subsequent purchaser is also bad in law, and inoperative - Consequently, there will be an order that the land shall vest in State Government free from all encumbrances - The vesting order, however, has to be on payment of appropriate compensation to the purchaser as the Collector may determine - If the second purchaser is interested in its proposed project, it shall pay the stated amount to Government - Direction given for adjustment of the amount paid - Constitution of India, 1950 - Art.142.

ADMINISTRATIVE LAW:

Departmental notings - Held: A higher civil servant normally has a varied experience and Ministers ought not to treat his opinion with scant respect - If Ministers want to take a different view, there must be compelling reasons, and the same must be reflected on the record - In the instant case, the Secretaries had given advice in accordance with the statute and yet the Minister has given a direction to act contrary thereto and permitted the sale which is clearly in breach of the statute.

Land policy - Held: Considering the scheme of the Act, the process of industrialization must take place in accordance therewith - If the law requires a particular thing should be done in a particular manner it must be done in that way and none other -State Government cannot ignore the policy intent and the procedure contemplated by the statute - In the instant case, State Government could have acquired the land, and then either by auction or by considering the merit of proposal, allotted it.

Power of statutory authority - Exercise of by Government - Minister permitting further sale - Held: Under s. 89A(3), Government is appellate authority where Collector does not grant a certificate for purchase of bonafide industrial purpose - Thus, powers of statutory authority have been exercised by Government which is an appellate authority - Minister's direction clearly indicates an arbitrary exercise of power - Orders passed by Government cannot, therefore, be sustained - Dictating the Collector to act in a particular manner on the assumption by Minister that it is in the interest of industrial development would lead to a breach of the mandate of statute framed by legislature - Gujarat Tenancy and Agricultural Lands (Vidarbha Region and Kutch Areas) Act, 1958 -- s.89-A.

The appellant filed a writ petiti[illegible]st

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before the High Court challenging primarily the permission granted by the Collector to respondent No.4 i.e., Indigold Refinery Limited, to sell certain parcels of agricultural land situated in District Kutch, which were said to have been purchased earlier by respondent No.4, for industrial purpose, in favour of respondent No.5 i.e. Alumina Refinery Limited, as being impermissible under the provisions ss. 89 and 89A of the Gujarat Tenancy and Agricultural Lands (Vidarbha Region and Kutch Areas) Act, 1958 (Tenancy Act, 1958). It was the case of the appellant that there was no provision for any further transfer of agricultural land from one industrial purchaser to any third party, once again, for industrial purpose when the first purchaser of agricultural land had defaulted in setting up the industry. Apart from being in breach of the law, the transaction was stated to be against public interest, and a mala-fide one resulting into a serious loss to the public exchequer. The writ petition also sought an inquiry into the role of the Collector and the Revenue Minister of the State Government as well as a direction to the State authorities to resume the land in question. The High Court dismissed the writ petition holding that there was delay in initiating the said public interest litigation (PIL), and that the writ petitioner had suppressed the material facts before the High Court concerning the investment claimed to have been made by respondent No.5.

In the instant appeal filed by the writ petitioner, the questions for consideration before the Court were: (i) whether the decision taken by the Government to permit the transfer of the agricultural land from respondent No. 4 to respondent No. 5, was legal and justified, and (ii) whether there had been any breach of ss.89 and 89-A, and if it was so what should be the order in the case?

Allowing the appeal in part, the Court

HELD: 1.1 Section 89 of the Gujarat Tenancy and Agricultural Lands (Vidarbha Region and Kutch Areas) Act, 1958 essentially bars the transfers of agricultural lands to non-agriculturists. Section 89A creates an exception to s. 89 for sale of land for bona-fide industrial purposes in certain cases. The purchaser has to send a notice to the Collector within 30 days of the purchase, and the Collector has to be satisfied that the land has been validly purchased for a bonafide industrial purpose, in conformity with the provisions of sub-s. (1) of s.89-A, and then issue a certificate to that effect. There is a further requirement that the purchaser has to commence the industrial activity within three years, and has to start the production within five years from the date of issuance of the certificate. Admittedly no such steps were taken by respondent no. 4 nor was any affidavit in reply filed by them, either before the High Court or before this Court. [para 45, 46 and 48] [118-G; 119-E; 121-H; 122-A-B]

1.2 It is significant to note that whereas the land is supposed to have been purchased in 2003 at a price of Rs.70 lakhs, it is said to have been sold at Rs.1.20 crores in 19.1.2010. It is very clear that even before the letter of 16.6.2009 proposing to sell the land to respondent No.5, in December 2008 itself respondent No.4 had written to the Collector that they were no more interested in putting up the industrial project, and, therefore, they wanted to dispose of the piece of land to their prospective clients. That being the position, it was mandatory for the Collector at that stage itself to act under sub-s. (5) of s.89A to issue notice, conduct the necessary enquiry, determine the compensation and pass the order vesting the land in the State Government. Then the land was to be disposed of by the Government having regard to the use of the land. In any case, the Collector should have taken the necessary steps in accordance with law at least after receiving the letter dated 16.6.2 e

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any such steps. Thus, the only authority contemplated under the Section is the Collector, and the decision is to be taken at his level. It is only in the event of his refusing to give the certificate of purchase for bonafide industrial purpose that an appeal lies to the State Government. [para 47 and 49] [122-E-H; 120-H; 121-A]

1.3 Respondent No.5 by letter dated 12.6.2009 addressed to the Deputy Collector Bhuj, sought permission to purchase the land belonging to respondent no. 4. It then sought the permission from the competent authority, u/s 89 of the Tenancy Act, 1958 to register the sale in their favour. After writing to the Collector on 16.6.2009, without waiting for any communication from him, respondent no. 5 wrote to the Chief Minister on 18.6.2009. Directors of respondent no. 5 had a meeting with the Minister of Revenue on 29.6.2009. The Minister passed an order that permission be given and, therefore, the Collector ultimately granted the permission as directed by the Government. Instead of the statutory authority viz. the Collector acting in accordance with the statutory mandate, only because a direction was given by the Minister that the statutory authority was bypassed, and even the enquiry as contemplated under sub-s. (5) of s. 89A was given a go-by. Thus, what emerges from the record is that whereas ss. 89 and 89A contemplate a certain procedure and certain requirements, what has been done in the instant matter is quite different. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.[para 50,52 and 53] [123-C-D and E-F; 124-B-E; 125-B]

Taylor Vs. Taylor (1875) 1 Ch D 426,431; *Nazir Ahmed Vs. King Emperor* AIR 1936 PC 253 ; *Rao Shiv Bahadur Singh Vs. State of Vindhya Pradesh* 1954 SCR 1038 = AIR 1954 SC 322; *State of U.P. Vs. Singhara Singh,* AIR 1964 SC 358; *Chandra Kishore Jha Vs. Mahavir Prasad* 1999 (2)

Suppl. SCR 754 = 1999 (8) SCC 266, *Dhananjaya Reddy Vs. State of Karnataka* 2001 (2) SCR 399 = 2001 (4) SCC 9 and *Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited* 2008 (4) SCR 822 = 2008 (4) SCC 755 - referred to

R v. Tower Hamlets London Borough Council [1988] AC 858 - referred to.

1.4 The notings of the Secretaries were significant. A higher civil servant normally has a varied experience and the ministers ought not to treat his opinion with scant respect. If Ministers want to take a different view, there must be compelling reasons, and the same must be reflected on the record. In the instant case, the Secretaries had given advice in accordance with the statute and yet the Minister has given a direction to act contrary thereto and permitted the sale which is clearly in breach of the statute. Under s. 89A(3), the Government is the appellate authority where the Collector does not grant a certificate for purchase of bonafide industrial purpose. The State Government could not have given a direction to the Collector who was supposed to take the decision under his own authority. Thus, thereby the powers of the statutory authority have been exercised by the Government which is an appellate authority. [para 55 and 62] [126-H; 127-A-B; 132-B-D]

Trilochan Dev Sharma vs. State of Punjab 2001 (3) SCR 1146 =AIR 2001 SC 2524 - referred to.

1.5 The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent affidavits. [para 57] [127-G]

Commissioner of Police, Bombay vs. Gordhandas Bhanji 1952 SCR 135 =AIR 1952 SC 16; *Mohinder Singh Gill vs. Chief Election Commissioner* =

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1978 (1) SCC 405 - referred to.

State of Punjay vs. Hari Kishan **1966 SCR 982 = AIR 1966 SC 1081 - referred to.**

1.6 The reliance on ss. 7 and 10 of the Transfer of Property Act is misconceived, since the Tenancy Act is a welfare enactment, enacted for the protection of the agriculturists. It is a special statute and the sale of agricultural land permitted under this statute will have to be held as governed by the conditions prescribed under the statute itself. The special provisions made in the Tenancy Act will, therefore, prevail over those in the Transfer of Property Act to that extent. Besides, it is clearly a case of dictation by the State Government to the Collector. [para 60-61] [130-G-H; 131-A]

Anirudhsinhji Karansinhji Jadega and anr. vs. State of Gujarat **1995 (2) Suppl. SCR 637 =1995 (5) SCC 302 - relied on.**

1.7 From the facts it is obvious that the land which was purchased by respondent No.4 for Rs.70 lakhs is permitted by the State Government to be sold directly to respondent No.5 at Rs.1.20 crores to set up an industry which could not have been done legally. It is undoubtedly not a case of loss of hundreds of crores as claimed by the appellants, but certainly a positive case of a loss of a few crores to the public exchequer by not going for public auction of the property. [para 63] [132-D-F]

1.8 It is true that in a given case State Government may invite an entrepreneur and give an offer. However, in the instant case, the sale of the land for industrial purpose is controlled by the statutory provisions, and the State Government was bound to act as per the requirements of the statute. The Minister's direction clearly indicates an arbitrary exercise of power. The

orders passed by the Government cannot therefore be sustained. There is neither a power nor a justification to make any special case, in favour of respondent No 5. [para 63] [132-E-G]

2.1 Considering the scheme of the Act, the process of industrialization must take place in accordance therewith. If the law requires a particular thing should be done in a particular manner it must be done in that way and none other. The State cannot ignore the policy intent and the procedure contemplated by the statute. In the instant case, the State Government could have acquired the land, and then either by auction or by considering the merit of the proposal allotted it to respondent No.5. Assuming that the application of respondent No 5 was for a bona-fide purpose, the same had to be examined by the Industrial Commissioner, to begin with, and thereafter it should have gone to the Collector. After the property vests in the Government, even if there were other bidders to the property, the Collector could have considered the merits and the bona-fides of the application of respondent No. 5, and nothing would have prevented him from following the course which is permissible under the law. It is not merely the end but the means which are of equal importance, particularly, if they are enshrined in the legislative scheme. The minimum that was required was an enquiry at the level of the Collector who is the statutory authority. [para 64] [133-A-E]

2.2 Dictating the Collector to act in a particular manner on the assumption by the Minister that it is in the interest of the industrial development would lead to a breach of the mandate of the statute framed by the legislature. The Ministers are not expected to act in this manner and, therefore, this particular route through the corridors of the Ministry, contrary to the statute, cannot be approved. This is clearly a case o[illegible]s

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by the Collector and dictation by the Minister, showing nothing but arrogance of power. [para 64] [133-E-F]

2.3 The High Court has erred in overlooking the legal position. It was expected to look into all the relevant aspects. The impugned judgment does not reflect on the issues raised in the petition. It could not be said that the petition was delayed and merely because investment had been made by respondent No.5, the court would decline to look into the important issues raised in the PIL. [para 65] [133-G-H]

2.4 This Court holds that the direction of the State Government dated 18.12.2009 and the consequent order issued by the Collector of Kutch on 15.1.2010 are arbitrary, and bad in law for being in violation of the scheme and the provisions of ss. 89 and 89A of the Tenancy Act. The direct sale of land by respondent no. 4 to respondent no. 5 is also bad in law, and inoperative. [para 68] [135-C-D]

3.1 (i) In the letter dated 6.12.2008 of respondent no. 4 itself, they clearly stated that they were no more interested in putting up any industrial project in the said land. Therefore, there is no need of any direction to hold an enquiry u/s 89-A(5).

(ii) Consequently, there will be an order that the land shall vest in the State Government free from all encumbrances. This vesting order, however, has to be on payment of appropriate compensation to the purchaser as the Collector may determine. Since respondent no. 4 has received from respondent no. 5 Rs. 1.20 crores as against the amount of Rs.70 lakhs, which it had paid to the agriculturists when it bought those lands in 2003. That being so, this amount of Rs. 1.20 crores would be set-off towards the compensation which would be payable by the State Government to the purchaser respondent no. 4, since the land was originally purchased by respondent no. 4 and is now to vest in the State Government.

(iii) The third step in this regard is that the land is to be disposed of by the State Government, having regard to the use of the land. The land was supposed to be used for the industrial activity on the basis of the utilization of bauxite found in Kutch, and respondent No. 5 has proposed a plant based on use of bauxite. The disposal of the land will, however, have to be at least as per the minimum price that would be receivable at the Government rate. In the facts and circumstances of the case, having noted that respondent No.5 claims to have made some good investment, and that it has also offered to pay, without prejudice, the difference between Rs.4.35 crores and Rs.1.20 crores i.e. Rs.3.15 cores to the State Government, the land will be permitted to be allotted to respondent no. 5 provided it pays Rs. 3.15 crores to the State Government. This particular order is being made further noting that respondent no. 5 has acted on the basis of the commitment made to it by the State Government in the Vibrant Gujarat Summit, and in furtherance of the industrial development policy of the State. It is also relevant to note that respondent No.5 had made an application to the Collector in the year 2009 for permitting the purchase of the land, and has been waiting to set up its industry for the last four years. In the circumstances, although the action of the State Government is held to be clearly arbitrary and untenable, the order of this Court will be appropriate to do complete justice in the matter. [para 69] [135-E-H; 136-A-H; 137-A]

3.2 (a) The order dated 18.12.2009 passed by the Government of Gujarat and by the Collector of Kutch on 15.1.2010, are held to be arbitrary and bad in law.

(b) The impugned judgment and order passed by the High Court is set-aside.

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(c) In the facts and circumstances of the case, the sale of the land by respondent no. 4 to respondent no. 5 is held to be bad in law. The land involved in the case is held to have vested in the State Government free from all encumbrances, and the amount of Rs. 1.20 crores paid by respondent no. 5 to respondent no. 4 is treated as full payment towards the compensation payable by the State to respondent no. 4

(d) If respondent no. 5 is interested in its proposed project, it shall pay an amount of Rs. 3.15 crores to the State Government within three months. On such a payment being made, an order of allotment of the land to respondent no. 5 will be issued by the State Government. The further activities of respondent no. 5 on the concerned parcel of land will start only after this payment is made, and in the event the amount is not so paid, the Government will proceed to take further steps to dispose of the land having regard to the use of the land. [para 70] [137-B-F]

Indian Council for Enviro-Legal Action Vs. Union of India & Ors. **1996 (1) Suppl. SCR 507 = 1996 (5) SCC 281,** *Centre for Public Interest Litigation and Ors. Vs. Union of India and Ors.* **2012 (3) SCR 147 = 2012 (3) SCC 1;** *Noida Entrepreneurs Association Vs. Noida and Ors.* **2011 (8) SCR 25 = 2011 (6) SCC 508;** *Chandra Bansi Singh Vs. State of Bihar* **1985 (1) SCR 579 = 1984 (4) SCC 316;** *Manohar Joshi Vs. State of Maharashtra and Ors.* **2011 (12) SCR 781 = 2012 (3) SCC 619;** *Bhaurao Dagdu Paralkar Vs. State of Maharashtra* **2005 (2) Suppl. SCR 774 = 2005 (7) SCC 605;** *Shrisht Dhawan Vs. Shaw Bros* **1991 (3) Suppl. SCR 446 = 1992 (1) SCC 534;** *Khawaja Vs. Secy. of State for Home Deptt.* **1983 (1) All ER 765;** *Deewan Singh & Ors. Vs. Rajendra Pd. Ardevi & Ors.* **2007 (1) SCR 30 = 2007(10) SCC 528;** *DLF Qutab Enclave Complex Educational Charitable Trust Vs. State of Haryana and Ors.* **2003 (2) SCR 1 = 2003**

(5) SCC 622; *Ujjagar Singh Vs. Collector* **1996 (4) Suppl. SCR 239 = 1996 (5) SCC 14;** *Jasbir Singh Chhabra Vs. State of Punjab* **2010 (4) SCC 192;** *Natural Resources Allocation, In Re: Special Reference (1) of 2012* **2012 (9) SCR 311 = 2012(10) SCC 1;** *Kasturi Lal Lakshmi Reddy Vs. State of J&K* **1980 (3)SCR 1338 =1980 (4) SCC 1;** *Prakash Amichand Shah Vs. State of Gujarat* **1985 (3) Suppl. SCR 1025 =1986 (1) SCC 581 - cited.**

Case Law Reference:

1996 (1) Suppl. SCR 507	**cited**	**para 32**
2012 (3) SCR 147	**cited**	**para 33**
2011 (8) SCR 25	**cited**	**para 33**
1985 (1) SCR 579	**cited**	**para 34**
2011 (12) SCR 781	**cited**	**para 34**
2005 (2) Suppl. SCR 774	**cited**	**para 34**
1991 (3) Suppl. SCR 446	**cited**	**para 34**
1983 (1) All ER 765	**cited**	**para 34**
2007 (1) SCR 30	**cited**	**para 35**
2003 (2) SCR 1	**cited**	**para 41**
1996 (4) Suppl. SCR 239	**cited**	**para 41**
2010 (4) SCC 192	**cited**	**para 42**
2012 (9) SCR 311	**cited**	**para 42**
1980 (3) SCR 1338	**cited**	**para 42**
1985 (3) Suppl. SCR 1025	**cited**	**para 44**
[1988] AC 858	**referred to**	**Para 52**
(1875) 1 Ch D 426431	**refe**	

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AIR 1936 PC 253	referred to	para 53
1954 SCR 1038	referred to	para 53
AIR 1964 SC 358	referred to	para 53
1999 (2) Suppl. SCR 754	referred to	para 53
2001 (2) SCR 399	referred to	para 53
2008 (4) SCR 822	referred to	para 53
1952 SCR 135	referred to	Para 57
1978 (2) SCR 272	referred to	Para 57
1966 SCR 982	relied on	para 61
1995 (2) Suppl. SCR 637	relied on	para 61
2001 (3) SCR 1146	referred to	Para 62

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 836 of 2014.

From the Judgment and Order dated 30.08.2012 of the High Court of Gujarat at Ahmedabad in Writ Petition (PIL) No. 44 of 2012.

Huzefa Ahmadi, Anirudh Sharma, Yashvardhan Roy, Rohan Sharma for the Appellants.

Krishnan Venugopal, V. Giri, T.R. Andhyarujina, Udai V.S. Rathore (for Vishal Gupta), Mayuri Raghuvanshi, Prakash Jani, Preetesh Kapur, Hemantika Wahi, Jesal Wahi, Jatin Zaveri for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave Granted.

2. This appeal by Special Leave seeks to challenge the judgment and order dated 30.8.2012 rendered by a Division

Bench of the Gujarat High Court dismissing Writ Petition (PIL) No.44 of 2012 filed by the appellants herein. The Writ Petition had various prayers, but essentially it sought to challenge the permission granted by the Collector, Bhuj, to sell certain parcels of agricultural land situated in district Kutch, which were said to have been purchased earlier by the respondent No.4 herein, one Indigold Refinery Limited of Mumbai, for industrial purpose in favour of respondent No.5 i.e. one Alumina Refinery Limited, Navi Mumbai, as being impermissible under the provisions of the Gujarat (earlier 'Bombay' prior to the amendment in its application in the State of Gujarat) Tenancy and Agricultural Lands (Vidarbha Region and Kutch Areas) Act, 1958 (Tenancy Act, 1958 for short). It was submitted that under Section 89A of this Act, agricultural land can be permitted to be sold by an agriculturist to another person for industrial purpose provided the proposed user is bona-fide. In the event, the land is not so utilised by such a person for such purpose, within the period as stipulated under the act, the Collector of the concerned district has to make an enquiry under sub-Section 5 thereof, give an opportunity to the purchaser with a view to ascertain the factual situation, and thereafter pass an order that the land shall vest in the State Government on payment of an appropriate compensation to the purchaser which the Collector may determine. It was contended that there was no provision for any further transfer of agricultural land from one industrial purchaser to any third party, once again, for industrial purpose when the first purchaser of agricultural land had defaulted in setting up the industry. Apart from being in breach of the law, the transaction was stated to be against public interest, and a mala-fide one resulting into a serious loss to the public exchequer. The Writ Petition criticised the role of the Collector and the Revenue Minister of the State Government, and sought an inquiry against them in the present case, and also a direction to the state authorities to resume the concerned land.

3. The impugned judgment and order rejected the said writ petition on two grounds, firstly that there [illegible] g

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the said Public Interest Litigation (PIL), and that the writ petitioner had suppressed the material facts before the Court concerning the investment claimed to have been made by the respondent No.5.

4. The writ petition, and now this appeal raise the issues with respect to the underlying policy and purpose behind the relevant provisions of the Tenancy Act, 1958. In that connection, it also raises the issue with respect to the duties of the revenue officers on the spot, such as the Collector, the importance of the role of senior administrative officers of the State Government, and whether a Minister of the Government can direct the administrative officers and the Collector to act contrary to the provisions and policy of the statute. The Secretary of the Department of Revenue of the Government of Gujarat, and the Collector of District Kutch at Bhuj are joined as respondent Nos. 2 and 3 to this appeal.

The facts leading to this appeal are as follows:-

5. It is pointed out by the appellants that the respondent No.4 Indigold Refinery Ltd. (Indigold for short) which is a company having its office in Mumbai, purchased eight parcels of land owned by one Virji Jivraj Patel and Jayaben Virji Patel residing at Bankers Colony, Bhuj, admeasuring in all 39 acres and 25 gunthas (i.e. roughly 40 acres) by eight sale deeds all dated 30.1.2003, for a consideration of about Rs.70 lakhs. These eight sale deeds are supposed to have been signed for respondent No.4 Indigold by one Hanumantrao Vishnu Kharat, its Chairman-cum-Managing Director. The lands are situated in villages Kukma and Moti Reldi in the district of Kutch. The sale deeds indicated that the purchaser had purchased these lands for industrial purpose, and that the purchaser will obtain the permission from the Deputy Collector, Bhuj for purchasing the said land within one month from the date of those sale deeds. The respondent No.4 is said to have applied for the necessary permission under Section 89A of the Tenancy Act, 1958 on 31.1.2003, and the Collector of Bhuj is stated to have

given the requisite certificate of purchase of the lands under sub-section (3) (c) (i) of the said section. It appears that thereafter no steps were taken by respondent No.4 to put up any industry on the said land.

6. Five years later, the respondent No.4 is stated to have applied on 6.12.2008 to the Deputy Collector at Bhuj for permission to sell these lands. The Collector of Bhuj sought the guidance from the Revenue Department, and in view of the direction of the Revenue Department, the Deputy Collector granted the permission on 15.1.2010, to sell the lands to respondent No. 5 treating it as a special case, and not to be treated as a precedent. Thereafter, the respondent No.4 conveyed the concerned lands to respondent No.5 by sale deed dated 19.1.2010. Respondent No.5 also obtained permission from the Industries Commissioner on 8.3.2010 for putting up the industry. Subsequently, the Collector issued the certificate as required under Section 89A (3) (c) (i) of the Tenancy Act, 1958, on 21.5.2010, that respondent No.5 had purchased the land for a bona-fide purpose. The permission for a non-agricultural user was given to the respondent No.5 on 5.1.2011. The Gujarat Mineral Development Corporation (GMDC) - which got itself impleaded in this appeal as respondent No.6 has entered into a Memorandum of Understanding (MOU for short) on 30.11.2011 with M/s Earth Refinery Pvt. Ltd. which is the holding company of respondent No.5 to purchase 26% of equity in a joint venture company to be set up by them, and which will own the industry.

7. It appears that a Gujarati Daily "Sandesh" in an article dated 20.8.2011 reported that there was a huge loss to the State exchequer in the sale of these lands to a private company almost to the tune of Rs.250 crores. The newspaper reported that although the respondent No.4 had purchased the concerned lands at village Kukma and Moti Reildi on 30.1.2003, no industrial activity was started till 2008 as required by the law, and after a long period of fiv... o

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be sold to Alumina Refinery Limited (Alumina for short). One Mr. Nitin Patel is the Managing Director of this Alumina, and Mr. Nilesh Patel who is his brother is its Director (Legal and Human Resources). The newspaper stated that Alumina had written a letter to the Chief Minister Mr. Narendra Modi, on 18.6.2009 that the Government should grant the necessary permission. It is further stated that on the said proposal being placed before them, the officers of the Revenue Department had placed negative remarks, and yet a permission was granted to sell 2 lakh sq. yds. of land at a throw away price when the rate of land was Rs.3500 - 4000 per sq. yd.. It was alleged that there was a direct involvement of the Chief Minister in this scam, and with a view to avoid Lokayukata enquiry, although a commission was appointed under Hon'ble Mr. Justice M.B. Shah, a former Judge of Supreme Court of India to enquire into a number of other controversial projects, this scam was excluded therefrom.

8. There was also a news item in another Daily "Kachchh Mitra" on 1.2.2011 that the Alumina Refinery Limited was given permission by breaching rules and regulations. The farmers of the nearby villages were worried, and some 200 farmers had protested against the proposal as it would affect their agricultural activities due to pollution. It was stated that they had sowed plants of tissue-culture Israeli dry-dates. They had planted lacs of Kesar Mango trees. They were also cultivating crops of Papaiya, Aranda, Wheat, Cotton, groundnuts etc. If the refinery work starts in this area, it will affect the agricultural work badly. There was also a fear that the blackish and toxic air of the factory will spoil the plants.

9. All this led the appellants to file the earlier mentioned writ petition, for the reliefs as prayed. The petition enclosed the above referred news reports, as also the information obtained through enquiry under the Right to Information Act, 2005 by one Shri Shashikant Mohanlal Thakker of Madhapur Village of Taluka Bhuj. This information contained the documents

incorporating the file notings of the revenue department and the orders granting permission. The aforesaid writ petition was filed on 28.2.2012. An affidavit in reply to the writ petition was filed by above referred Nitin Patel on behalf of respondent No.5, and the appellants filed a rejoinder. Respondent No.5 filed a sur-rejoinder thereto. The respondent No.1 State of Gujarat filed an affidavit in reply on 16.8.2012, and the petitioner filed a rejoinder to the Government's affidavit on 10.11.2012. After the writ petition was filed on 28.2.2012 an order of status-quo was granted on 1.3.2012, and it continued till the dismissal of the petition on 30.8.2012 when the order of stay was vacated. However, when the present SLP was filed, an order of status-quo was granted by this Court on 4.1.2013, and it has continued till date.

Relevant provisions of the Statute:-

10. In as much as we are concerned with the provisions contained in Section 89 and Section 89A of the Tenancy Act, 1958, it is necessary to reproduce the two sections in their entirety. These two sections appear in Chapter VIII of the Tenancy Act, 1958. The sections read as follows:-

"CHAPTER VIII

RESTRICTIONS ON TRANSFERS OF AGRICULTURAL LANDS

AND ACQUISITION OF HOLDINGS AND LANDS

89 Transfers to non-agriculturists barred.-

Transfers to non-agricul-turists barred (1) Save as provided in this Act,

(a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recover[...]d

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revenue), gift exchange or lease of any land or interest therein, or

(b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee,

shall be valid in favour of a person who is not an agriculturist or who being an agriculturist cultivates personally land not less than three family holdings whether as owner or partly as tenant or who is not an agricultural labourer:

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, in such circumstances as may be prescribed:

[Provided further that no such permission shall be granted, where land is being sold to a person who is not an agriculturists for agricultural purpose, if the annual income of such person from other source exceeds five thousand rupees.]

(2) Nothing in this section shall be deemed to prohibit the sale, gift, exchange or lease of a dwelling house or the site thereof or any land appurtenant to it in favour of an agricultural labourer or an artisan.

(3) Nothing in this section shall apply to a mortgage of any land or interest therein effected in favour of a co-operative society as security for the land advanced by such society.

(4) Nothing in section 90 shall apply to any sale made under sub-section (I).

89A. Sale of land for bonafide industrial purpose permitted in certain cases:-

(1) Nothing in section 89 shall prohibit the sale or the agreement for the sale of land for which no permission is required under sub-section (1) of section 65B of the Bombay Land Revenue Code, 1879 (Bom. V of 1879) in favour of any person for use of such land by such person for a bonafides industrial purpose:

Provided that-

(a) the land is not situated within the urban agglomeration as defined in clause (n) of section 2 of the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976),

(b) where the area of the land proposed to be sold exceeds ten hectares, the person to whom the land is proposed to be sold in pursuance of this sub-section shall obtain previous permission of the Industries Commissioner, Gujarat State, or such other officer, as the State Government may, by an order in writing, authorise in this behalf.

(c) the area of the land proposed to be sold shall not exceed four times the area on which construction for a bonafide industrial purpose is proposed to be made by the purchaser:

Provided that any additional land which may be required for pollution control measures or required under any relevant law for the time being in force and certified as such by the relevant authority under that law shall not be taken into account for the purpose of computing four times the area.

(d) where the land proposed to be sold is owned by a person belonging to the Scheduled Tribe, the sale shall be subject to the provisions of section 73AA of the Bombay Land Rever

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V of 1879).

(2) Nothing in the Section 90 shall apply to any sale made in pursuance of subsection (1).

(3) (a) Where the land is sold to a person in pursuance of sub-section (1) (hereinafter referred to as "the purchaser"), he shall within thirty days from the date of purchase of the land for bonafides industrial purpose, send a notice of such purchase in such form alongwith such other particulars as may be prescribed, to the Collector and endorse a copy thereof to the Mamlatdar.

(b) Where the purchaser fails to send the notice and other particulars to the Collector under clause (a) within the period specified therein, he shall be liable to pay, in addition to the non-agricultural assessment leviable under this Act, such fine not exceeding two thousand rupees as the Collector may subject to rules made under this Act, direct.

(c) Where, on receipt of the notice of the date or purchase for the use of land for a bonafides industrial purpose and other particulars sent by the purchaser under clause (a), the Collector, after making such inquiry as he deems fit-

(i) is satisfied that the purchaser of such land has validly purchased the land for a bonafide industrial purpose in conformity with the provisions of sub-section (1), he shall issue a certificate to that effect to the purchaser in such form and with in such time as may be prescribed.

(ii) is not so satisfied, he shall, after giving the purchaser an opportunity of being heard, refuse to issue such certificate and on such refusal, the sale

of land to the purchaser shall be deemed to be in contravention of section 89.

(d) (i) The purchaser aggrieved by the refusal to issue a certificate by the Collector under sub-clause (ii) of clause (c) may file an appeal to the State Government or such officer, as it may, by an order in writing, authorise in this behalf.

(ii) The State Government or the authorised officer shall, after giving the appellant an opportunity of being heard, pass such order on the appeal as it or he deems fit.

(4) The purchaser to whom a certificate is issued under sub-clause (i) of clause (c) of sub-section (3), shall commence industrial activity on such land within three years from the date of such certificate and commence production of goods or providing of services within five years from such date:

Provided that the period of three years or, as the case may be, five years may, on an application made by the purchaser in that behalf, be extended from time to time, by the State Government or such officer, as it may, by an order in writing authorise in this behalf, in such circumstances as may be prescribed.

(5) Where the Collector, after making such inquiry as he deems fit and giving the purchaser an opportunity of being heard, comes to a conclusion that the purchaser has failed to commence industrial activity or production of goods or providing of services within the period specified is clause (b) of sub-section (4), or the period extended under the proviso to that clause, the land shall vest in the State Governm ll

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encumbrances on payment to the purchaser of such compensation as the Collector may determine, having regard to the price paid by the purchaser and such land shall be disposed of by the State Government, having regard to the use of land."

The pleadings of the parties before the High Court:-

11. The appellants had contended in paragraph 6 of their Writ Petition that the permission given to Indigold to sell the land was contrary to the provisions and restrictions imposed under the law, and contrary to the original permission granted to them by the Deputy Collector, Bhuj, on 1.5.2003. The market value of the land in question goes into crores of rupees, and such an act will result in huge loss to the public exchequer. They had contended that the decision was malafide. The decision was alleged to have been taken for a collateral purpose, which was apparently neither legal nor in the interest of the administration and public interest. Inasmuch as it was concerning disposal of public property, the only mode to be adopted was a fair and transparent procedure which would include holding a public auction inviting bids, and thereby providing equal opportunity to all interested or capable industries, in order to promote healthy competition and to fetch the right market price. The decision has been taken at the instance of the Hon'ble Revenue Minister. It was also submitted that, there were possibilities that the directors / promoters and the management of Indigold and Alumina are the same, and if that is so, it would be a design to defraud the Government. Alumina had contended that it had signed an MOU with the State Government during the Vibrant Gujarat Investors' Summit, 2009. The appellants had submitted that the same cannot be a ground to grant the permission to sell, contrary to the mandatory provisions of law. Section 89A makes a contingent provision in case the land is not used for industrial activity within the time provided, and such mandatory provisions of the Act cannot be bypassed merely upon the endorsement made by the Hon'ble Revenue Minister. The action

on the part of the State is absolutely arbitrary. The State or a public authority which holds the property for the public, and which has the authority to grant the largesse, has to act as a trustee of the people, and therefore to act fairly and reasonably. The holders of pubic office are ultimately accountable to the public in whom the sovereignty vests. The action of the Government is arbitrary, and therefore violative of Article 14 of the Constitution of India.

12. Respondent No.5 was the first to file a reply to this petition in the High Court which was affirmed by Mr. Nitin Patel on 11.7.2009. In this reply he principally submitted that it was not correct to say that the land was being given away at a throwaway price, causing great loss to the public exchequer to the tune of Rs.250 crores, as alleged. The State Authorities and the Revenue Minister have not acted in violation of any mandatory provisions of law. The affidavit further narrated the various events in the matter leading to the sale deed dated 19.1.2010 by Indigold in favour of Alumina, and the permission of the Industries Commissioner dated 8.3.2010. It was also pointed out that permission had been granted by the Collector, Bhuj on 5.1.2011. Thereafter, it was contended that the land has been purchased by the respondent No.5 way back in January 2010, and the petition, making frivolous and baseless allegations, has been filed two years after the said transaction.

13. Then, it was pointed out that the respondent No.5 was incorporated under the Companies Act in the year 2008, and that the company is promoted by Earth Refining Company Pvt. Limited. Respondent No.5 wanted to manufacture high value added products from bauxite ore available in Kutch district which ore was currently sold or exported as it is without any value addition. The intention of respondent No.5 was in line with and supported by Government of Gujarat Industries and Mines Policies, 2009. The project was to be first of its kind in Gujarat, with technology supplied to it by National Aluminum Company Ltd. (shortly known as NALCO), a [illegible]a

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Enterprise. A share holding agreement dated 30.11.2011 had been entered into between GMDC and Earth Refining Company Ltd. whereby GMDC had agreed to be joint venture partner, and to subscribe to 26% of the equity share capital of the new company. NALCO has provided advanced technology for the project.

14. It was further submitted in para 15 (g) of the reply that, the opinions of all the subordinate officers are *"inconsequential and not binding on the Revenue Minister"*. The decision of the Minister cannot be faulted on the basis of certain notings of a lower authority.

15. One Mr. Hemendera Jayantilal Shah, Additional Secretary, Revenue Department filed the reply on behalf of the respondent-State. In paragraph 3.4 it was contended that the notings from the Government files reflect only the exchange of views amongst the officers of the departments. The decision of the State Government to grant permission for sale of the land could not be said to be arbitrary, malafide or in the colourable exercise of power. Three reasons were given in support thereof:-

(i) If the land had been directed to be vested in the State Government, State would have been required to pay compensation to M/s Indigold under Section 89A(5) which is otherwise a long-drawn process involving Chief Town Planner and State Level Valuation Committee, for the purpose of determining the valuation of the land, and thereafter for finding the suitable and interested party to set up an industry on the land in question.

(ii) In the sale to Alumina, the State Government's own interest through its public sector undertaking had been involved, and therefore there has been a substantial compliance of the spirit flowing from the provisions of Section 89A(5).

(iii) The price of the land in question was around Rs.4.35

crores as per the Jantri (i.e. official list of land price) at the relevant time, and it had come down to Rs.2.08 crores, as per the revised Jantri rated of 2011. Thus, apart from time being consumed in the process, perhaps there would have been a loss to the public exchequer. Thereafter, it was stated in paragraph 4 of the reply as follows:-

> "I further respectfully say that the action of the State Government was bonafide and taking into consideration all the aspects of the matter, viz. (i) the land is being used for the industrial purpose, (ii) a dire need for industrialization in the Kutch District; (iii) MoU arrived at during the Vibrant Summit, 2009, whereby, a ready and interested party was available to start the industry immediately on the land in question; and (iv) GMDC possessing 26% of the share in such interested party, i.e. M/s Alumina Refinery Pvt. Ltd."

It is relevant to note that no reply was filed on behalf of Indigold.

Additional pleadings of the parties in this Court:-

16. As far as this Court is concerned, a counter affidavit was filed on behalf of the State Government by one Mr. Ajay Bhatt, Under Secretary, Land Reforms. In his reply, he stated that in any event in the present process the State is the beneficiary in permitting this transaction with GMDC which is a Government Undertaking. It will have 26% stock in respondent No.5. In paragraph 4(E)(e)(ii) he stated that since the Government's own interest was involved, there has been a substantial compliance of the spirit flowing from the provisions of Section 89A(5) of the Act.

17. A counter was also filed in this Court by one Mr. Deepak Hansmukhlal Gor, Vice President of respondent No.5-Alumina. He pointed out that although the petition in the High Court was moved as a PIL, the petitio[illegible] a

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leader of the opposition party in the State. In order to mislead the Court it was stated in the petition that the land was worth Rs.250 crores. It was further submitted that to seek an interim relief a false statement had been made in the writ petition that no activity had been initiated by respondent No.5 on the concerned land by the time writ petition was filed. The respondent No.5 had made substantial investment and construction on the land, and photographs in that behalf were placed on record. It was also submitted that the decision of the State Government was in tune with Mineral Development Policy, 2008 of the Government of India and Gujarat Mineral Policy, 2003. It was then pointed out that apart from other controversies, the present controversy has also been included for the consideration of Hon'ble Mr. Justice M.B. Shah, Former Judge of this Court. The sale of land in the present case was rightly considered as a special one, and the challenge thereto was highly unjustified and impermissible. The respondent No.5 filed various documents thereafter, including the various permissions obtained by respondent No.5 for the project and the technology supply agreement entered into between NALCO and M/s Earth Refining Company Ltd. It was submitted that the Respondent No. 5 is a bona-fide purchaser of the land, and in any case it should not be made to suffer for having invested for industrial development. It is claimed that Respondent No. 5 has made an investment to the tune of Rs 6.85 crores as on 31.3.2012 on the project, and moved in some machinery on the site.

18. The appellant No.1 has filed his rejoinder to both these counters. He has stated that he has not suppressed that he is a political activist, which is what he has already stated in the petition. He has maintained his earlier submissions in the writ petition, and denied the allegations made in the two counter affidavits.

19. As stated earlier, GMDC has applied for joining as respondent No.6. In its application it has stated that Alumina

was selected through transparent evaluation. Then, it was short-listed for setting up the project in Kutch at the Vibrant Gujarat Summit in 2009. It also defended the Government's decision on the ground that it is going to have 26% equity in respondent No.5.

Points for consideration before this Court:

20. It, therefore, becomes necessary for this Court to examine whether the decision taken by the Government to permit the transfer of the agricultural land from respondent No. 4 to respondent No. 5, was legal and justified. For that purpose one may have to consider the developments in this matter chronologically as disclosed from the above pleadings of the parties, as well as from the material available from the Government files placed for the perusal of the Court. Thereafter, one will have to see the scheme underlying Sections 89 and 89A, and then examine whether there has been any breach thereof, and if it is so what should be the order in the present case?

Material on record and the material disclosed from the files of the Government and the Collector:-

21. The respondents have contended that the sale transaction between respondent Nos.4 and 5 took place because of the financial constraints faced by respondent No.4 Indigold Refinery Limited, and that is reflected in their letter dated 16.6.2009 addressed to the Collector, Bhuj. The letter-head of the respondent No.4 shows that it claims to have a gold refinery at Chitradurg in State of Karnataka. This letter refers to their earlier letter dated 6.12.2008, and letter dated 12.6.2009 from respondent No.5 Alumina. The relevant paragraph of letter dated 16.6.2009 reads as follows:-

"……..

- *With regret we have hereby ... e to financial constraints on c ... e*

to execute our proposed refinery project on the said land. We are well aware of the fact that sufficient amount of time has passed from the date of permission granted by the office of Deputy Collector-Bhuj to set up the project. We have tried our level best to set up the industry on the land in question."

- *M/s Alumina Refinery (P) Ltd. having their registered office in Mumbai has shown keen interest to set their Alumina Refinery Project on our above mentioned ownership land.*

- *A copy of consent letter dated 12.06.2009 has already been sent to your office by M/s Alumina Refinery (P) Ltd., whereby they have applied to avail the permission to purchase our above ownership land u/s 89.*

- *We appreciate and are thankful to your office and Government of Gujarat for giving us an opportunity to purchase and set up of our then proposed refinery project on the above mentioned agricultural land.*

- *We would like to confirm that we had a clear intention to set up industry on the above mentioned land, it is only because of non availability of monetary fund we are not in a position to set up our industry on the above mentioned agricultural land. Further, we are also not having any intention to take any undue advantage in form of booking any profit by sale of ownership land to M/s Alumina Refinery (P) Ltd.*

We, hereby request your office to kindly grant the permission to sale all the above land and allow us to execute the Sale Deed for registration with the competent

authority….."

(emphasis supplied)

22. The earlier letter dated 6.12.2008 mentioned in this letter of 16.6.2009, however, nowhere mentions that respondent No.4 had any financial constraints because of which it could not set up the industry and thefore it wanted to sell the particular land. This letter is seen in the file of the Collector. This letter reads as follows:-

"INDIGOLD REFINERIES LIMITED

6th December 2008

To,
Collector of Kutch,
Bhuj, State of Gujarat

Sub:- Permission for the sale of agricultural land admeasuring 39 acres 25 gunthas at Moti Reladi Kukama, Taluka Bhuj, District Kutch, State of Gujarat.

Dear Sir,

Reference to above, we have to respectfully inform your good self that we had purchased land as per details here below for setting up of Industrial project:-

Sr.no.	*Name of Village*	*Survey No.*	*Measurement Acres and gunthas*
1.	*Kukama*	*94/1*	*4/14*
2.	*Kukama*	*94/2*	*2/16*
3.	*Moti Reladi*	*101/1*	*9/30*
4.	*"*	*106*	*6/10*
5.	*"*	*100/1*	*2/20*
6.	*"*	*107*	

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7.	*"*	*105/4*	*5/21*
8.	*"*	*110/2/3*	*4/16*
Total			*39 acres 25 gunthas*

The above piece of land was purchased with the permission granted by Deputy Collector, Bhuj, Kutch, wide letter no. LND/VC/1169/03 dated 2nd May 2003. We further respectfully inform yourself that we are no more interested to put any industrial project in the said land and therefore we are disposing off entire piece of land as per aforesaid details to our prospective client. We, therefore, request your good self to kindly give us your permission for sale, so as to enable us to register the sale deed with the concern competent authority.

We hope you will extend your maximum corporation and assistances in this regard and oblige.

Thanking you
Yours faithfully
Sd/-
Indigold Refineries Ltd.
Hanumantrao V. Kharat"

(emphasis supplied)

23. As stated earlier, the File notings of the Revenue Department, were obtained through an RTI inquiry, and were placed on record alongwith the Writ Petition. The learned counsel for the State of Gujarat was good enough to produce the original files for our perusal. In the file of the Revenue Department, there is an Email dated 1.7.2009 from Shri Nitin Patel, Chairman & MD of respondent No.5 forwarding his letter dated 30.6.2009 addressed to Smt. Anandiben M. Patel, Hon'ble Minister of Revenue recording the minutes of the meeting held in her office on 29.6.2009. Immediately thereafter, the respondent No.5 has written a letter to the Chief Minister of Gujarat seeking permission to purchase these lands. The

Secretary to the Chief Minister, Shri A.K. Sharma has then sent a letter on 2.7.2009 to the Principal Secretary, Revenue Department informing him that Shri Nitin Patel, of respondent No.5, had approached them with their representation dated 18.6.2009. It had inked an MOU during the Vibrant Gujarat Global Summit for establishing an Alumina Refinery, and they had identified a land suitable for that purpose. This letter further stated:

"On verification of the issue, necessary action may kindly be taken at the earliest. In the meantime, a brief note indicating the possible course of action may please be sent to this office."

24. In view of this note from the Secretary to the Chief Minister, the Revenue Department sought the factual report from the Collector by their letter dated 6.7.2009. What we find however, is that instead of sending a factual report, the Collector fowarded the original proposal of respondent No.5 itself to the Department, and sought their decision thereon in favour of Alumina through his letter dated 31.7.2009. Thereafter, we have the note dated 7.8.2009 in the Government file which is signed by then Section Officer and Under Secretary, Land Revenue. This note refers to the fact that a letter dated 2.7.2009 had been received from the Secretary to the Chief Minister. Thereafter, a letter dated 31.7.2009 had been received from the Collector, Kutch stating that respondent No.4 had purchased the concerned land admeasuring 39 acres and 25 guntas, but no industrial use had been made, and that the respondent No.5 had shown his willingness to purchase the land. Thereafter, the note records what the Collector had stated viz.

"Taking into consideration the reasons shown in the submission of Alumina Refinery Company addressed to the Hon'ble C.M., dated 18.6.2009, it is submitted to grant permission for purchasing land".

25. The departmental note ther[...]-

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paragraph A, B, C of paragraph 4, that under the relevant law the purchaser of the land should commence the industrial activity within a period of 3 years from date of the certificate of purchase, and within 5 years start the manufacture of goods and provide the services. Where the purchaser fails to commence the industrial activity, the Collector has to initiate an enquiry as to whether the purchaser has failed to commence industrial activity or production, as mentioned in clause (b) of sub-section 4. Thereafter, if on giving the purchaser an opportunity to be heard, the Collector comes to a conclusion that the purchaser has failed to do so, he has to determine the payment of compensation, and pass an order that the land shall vest in the State Government. Thereafter the note records:-

> *" .....Taking into consideration the above provisions, whatever action required to be taken, is to be taken by Collector, Kutch, means there is no question at all of the authority for a period of more than five years. Further vide letter dated 6.7.2009, Collector was informed to submit factual report. Instead of the same, proposal is submitted by him. Vide order dated 1.5.2003 Deputy Collector has granted permission to Indigold Refinery Company under Section-89 of the T.A. with regard to the lands in question. The time limit of this permission has come to an end. Now another company, Alumina Refinery Co. wants to purchase land of this company and establish a project. Looking to the same, taking into consideration the above provisions, whatever action is required to be taken, the same is to be taken at his (Collector) level only. This is submitted for consideration whether to inform Collector accordingly or not?*
>
> *As Collector is required to take action as per the legal provisions, any action on proposal of Collector is not required to be taken by this office. Therefore, proposal of the Collector be sent back.*

> Submitted respectfully…"

(emphasis supplied)

26. Since, the Secretary of the Hon'ble Chief Minister had sought a note indicating the possible course of action, the Deputy Secretary, Land Revenue made a note on 25.8.2009, and at the end thereof, he stated as follows:-

> *"........*
>
> *Under these circumstances, looking to legal provisions, there is a provision that either the company carries out the industrial activity or the State Government resumes the land. There is no provision for mutual transfer by the parties.*
>
> *As suggested by the Secretary to the Hon'ble C.M., note indicating the above position be sent separately."*

27. A note was, thereafter, made by the Principal Secretary, Land Revenue, which recorded that as per existing policy such sale was not permissible. In para 2 of his note he stated:

> *"as per rules, the land is to be resumed by Collector in case of failure to utilize for industrial use". In para 5 thereof he however suggested "that in such case, as in cases under the Land Acquisition Act, 50% of the unearned income being required to be charged by the State Government can be introduced as a policy measure".*

The Principal Secretary, Revenue Department marked para 2 above as "A" and then remarked on 29.8.2009 as follows:-

> *"We may resume as "A" of pre-page and allot as per the existing policy on land price".*

The Chief Secretary wrote thereon on

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> "We should take back the land. Allotment may be separately examined".

What is relevant to note is that the Minister of Revenue Smt. Anandiben Patel thereafter put a remark on 10.9.2009:-

> ***"Land is of private ownership. As a special case, permission be granted for sale".***

28. Thereafter, it is seen from this file that in view of this direction by the Minister, the matter was further discussed. A note was then made by the Principal Secretary, Revenue Department on 21.9.2009 - "Discussed. We may resubmit to adopt a procedure for such cases". The Principal Secretary, Land Revenue made a detailed note thereafter on 14.10.2009 referring to the amendment brought in by Gujarat Act No.7 of 1997 incorporating Section 63AA in the Bombay Tenancy and Agricultural Lands Act, 1948, and the developments in the present matter up to the noting made by the Minister, that the land may be permitted to be sold as a special case. Thereafter, he sought an opinion as to whether or not an action similar to a provision under the Land Acquisition Act on the occasion of sale of land providing for taking of 50% amount of unearned income by the State Government, be taken in the present case. The Chief Secretary made a note thereon as follows:-

> "It would be proper to give land to the new party provided industry department recommends as per the laid down rules. As indicated in page 9/D note (marginal). Let us take back land under 63AA and then re-allot to the new party".
>
> 15.10

The Minister still made a note thereon on 4.11.2009:-

> **"As a special case as suggested earlier, permission for sale be given".**

In view of this direction by the minister, the department has, thereafter, taken the decision that the permission be given as a special case but not to be treated as precedent. Thus, the opinion of the Principal Secretary, Land Revenue that 50% of the unearned income be taken by the Government was not accepted. Similarly, the opinion of the Chief Secretary that the land be resumed, and then be re-allotted to the new party was also not accepted.

29. This has led to the communication from the State Government to the Collector dated 18.12.2009 that the Government had granted the necessary permission to respondent No.5 to purchase the land, treating it as a special case. The said letter reads as follows:-

> *"Urgent/RPAD*
>
> *Sr. No.: GNT/2809/2126/Z State of Gujarat*
> *Revenue Department*
> *11/3 Sardar Bhavan*
> *Sachivalay*
> *Gandhinagar*
> *Date: 18/12/2009*
>
> *To,*
> *The Collector*
> *Kutch-Bhuj*
>
> *Subject: Shri Nitin Patel c/o M/s Indigold Refinery/ Alumina Representation qua the land of Kukma and Moti Reldi*
>
> *Reference: Your letter dated 31/9/09 bearing no. PKA-3- Land- Vs. 2083/2009*
>
> *Sir,*
>
> *In connection with your above referred and subject letter, the land of Kukma and M*[illegible]*g*

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Acre 39 Guntha 25 was purchased by Indigold Refinery as per the provisions of Bombay Tenancy and Agricultural Lands (Vidharbha Region and Kutch Area) Act, 1958; Section 89. However due to financial incapability, the Company is unable to establish industry and other company M/s Alumina Refinery Pvt. Ltd. being ready to purchase the said land, upon careful consideration the Government on the basis of treating the case as "A special case and not to be treated as precedent" has granted the permission.

2. Papers containing pages 1 to 89 are returned herewith.

Encl:

As above

Yours sincerely
Section Officer
Revenue Department
State of Gujarat

Copy to:
Select File/Z Branch
Select File/Z Branch/N.S.A"

30. Thereafter, the Deputy Collector has issued an order dated 15.1.2010 granting permission to sell the land for industrial purpose under Section 89A of the Act. He, however, added that the action of issuing the certificate can be taken only after the submission of a project report and technical recommendation letter of Industries Commissioner by respondent No.5. The above referred order dated 15.1.2010 of the Deputy Collector granting permission to sale the land reads as follows:-

No. Jaman Vashi/218/09

Office of Deputy Collector
Bhuj, Date-15/01/2010

To
Shri Hanumantrav V. Kharat
Indi Gold Refineries Limited
201-212, EMCS House
289 SBSL, Fort
Mumbai-400 001

Subject:- Regarding getting the approval for sale of the agricultural land of village Kukma and Moti Reldi, Taluka Bhuj purchased for industrial purpose, under Section-89-A of the Tenancy Act.

Read:- Letter No. Ganat/2809/2126/Z dated 18/12/2009 of the Revenue Department of the Government, Gandhinagar.

Sir,

With reference to the above subject it is to be informed that vide this office certificate No. Land/Vasi/1169/03 dated 01/05/2003 you have been granted permission under Section-89-A of the Tenancy Act for purchasing agricultural land for industrial purpose as under:-

Sr.No.	*Name of Village*	*Survey No.*	*Acre/Guntha*
1	*Kukma*	*94/1*	*4.14*
2	*Kukma*	*94/2*	*2.16*
3	*Moti Reldi*	*101/1*	*9.30*
4	*Moti Reldi*	*106*	*6.10*
5	*Moti Reldi*	*100/1*	*2.20*
6	*Moti Reldi*	*107*	*4.15*
7	*Moti Reldi*	*105/4*	*5.21*
8	*Moti Reldi*	*110/2/3*	*4.19*
		Total	

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In the above lands as the company due to financial circumstances is not in a position to establish any industry, with reference to your application dated 06/12/2008 seeking the permission for sale of the above land for industrial purpose to Shri Alumina Refinery (Pvt.) Limited, Mumbai for the Alumina Refinery project, vide the above referred letter of the R.D. of the Government as a "special case and with a condition not to treat as the precedent" the permission is granted, which may be noted.

As the above land is admeasuring more than 25 Acres, in this case on submission of the Project Report and the Technical recommendation letter of Industries Commissioner, G.S., Gandhinagar by the party desirous to purchase the land Alumina Refinery (Pvt.) Ltd., Mumbai, further action can be taken by this office for issuing the certificate under Section-89 of the Tenancy Act, which may be noted.

Sd/-
Deputy Collector, Bhuj

Copy to
Alumina Refinery (Pvt.) Ltd.
1501-1502 Shiv Shankar Plaza-
Near HDFC Bank, Sector-8
Airoli, New Mumbai-400 708"

31. This led to the sale deed between respondent No.4 and 5 for sale of the lands at Rs.1.20 crores. It is, however, interesting to note that the sale deed is signed for Indigold by Nitin Patel on the basis of the power of attorney from them, and for Alumina by his brother Nilesh Patel. Subsequently the permission from the Industries Commissioner was obtained on 8.3.2010, and the certificate under Section 89A (3) (c) (i) of purchase for bona-fide industrial purpose on 21.5.2010.

The submissions on behalf of the appellants:-

32. The decision of the State Government to permit the transfer of the concerned agricultural lands was challenged by the appellants on various grounds. Firstly, it was submitted that Section 89 basically bars transfer of agricultural land to the non-agriculturists. Section 89A makes an exception only in favour of a bonafide industrial user. The industry is required to be set-up within three years from the issuance of necessary certificate issued by the Collector for that purpose, and the production of the goods and services has to start within five years. If that is not done, the Collector has to take over the land after holding an appropriate enquiry under sub-section (5) of 89A, and the land has to vest in the Government after paying the compensation to the purchaser which has to be determined having regard to the price paid by the purchaser. In the instant case, it is very clear that the respondent No. 4 had expressed their inability to develop the industry way back on 6.12.2008. The Collector was, therefore, expected to hold an enquiry and pass appropriate order. This was a power coupled with a duty. A judgment of this Court in Indian Council for Enviro-Legal Action Vs. Union of India & Ors. reported in 1996 (5) SCC 281, was relied upon to submit that a law is usually enacted because the legislature feels that it is so necessary. When a law is enacted containing some provisions which prohibit certain types of activities, it is of utmost importance that such legal provision are effectively enforced. In Section 89A there is no provision for a further transfer by such a party which has not developed the industry, and therefore, the Collector ought to have acted as required by Section 89A (5). In that judgment it was observed "enacting of a law, but tolerating its infringement, is worse than not enacting a law at all." It was submitted that in the instant case the state itself has issued an order in violation of the law.

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33. It was then submitted that the Collector was expected to dispose of the land by holding an auction. The judgment of this court in *Centre for Public Interest Litigation and Ors. Vs. Union of India and Ors.* reported in 2012 (3) SCC 1 was relied upon in support, wherein it has been held that natural resources are national assets and the state acts as trustee on behalf of its people. Public Interest requires that the disposal of the natural resources must be by a fair, transparent and equitable process such as an auction. The same having not been done, the State exchequer has suffered. Reliance was also placed on the judgment in *Noida Entrepreneurs Association Vs. Noida and Ors.* reported in 2011 (6) SCC 508 to submit that whatever is provided by law to be done cannot be defeated by an indirect and circuitous contrivance.

34. In the instant case, the transfer of the land has been permitted because respondent No. 5 directly approached the Chief Minister and thereafter the Revenue Minister. It was submitted that such an act of making of a special case smacks of arbitrariness. The judgment of this Court in *Chandra Bansi Singh Vs. State of Bihar* reported in 1984 (4) SCC 316 was relied upon in this behalf. In that matter the state of Bihar had released a parcel of land acquired by it for the benefit of one particular family which had alleged to have exercised great influence on the Government of the time. The action of the State was held to be a clear act of favouritism. Another judgment of this Court in *Manohar Joshi Vs. State of Maharashtra and Ors.* reported in 2012 (3) SCC 619 was also relied upon to criticise a direct approach to the ministers rather than going through the statutory authorities. Reliance was also placed on the judgment in *Bhaurao Dagdu Paralkar Vs. State of Maharashtra* reported in 2005 (7) SCC 605 which has explained the concept of 'fraud' from paragraph 9 to 12 thereof. In paragraph 12 amongst others it has referred to an earlier judgment in Shrisht Dhawan Vs. Shaw Bros reported in 1992 (1) SCC 534 which relies upon the English judgment in *Khawaja Vs. Secy. of State for Home Deptt.* reported in 1983 (1) All ER 765. In para 20 of *Shrisht*

Dhawan (supra) this Court has observed:-

> *" If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope.' Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administrative law, as it is developing, is assuming different shades……"*

35. The learned senior counsel for the appellants Mr. Huzefa Ahmadi submitted that the appellants' writ petition should not have been dismissed only on the ground of delay, in as much as the environmental clearance to the project was granted on 19.2.2012 and the writ petition was filed in March 2012. He submitted that similarly the appellant cannot be criticised for suppression of any information about the investment made by respondent No. 5, since the appellant cannot be aware of the same. In any case he submitted that in as much as there has been an immediate interim order, the plea of large investment having been made is untenable. As far as the objection to the appellant No 1 being a person belonging to a rival political party is concerned, he submitted that he has specifically accepted that he is a political activist. In any case, he submitted that the Collector did not act in accordance with law at any point of time. Similarly, the order passed by the Government is not a reasoned order and is undoubtedly arbitrary. The power in the Collector implied a duty in him to act in accordance with law. He relied upon a judgment of this Court in *Deewan Singh & Ors. Vs. Rajendra Pd. Ardevi & Ors.* reported in 2007 (10) SCC 528 in this behalf.

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Submissions on behalf of the State Government:-

36. The defence of the Government has principally been that because Indigold was not in a position to set up the industry, and Alumina had given a proposal in the Vibrant Gujarat summit to set up its project on the very land, the proposal was accepted. It had entered into an MOU with GMDC which was to have 26% equity therein. While looking into the proposal, initially there was some hesitation on the part of the Government as can be seen from the notings of the officers in the Government files. However, ultimately looking into the totality of the factors, the Government took the decision to permit the transfer of the land. It is not mandatory that the land must be resumed under Section 89A (5) of the Tenancy Act, if the initial purchaser does not set up the industry. Section 89A (5) does not operate automatically. Besides, the permission to Indigold to sell the land can be explained with reference to the authority of the Collector available to him under the first proviso to Section 89(1) read with condition No. (4) of the permission dated 1.5.2003 granted to Indigold to purchase the concerned lands. This condition No. (4) reads as follows:-

> *"4. These lands cannot be sold, mortgaged, gifted or transferred in any manner etc. without obtaining prior permission of the competent officer."*

Last but not the least, Section 126 of the Tenancy Act was relied upon to submit that the State Government has an overall control which permits it to issue the necessary directions. This Section 126 reads as follows:-

> *"126. Control- In all matters connected with this Act, the State Government shall have the same authority and control over the [Mamlatdar] and the Collectors acting under this Act as [it has and exercises] over them in the general and revenue administration."*

37. The learned senior counsel Mr. Andhyarujina appearing for the State, submitted that the Collector had the authority to grant such a permission to sell under Rule 45 (b) of the Bombay Tenancy and Agricultural Lands Rules, 1959. This rule reads as follows:-

> "45.Circumstances in which permission for sale, etc. of land under section 89 may be granted - The Collector or any other officer authorised under the proviso to sub-section (1) of section 89 may grant permission for sale, gift exchange, lease or mortgage of any land in favour of a person who is not an agriculturists or who being an agriculturists, cultivates personally land not less than three family holdings whether as tenure holder or tenant or partly as tenure holder and partly as tenant in any of the following circumstances:-
>
> (a) such a person bona fide requires the land for a non-agricultural purpose; or
>
> (b) the land is required for the benefit of an industrial or commercial undertaking or an educational or charitable institution"
>
> …..

Submissions on behalf of the other respondents:-

38. Since it was the respondent No.4 Indigold, which had initially purchased the land for industrial purpose, the stand of Indigold was of significance. It is, however, very relevant to note that Indigold had neither filed any affidavit in the High Court, nor in this Court, and their counsel Mr. Trivedi stated that he has no submissions to make. It is the failure of the respondent No. 4 to set up the industry, and the subsequent justification on the basis of financial difficulties for the same which has led to the sale of the land. It is strange that such a party had nothing to state before the Court. This is probably because it had already received its price after selling the land. The respondent No. 4

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appeared to be very much disinterested in as much as even the sale documents were signed on their behalf by Mr. Nitin Patel, the Managing Director of Alumina. Mr. Ahmadi, learned counsel for the appellant therefore alleged collusion amongst all concerned.

39. The respondent No. 5, however, contested the matter vigorously. Mr. Krishnan Venugopal, learned senior counsel appearing for respondent No. 5 pointed out that the respondent No. 5 had entered into a correspondence with GMDC earlier, and thereafter participated in the Vibrant Gujarat Summit. He pointed out that the respondent No. 5 had previous experience in dealing in Alumina products, and therefore was interested in setting up the plant in Kutch. It intended to use the bauxite available in that district, and finally it was going to have a production of 25,000 metric tonnes of Alumina per-annum. It was being set up with an investment of Rs. 30 crores. The project was being set up in furtherance of the Industrial Policy of the State of Gujarat and with the technical know-how from NALCO. He drew our attention to the project report and the photographs showing the work done so far.

40. It was submitted that the respondent No.5 had also entered into an MOU with GMDC whereunder GMDC was to supply bauxite for 25 years, and it was to have 26% equity participation. It is however, material to note that there are 3 MOUs placed on record. The first MOU is dated 13.1.2009 between Alumina Refinery Pvt. Ltd. and GMDC which is basically like a declaration of intent to set up the plant, and it contains the assurance of support from the Government of Gujarat. The second MOU between them is dated 9.9.2009, and it records that Government of Gujarat has agreed to support this refinery, and that the GMDC had agreed to supply, on priority basis, the plant-grade bauxite to this plant. It is this document which states that GMDC will invest in the equity of Alumina Refinery to an extent not exceeding 26%. It contains the promise to supply bauxite. Mr. Krishnan Venugopal, fairly

accepted that this document cannot be construed as a contract, and that it can at best be utilised as a defence to insist on a promissory estoppel. The third MOU is dated 30.11.2011 which is an agreement between Earth Refinery Pvt. Ltd. which the holding company of Respondent No. 5 and GMDC. In clause 2.1 of this agreement they have agreed to set up a joint venture Company by name Alumina Refinery Ltd. Clause 6.2 of this agreement states that equity participation of GMDC in this company shall be 26%. The obligation of GMDC has been spelt out under clause 4.2 to supply bauxite.

41. The principal submission of respondent No. 5 is that it is a bonafide purchaser of land of respondent No. 4, it has a serious commitment for industrial development, and it is acting in accordance with the industrial policy of the State. There is nothing wrong if the Minister directs the transfer of the unutilized land of respondent No. 4 to respondent No. 5 for industrial purpose, and this should be accepted as permissible. The minister's action cannot be called malafide since it is in the interest of the industrial development of the State. Mr. Krishnan Venugopal submitted that the right to transfer is incidental to the right of ownership, and relied upon paragraph 36 of the judgment of this Court in *DLF Qutab Enclave Complex Educational Charitable Trust Vs. State of Haryana and Ors.* reported in 2003 (5) SCC 622. He further submitted that unless the possession of the unutilized area is taken over by the State, the landlord's title to it is not extinguished. There is no automatic vesting of land in the instant case. He relied upon the judgment of this Court in *Ujjagar Singh Vs. Collector* reported in 1996 (5) SCC 14 in this behalf.

42. It was then submitted that notings cannot be made a basis for an inference of extraneous consideration, and reliance was placed upon the observations of this Court in paragraph 35 in *Jasbir Singh Chhabra Vs. State of Punjab* reported in 2010 (4) SCC 192. He pointed out that the law laid down in *Centre for Public Interest Litigation a* [illegible] *of*

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India and Ors. (supra) had been clarified by a Constitution Bench in the matter of *Natural Resources Allocation,* In Re: *Special Reference (1) of 2012* reported in 2012(10) SCC 1. He referred to paragraph 122 of the judgment which quotes the observations from *Katuri Lal Lakshmi Reddy Vs. State of J&K* reported in 1980 (4) SCC 1 as follows:-

> *" 122. In Kasturi Lal Lakshmi Reddy v. State of J&K, while comparing the efficacy of auction in promoting a domestic industry, P.N. Bhagwati, J. observed: (SCC p. 20, para 22)*
>
> "22. … If the State were giving a tapping contract simpliciter there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public wealth or interest, but in a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging setting up of industries within the State, we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry….."

He also referred to paragraph 146 of the judgment (Per Khehar J), therein, where the learned Judge has observed that the court cannot mandate one method to be followed in all facts and circumstances, and auction and economic choice of disposal of natural resources is not a constitutional mandate. It was therefore submitted that, it was not necessary that the Collector

ought to have opted for auction of the concerned parcel of land.

43. The learned senior counsel Mr. Krishnan Venugopal, lastly drew our attention to the Jantri prices of the land in 2008. He pointed out that at the highest, the State would have sold this land, as per the Jantri price, for Rs. 4.35 crores. Assuming that the State was also to pay Rs. 1.20 crores as compensation to Indigold, the loss to the State would come to Rs 3.15 crores. He submitted that if it comes to that, the respondent No. 5, alongwith Indigold, could be asked to compensate the state for this difference of 3.15 crores or such other amount as may be directed, but its project must not be made to suffer.

44. GMDC was represented by learned senior counsel Mr. Giri. He defended the action of the State as something in furtherance of the industrial policy of the State. If the land was to be sold and compensation was to be given, it may not have resulted into much benefit to the state. He relied upon Section 7 of the Transfer of Property Act, to submit that every person competent to contract, and entitled to transferable property can transfer such property, and under S 10 of the said Act any condition restraining alienation was void. He relied on paragraph 20 of the judgment in *Prakash Amichand Shah Vs. State of Gujarat* reported in 1986 (1) SCC 581, to submit that divesting of title takes place only statutorily, and which had not happened in the instant case.

Examination of the Scheme underlying Sections 89 and 89A above:-

45. Before we examine the submissions on behalf of all the parties, it becomes necessary to examine the scheme underlying the relevant sections 89 and 89A. As can be seen, Section 89 essentially bars the transfers of agricultural lands to non-agriculturists. The said section is split into four parts.

(a) Sub-section (1) provides that no sale or mortgage, gift, exchange or lease of any land, or no ag[illegible] If

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shall be valid in favour of a non-agriculturist. The first proviso to Section 89 (1) makes an exception viz. that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage for that purpose, in such circumstances as may be prescribed. The second proviso of course provides that no permission is required where the land is being sold to a person who is not an agriculturist, but it is sold for agricultural purpose.

(b) Sub section (2) provides that the above restriction will not apply to a sale etc. in favour of an agricultural labourer or an artisan

(c) Sub-section (3) similarly provides that the above restriction will not apply to a mortgage in favour of a cooperative society, to secure a loan therefrom.

(d) Sub-section (4) lays down that the restriction under Section 90 with respect to the reasonable price for the land to be sold will not apply to the sale under Section 89(1).

46. Section 89A creates an exception to Section 89 for sale of land for bona-fide industrial purposes in certain cases. This section is split into five sub-sections. Sub-section (1) of Section 89A deals with those lands for which no permission is required under sub-section (1) of Section 65B of the Bombay Land Revenue Code, 1879, i.e. lands such as those in industrial zone etc. It lays down that nothing in Section 89 will prohibit the sale or the agreement of sale of such zonal land in favour of any person for use of such land by such person for a bona-fide industrial purpose. Section 89A, creates an exception to Section 89 by allowing a sale of land for bonafide industrial purpose in certain cases as contemplated under the said section. These requirements are laid down in the provisos (a) to (d) of sub-section (1) and in sub-section (2) to (4) of Section 89A. They are as follows:-

(i) That the land is not situated within an urban

agglomeration,

(ii) A prior permission of the Industries Commissioner of the State is to be obtained where the area of the land proposed to be sold exceeds ten hectares,

(iii) The land proposed to be sold shall not exceed four times the area on which the construction of the industry is to be put up excluding the additional land for pollution measures,

(iv) If the land belongs to a tribal, it shall be subjected to certain additional restrictions,

(v) Within 30 days the purchaser has to inform the Collector of such purchase failing which he is liable to a fine,

(vi) The Collector has thereafter to make an enquiry whether the land is purchased for a bonafide industrial purpose and issue a certificate to that effect. In case he is not satisfied of the bonafide industrial purpose, he has to hear the purchaser, and thereafter he may refuse issuance of such certificate against which an appeal lies to the State Government.

(vii) Lastly, the purchaser has to commence the industrial activity within three years from the date of certificate, and start the production of goods and services within five years from the date of issuance of certificate.

47. Where the purchaser fails to start the industrial activity as stipulated above, Section 89A (5) requires the Collector to hold an enquiry, wherein he has to give the purchaser an opportunity of being heard. Thereafter, if he confirms such a view, he is expected to pass an order that the land shall vest in the Government which will, however, be done after determining appropriate compensation payable to the purchaser, which has to be done having regard to the price paid by the purchaser. Then the land shall be disposed of by the Government having regard to the use of the land. Thus, the only authority contemplated under the sectio d

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the decision is to be taken at his level. It is only in the event of his refusing to give the certificate of purchase for bonafide industrial purpose that an appeal lies to the State Government. Thus, where one wants to purchase agricultural land for industrial purposes, one has to first obtain the permission of the Industries Commissioner. The purchaser has also to inform the Collector about the purchase within 30 days of such purchase, and obtain a certificate that the land is purchased for a bonafide industrial purpose. He has to see to it that the industrial activity starts in three years from the date of such certificate, and the production of goods and services also starts within five years thereof, which period can be extended by the State Government, in an appropriate case. In the event the purchaser fails to commence such industrial activity, the Collector has to make an enquiry, and thereafter pass an appropriate order of resumption of the land on determining the compensation. Thus, the entire authority in this behalf is with the Collector and none other.

Have the provisions of Sections 89 and 89A been complied in the present case:-

48. Now, we may examine the developments in the present matter on the backdrop of these statutory provisions. It is relevant to note that in their first letter dated 6.12.2008, the respondent No.4 has not referred to any financial constraint. The letter merely states that respondent No.4 wanted to dispose off the entire piece of land since they were no more interested in putting up any industrial project in the said land. As can be seen from Section 89A, the object of the section is to permit transfer of agricultural land, only for a bonafide industrial purpose. Where the land exceeds ten hectares, such a purchaser has to obtain, to begin with, a previous permission of the Industries Commissioner before any such sale can be given effect to. Thereafter, the purchaser has to send a notice to the Collector within 30 days of the purchase, and the Collector has to be satisfied that the land has been validly purchased for a bonafide

industrial purpose, in conformity with the provisions of sub-section (1), and then issue a certificate to that effect. There is a further requirement that the purchaser has to commence the industrial activity within three years, and has to start the production within five years from the date of issuance of the certificate. Admittedly no such steps were taken by Indigold, nor was any affidavit in reply filed by them, either before the High Court or before this Court. Mr. Trivedi, learned counsel, appeared for Indigold, and he was specifically asked as to what were the attempts that had been made by respondent No.4 to set up the industry, and what were the difficulties faced by it. He was asked as to whether there was any material in support of the following statement made in Indigold's letter dated 16.6.2009 i.e. 'we have tried our level best to set up the industry on the land in question.' Mr. Trivedi stated that he had nothing to say in this behalf. All that he stated was that the respondent No.4 purchased the land, it was unable to set up its unit, and it sold the land to respondent No.5.

49. What is, however, material to note in this behalf is that whereas the land is supposed to have been purchased in 2003 at a price of Rs.70 lakhs, it is said to have been sold at Rs.1.20 crores in 19.1.2010. It is very clear that even before the letter of 16.6.2009 proposing to sell the land to respondent No.5, in December 2008 itself respondent No.4 had written to the Collector that they were no more interested in putting up the industrial project, and therefore they wanted to dispose off the piece of land to their prospective clients. That being the position, it was mandatory for the Collector at that stage itself to act under sub-Section 5 of Section 89A to issue notice, conduct the necessary enquiry, determine the compensation and pass the order vesting the land in the State Government. It is very clear that Collector has done nothing of the kind. In any case he should have taken the necessary steps in accordance with law at least after receiving the letter dated 16.6.2009. Again he did not take any such steps.

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50. It has been pointed out by the respondents that the representative of respondent No.5 participated in the Vibrant Gujarat Global Investors Summit on 31.1.2009, and signed an MOU with respondent No.6 for setting up a specialty alumina plant in Kutch. The MOU stated that the Government of Gujarat was assuring all necessary permissions to respondent No.5. The respondent No.5 will be investing an amount of Rs.30 crores in the proposed plant, and it will provide employment to 80 persons. Thereafter, the above referred letter dated 12.6.2009 was addressed by the respondent No.5 to the Deputy Collector Bhuj. The letter sought permission to purchase land belonging to Indigold. It referred to the letter of respondent No.4 dated 6.12.2008. It stated that the respondent No.5 would like to purchase the land for a bonafide industrial purpose, for setting up their upcoming project, Alumina Refinery Limited, on the land admeasuring 39 acres and 25 gunthas, situated in villages Kukma and Moti Reladi. It then sought the permission from the competent authority, under Section 89 of the Tenancy Act, 1958 to register the sale in their favour.

51. After writing to the Collector on 16.6.2009, without waiting for any communication from him, Alumina wrote to the Chief Minister on 18.6.2009. Directors of Alumina had a meeting with the Minister of Revenue Smt. Anandiben Patel on 29.6.2009, which was recorded by Mr. Nitin Patel on 30.6.2009. The Chief Minister's Secretary wrote to the Principal Secretary, Revenue Department on 2.7.2009 seeking a note on the possible course of action. The Revenue Department sought a factual report from the Collector, who instead of furnishing the same, forwarded the proposal of Alumina itself to the Department for granting the permission for the sale. The Department looked into the statutory provisions, and then recorded on 7.8.2009 that the Collector is required to take an action at his level in the matter, and the proposal be sent back to him. After looking into the legal position, the Principal Secretary, Revenue Department and the Chief Secretary of the State wrote that the land be taken back, and thereafter the issue

of allotment be examined separately.

52. The matter could have rested at that, but the Minister of Revenue put a remark that permission be granted as a special case, since the land is of private ownership. The matter was again discussed thereafter, and then a suggestion was made by the departmental officers that 50% of the unearned income may be sought from the seller. The Chief Secretary noted that land may be given to the new party provided Industries Department recommends it as per the laid down rules. He maintained that the land be taken back, and then be re-allotted to the new party. The Minister, however, again passed an order that as suggested earlier by her, permission be given and, therefore, the Collector ultimately granted the permission as directed by the Government. Thus, as can be seen, that instead of the statutory authority viz. the Collector acting in accordance with the statutory mandate, only because a direction was given by the Minister that the statutory authority was bypassed, and even the enquiry as contemplated under sub-section 5 of Section 89A was given a go-by. Thus, as can be seen from the above narration what emerges from the record is that whereas Sections 89 and 89A contemplate a certain procedure and certain requirements, what has been done in the present matter is quite different. We may refer to Lord Bingham's work titled 'Rule of Law' where in the Chapter on exercise of power, he observes that:

> *'Ministers and public officers at all level must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably'* .

He quotes from *R v. Tower Hamlets London Borough Council* [1988] AC 858, which states:

> *'Statutory power conferred for public purposes is conferred as it were upon trust, no[illegible]o*

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> *say, it can validly be used only in the right and proper way which the parliament, when conferring it, is presumed to have intended.'*

53. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. This proposition of law laid down in *Taylor Vs. Taylor* (1875) 1 Ch D 426,431 was first adopted by the Judicial Committee in *Nazir Ahmed Vs. King Emperor* reported in AIR 1936 PC 253 and then followed by a bench of three Judges of this Court in *Rao Shiv Bahadur Singh Vs. State of Vindhya Pradesh* reported in AIR 1954 SC 322. This proposition was further explained in paragraph 8 of *State of U.P. Vs. Singhara Singh* by a bench of three Judges reported in AIR 1964 SC 358 in the following words:-

> "8. The rule adopted in *Taylor v. Taylor* is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted…."

This proposition has been later on reiterated in *Chandra Kishore Jha Vs. Mahavir Prasad* reported in 1999 (8) SCC 266, *Dhananjaya Reddy Vs. State of Karnataka* reported in 2001 (4) SCC 9 and *Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited* reported in 2008 (4) SCC 755.

54. (i) Therefore, when Indigold informed the Collector on 6.12.2008 that they were 'no more interested' to put up any industrial project, and were disposing of the entire piece of land to their prospective client, the Collector was expected to hold the necessary enquiry. This was the minimum that he was expected to do. After holding the enquiry, if he was convinced that the industrial activity had not been started, he was expected

to pass an order that the land will vest in the State which will have to be done after determining the compensation payable having regard to the price paid by the purchaser. In the instant case, the respondent No.4 claims to have purchased the land for Rs.70 lakhs. As pointed out by Mr. Krishnan Venugopal himself, as per the jantri price of the lands at that time, i.e. even at the Government rate in 2008, the land was worth Rs.4.35 crores. The collector was expected to dispose of the land by auction which is the normal method for disposal of natural resources which are national assets. Out of that amount, the compensation payable to the respondent no.4 would have been around Rs.70 lakhs having regard to the amount that the respondent No.4 had paid. This is because respondent no. 4 had purchased agricultural land to put up an industry, and they had taken no steps whatsoever for over five years to set up the industry. They were not expected to purchase the land, and thereafter sell it for profiteering. The Jantri price is an official price. In actual auction the State could have realised a greater amount. In permitting the sale inter-se parties, the State exchequer has positively suffered.

(ii) On the other hand, in the event, the Collector was to form an opinion after receiving the bids or otherwise that it was not worth disposing of the land in that particular way, he could have divested Respondent No. 4 of the land by paying compensation, and re-allotted the same to the Respondent No 5 at an appropriate consideration. The statute required him to act in a particular manner and the land had to be dealt in that particular manner only, and in no other manner, as can be seen from the legal position, accepted in various judgments based on the proposition in *Taylor vs. Taylor*.

55. Thus inspite of the Secretaries repeating their advice, the Minister of Revenue Smt. Anandiben Patel has insisted on treating this case as a special case for which she has recorded no justifiable reasons whatsoever, and orders were issued accordingly. Under Section 89A(3), th[...]e

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appellate authority where the Collector does not grant a certificate for purchase of bonafide industrial purpose. Thus what has happened, thereby is that the powers of the statutory authority have been exercised by the Government which is an appellate authority.

56. The State Government gave three additional reasons when it defended its decision. (i)The first reason was that if the land had been directed to be vested in the State Government, State would have been required to pay compensation to Indigold, and it would have been a long-drawn process for determining the valuation of the land, and thereafter for finding the suitable and interested party to set up an industry. As stated earlier, this plea is not tenable. If the law requires something to be done in a particular manner, it has got to be done in that way and by no other different manner. (ii) The second reason given was that the action was in State's own interest because through its public sector undertaking i.e. GMDC, it was involved in the transaction viz. that is it is going to have 26% equity. As far as this part is concerned again it is difficult to accept this reason also because one does not know what will be the value of shares of the new company. (iii) Third reason given was that the land was worth Rs.4.35 crores as per the Jantri in 2008, and as per the revised Jantri in 2011 it had come down to Rs.2.08 crores. This is a situation which was brought about by the State itself and this cannot be a ground for the State to submit that it would not have gained much in the process.

57. That apart it has to be examined whether the Government had given sufficient reasons for the order it passed, at the time of passing such order. The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent affidavits as laid down by this Court long back in *Commissioner of Police, Bombay vs. Gordhandas Bhanji* reported in AIR 1952 SC 16 in the following words:-

> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."*

This proposition has been quoted with approval in paragraph 8 by a Constitution Bench in *Mohinder Singh Gill vs. Chief Election Commissioner* reported in 1978 (1) SCC 405 wherein Krishna Iyer, J. has stated as follows:-

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."*

In this context it must be noted that the Revenue Minister's direction merely states that it is a private land, and the Governments letter dated 18.12.2009 speaks of the financial incapability of Inidgold. Neither the letter dated 18.12.2009 from the Government to the Collector, nor the order passed by the Deputy Collector on 15.1.2010 mention anything about:

1. the mineral policy of the Government of Gujarat.

2. the time taking nature of the process of acquiring the land and re-allotting it.

3. That the second sale was under the authority of the Collector available to him under the first proviso to Section 89(1) read with condition no. (4) o[illegible] d

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1.5.2003 granted to Indigold to purchase the concerned lands.

In the absence of any of these factors being mentioned in the previous orders, it is clear that they are being pressed into service as an after-thought. The Government can not be allowed to improve its stand in such a manner with the aid of affidavits.

58. As noted earlier, the State Government is an Appellate Authority under sub-section 3 of Section 89A, and it could not have given a direction to the Collector who was supposed to take the decision under his own authority. We may profitably refer to a judgment of a Constitutional Bench in *State of Punjay vs. Hari Kishan* reported in AIR 1966 SC 1081. In that matter, the respondent desired to construct a cinema at Jhajhar. He submitted an application and under the orders of the State Government all applications were directed to be referred to the State Government. Therefore, though his application was initially accepted, the SDO informed him that the application was rejected. He appealed to the State Government and the appeal was rejected which has led to the petition in the High Court. The Punjab High Court framed the question as to whether the State of Punjab was justified in assuming the jurisdiction which was conferred on the licensing authority by the act. The Supreme Court held in paragraph 4 of the judgment, that the course adopted by the State of Punjab had resulted in the conversion of the appellate authority into the licensing authority. That was not permissible, and so it is in the present case. The reliance by the State Government on the overall control of the State under Section 126 of the Tenancy Act cannot be used when in the instant case the power is with the Collector and the appellate power is with the State Government. The power under Section 126 can be utilized for giving general guidelines, but not for interference or giving directions in individual cases.

59. The submission that condition No.4 of the permission to purchase, obtained by respondent No.4 in 2003 permits the

Collector to pass such an order is equally untenable. There is nothing in the statutory scheme to suggest that a second sale, inter se parties, after the failure of a purchaser to set up an industry is permissible. In such an event, the statute requires an enquiry to be conducted by the collector. If he is satisfied that there is a failure to set up the industry, the compensation to be paid to the purchaser is determined. After this stage the land vests in the Government. It is thus clear that the condition No 4 in the permission obtained by Respondent No. 4 is bad in law, not having its basis in any statutory provision. Even assuming that the Collector had that power to lay down such a condition, the authority to permit the sale as per the said condition had to be exercised by him in the manner contemplated under Section 89 A (5) viz. after holding the enquiry as prescribed. Here the enquiry itself was dispensed with. Rule 45(b) of the Bombay Tenancy and Agricultural Lands Rules, 1959 also cannot be pressed into service for the reason that, neither under Section 89 nor under Section 89A, a sale inter-se parties is contemplated or permitted.

60. Now, what is to be noted is that wherever an agriculturist is in possession of a land, either as an owner or as a tenant protected by the statute, transfer of his land for industrial purposes is subject to the conditions regulated by the Act. It is for the protection and preservation of the agricultural land that the bar against conversion is created under Section 89. Thereafter, as an exception, only a bonafide use for industrial purpose is permissible under section 89A. Ownership of respondent No.4 was subject to the conditions of utilization for bonafide industrial purpose, and it was clear on record that respondent No.4 had failed to utilize the land for bonafide industrial purpose. The reliance on Sections 7 and 10 of the Transfer of Property Act is also misconceived in the present case, since the Tenancy Act is a welfare enactment, enacted for the protection of the agriculturists. It is a special statute and the sale of agricultural land permitted under this statue will have to be held as governed by the conditions [illegible] statute itself. The special provisions ma[illegible]ct

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will therefore prevail over those in the Transfer of Property Act to that extent.

61. Besides, the present case is clearly a case of dictation by the State Government to the Collector. As observed by Wade and Forsyth in Tenth Edition of Administrative Law:-

> *"if the minister's intervention is in fact the effective cause, and if the power to act belongs to a body which ought to act independently, the action taken is invalid on the ground of external dictation as well as on the obvious grounds of bad faith or abuse of power".*

The observations by the learned authors to the same effect in the Seventh Edition were relied upon by a bench of three judges of this Court in *Anirudhsinhji Karansinhji Jadega and anr. vs. State of Gujarat* reported in 1995 (5) SCC 302. In this matter the appellant was produced before the Executive Magistrate, Gondal, on the allegation that certain weapons were recovered from him. The provisions of TADA had been invoked. The appellant's application for bail was rejected. A specific point was taken that the DSP had not given prior approval and the invocation of TADA was non-est. The DSP, instead of granting prior approval, made a report to the Additional Chief Secretary, and asked for permission to proceed under TADA. The Court in para 13, 14, 15 has held this to be a clear case of 'dictation', and has referred to Wade and Forsyth on 'Surrender Abdications and Dictation'.

62. The respondent No.5 had the courage to state that the notings of the Secretaries were inconsequential. As a beneficiary of the largesse of the Government, respondent No.5 could say that, but it is not possible for us to accept the same. In *Trilochan Dev Sharma vs. State of Punjab* reported in AIR 2001 SC 2524 what is observed by this Court is relevant for our purpose

> *"In the system of Indian Democratic Governance, as contemplated by the constitution, senior officials occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politications, for carrying out commands having no sanctity in law."*

A higher civil servant normally has had a varied experience and the ministers ought not to treat his opinion with scant respect. If Ministers want to take a different view, there must be compelling reasons, and the same must be reflected on the record. In the present case, the Secretaries had given advice in accordance with the statute and yet the Minister has given a direction to act contrary thereto and permitted the sale which is clearly in breach of the statute.

63. Now, the effect of all that is stated above is that the land which was purchased by respondent No.4 for Rs.70 lakhs is permitted by the Government of Gujarat to be sold directly to respondent No.5 at Rs.1.20 crores to set up an industry which could not have been done legally. It is undoubtedly not a case of loss of hundreds of crores as claimed by the appellants, but certainly a positive case of a loss of a few crores by the public exchequer by not going for public auction of the concerned property. It is true as pointed out by Mr. Venugopal, learned senior counsel that in a given case the state may invite an entrepreneur and give an offer. However, in the instant case, the sale of the land for industrial purpose is controlled by the statutory provisions, and the State was bound to act as per the requirements of the statute. The minister's direction as seen from the record clearly indicates an arbitrary exercise of power. The orders passed by the Government cannot therefore be sustained. As seen earlier, there is neither a power nor a justification to make any special case, in favour of the Respondent No 5. Such exceptions may open floodgates for similar applications and orders, even though the Gujarat Government is contending that this order is purportedly not to be treated as a precedent.

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64. In our view, considering the scheme of the act, the process of industrialization must take place in accordance therewith. As stated earlier if the law requires a particular thing should be done in a particular manner it must be done in that way and none other. The State cannot ignore the policy intent and the procedure contemplated by the statute. In the instant case, the State could have acquired the land, and then either by auction or by considering the merit of the proposal of respondent No.5 allotted it to respondent No.5. Assuming that the application of the Respondent No 5 was for a bona-fide purpose, the same had to be examined by the industrial commissioner, to begin with, and thereafter it should have gone to the collector. After the property vests in the Government, even if there were other bidders to the property, the collector could have considered the merits and the bona-fides of the application of Respondent No. 5, and nothing would have prevented him from following the course which is permissible under the law. It is not merely the end but the means which are of equal importance, particularly if they are enshrined in the legislative scheme. The minimum that was required was an enquiry at the level of the Collector who is the statutory authority. Dictating him to act in a particular manner on the assumption by the Minister that it is in the interest of the industrial development would lead to a breach of the mandate of the statute framed by the legislature. The Ministers are not expected to act in this manner and therefore, this particular route through the corridors of the Ministry, contrary to the statute, cannot be approved. The present case is clearly one of dereliction of his duties by the Collector and dictation by the Minister, showing nothing but arrogance of power.

65. The High Court has erred in overlooking the legal position. It was expected to look into all the earlier mentioned aspects. The impugned judgment does not reflect on the issues raised in the petition. It could not be said that the petition was delayed and merely because investment had been made by the respondent No.5, the court would decline to look into the important issues raised in the PIL.

Epilogue:-

66. Before we conclude, we may observe that India is essentially a land of villages. Although, urbanization and industrialization is taking place, the industry has not developed sufficiently, and large part of our population is still required to depend on agriculture for sustenance. Lands are, therefore, required to be retained for agricultural purposes. They are also required to be protected from the damage of industrial pollution. Bonafide industrial activity may mean good income to the entrepreneurs, but it should also result into good employment and revenue to the State, causing least pollution and damage to the environment and adjoining agriculturists. While granting the permission under Section 89A (5) the Collector has to examine all these aspects. This is because the only other exception for conversion of agricultural lands to non-agricultural purpose is for those lands which are in an industrial zone. As far as the conversion of lands otherwise than those in the industrial zone is concerned, all the aforesaid precautions are required to be taken when a decision is to be arrived at as to whether the application is for a bonafide industrial purpose. In the instant case, there were newspaper reports of apprehensions and protest of the adjoining farmers. The Revenue Secretary and the Chief Secretary had placed the statutory provisions on record. It was expected of the Government and the Revenue Minister to take cognizance of these apprehensions of the farmers as well as the statutory provisions brought to her notice by the secretaries. She has simply brushed aside the objections of the secretaries merely because the Chief Minister's secretary had written a letter, and because she was the minister concerned. While over-ruling the opinion of secretaries to the concerned department, the Minister was expected to give some reasons in support of the view she was taking. No such reason has come on record in her file notings. She has ignored that howsoever high you may be, the law is above you.

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67. Development should not be measured merely in terms of growth of gross domestic product, but it should be in terms of utility to the community and the society in general. There is a certain inbuilt wisdom in the statute which is the mandate of the legislature which represents the people. The Minister has clearly failed to pay respect to the same.

Hence, the following decision:-

68. Having noted the legal position and the factual scenario, the impugned judgment and order passed by the High Court will have to be set aside. The prayers in the PIL will have to be entertained to hold that the direction of the State Government dated 18.12.2009 and the consequent order issued by the Collector of Kutch on 15.1.2010 is arbitrary, and bad in law for being in violation of the scheme and the provisions of Sections 89 and 89A of the Tenancy Act. The direct sale of land by Indigold to Alumina is also held to be bad in law, and inoperative.

69. (i) In normal circumstances, the order hereafter would have been to direct the Collector to proceed in accordance with Section 89A(5) viz., to hold an enquiry to decide whether the purchaser viz. Indigold had failed to commence the industrial activity and the production of goods and services within the period specified. In the instant case, there is no need of any such direction to hold an enquiry, in view of the letter of Indigold itself, dated 6.12.2008, wherein, it clearly stated that they were no more interested in putting up any industrial project in the said land.

(ii) Consequently, there will be an order that the land shall vest in the State Government free from all encumbrances. This vesting order, however, has to be on payment of appropriate compensation to the purchaser as the Collector may determine. In the instant case, there is no need of having this determination, for the reason that Indigold has received from Alumina Rs. 1.20 crores as against the amount of 70 lakhs, which it had paid to the agriculturists when it bought those lands

in 2003. Neither Indigold nor Alumina is making any grievance towards this figure or the payment thereof. In fact, it is the case of both of them that the direct sale by Indigold to Alumina for this amount as permitted by the State Government be held valid. That being so, this amount of Rs. 1.20 crores would be set-off towards the compensation which would be payable by the State Government to the purchaser Indigold, since the land was originally purchased by Indigold, and is now to vest in the State Government.

(iii) The third step in this regard is that the land is to be disposed off by the State Government, having regard to the use of the land. The land was supposed to be used for the industrial activity on the basis of the utilization of bauxite found in Kutch, and respondent No. 5 has proposed a plant based on use of bauxite. The disposal of the land will, however, have to be at least as per the minimum price that would be receivable at the Government rate. In the facts and circumstances of this case, having noted that the respondent No.5 claims to have made some good investment, and that the Respondent No.5 has also offered to pay, without prejudice, the difference between Rs.4.35 crores and Rs.1.20 crores i.e. Rs.3.15 cores to the State, the land will be permitted to be disposed of by the State Government to Alumina provided Alumina pays this amount of Rs. 3.15 crores to the State Government. This particular order is being made having further noted that, Alumina has acted on the basis of the commitment made to it by the Government of Gujarat in the Vibrant Gujarat Summit, and in furtherance of the industrial development policy of the State. It is also relevant to note that the respondent No.5 had made an application to the Collector in the year 2009 for permitting the purchase of the land, and has been waiting to set up its industry for the last four years. Mr. Ahmadi, learned senior counsel appearing for the appellants has also submitted that, as such, appellants are not against the development of Kutch area, but they do want the state to follow the law and exchequer not to suffer. In the circumstances, although we do not approve the action of the State Government, and hold it to be [illegible] d

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untenable, we are of the view that the aforesaid order will be appropriate to do complete justice in the matter.

70. In the circumstances, we pass the following orders:-

(a) The appeal is allowed in part;

(b) The impugned judgment and order passed by the High Court is set-aside;

(c) The PIL No.44 of 2012 filed by the appellants is allowed by holding that the order dated 18.12.2009 passed by the Government of Gujarat and by the Collector of Kutch on 15.1.2010, are held to be arbitrary and bad in law;

(d) In the facts and circumstances of this case, the sale of the concerned land by Indigold to Alumina is held to be bad in law. The land involved in the present case is held to have vested in the State of Gujarat free from all encumbrances, and the amount of Rs. 1.20 crores paid by Alumina to Indigold is treated as full payment towards the compensation payable by the State to Indigold.

(e) If Alumina is interested in their proposed project, it shall pay an amount of Rs. 3.15 crores to the Government of Gujarat within three months hereafter. On such a payment being made, an order of allotment of the land to Alumina will be issued by the State Government. The further activities of Alumina on the concerned parcel of land will start only after this payment is made, and in the event the amount is not so paid within three months hereafter, the Government will proceed to take further steps to dispose of the land having regard to the use of the land.

(f) In the facts of the present case, there shall be no order as to costs.

R.P. Appeal partly allowed.

DEEPAK BHANDARI
v.
HIMACHAL PRADESH STATE INDUSTRIAL DEVELOPMENT CORPORATION LIMITED
(Civil Appeal No. 1019 of 2014)

JANUARY, 29, 2014

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

State Financial Corporations Act, 1951: s.29 - Right to sue under contract of indemnity - Limitation period - Held: When the Corporation takes steps for recovery of the amount by resorting to provisions of s.29 of the Act, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern as the Corporation would be in a position to know if there is a shortfall or there is excess amount realised, only after the sale of the mortgage/ hypothecated assets - The instant case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908 - The right to sue on a contract of indemnity/ guarantee arise when the contract is broken - Therefore, the period of limitation is to be counted from the date when the assets of the Company were sold and not when the recall notice was given - Limitation Act, 1963 - Article 55.

Respondent no.2-company, an industrial concern defaulted in repayment of loan disbursed by respondent no.1-corporation constituted under State Development Corporation Act. The respondent no.2, thereafter, went under liquidation. The appellant who was the director of the company was a Guarantor for the payment of loans taken by the company from the Corporation. The Corporation issued a recall notice dated 21.5.1990. The

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company failed to make the repayment and the Corporation proceeded under Section 29 of the State Financial Corporations Act, 1951 to take over the mortgaged/hypothecated assets of the company. The assets of the company were taken over by the Corporation and sold on 31.3.1994. Still certain amount remained outstanding against the company so the Corporation filed a suit for recovery of remaining amount on 26.12.1994. The High Court dismissed the plea of the appellant that the suit was time barred and decreed the suit.

The question for consideration in the instant appeal was whether the limitation for filing the suit would start on 21.5.1990, when the notice of recall was issued or the starting point would be 31.3.1994, when the assets of the Company were sold and the balance amount payable.

Dismissing the appeal, the Court

HELD: 1. When the Corporation takes steps for recovery of the amount by resorting to the provisions of Section 29 of State Financial Corporations Act, 1951, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern as the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realised, only after the sale of the mortgage/ hypothecated assets. This is clear from the language of sub-Section (1) of Section 29. It is thus clear that merely because the Corporation acted under Section 29 of the State Financial Corporation Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract. It may be that only the Corporation taking action under Section 29 and on their taking possession they became deemed

owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient. The right to sue on the contract of indemnity arose after the assets were sold. The instant case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity/ guarantee would arise when the contract is broken. Therefore, the period of limitation is to be counted from the date when the assets of the Company were sold and not when the recall notice was given. [Paras 21-23] [153-C-D; 153-G-H; 154-A-D]

HP Financial Corporation v. Pawana & Ors. **C.A. No. 1971 of 1998 dated 18.2.2003 - relied on.**

Maharashtra State Financial Corporation v. Ashok K. Agarwal & Ors. **2006 (9) SCC 617: 2006 (3) SCR 617 - Distinguished.**

Oriental Insurance Co. Ltd. vs. Smt. Raj Kumari & Ors. **2007 (13) SCALE 113 - referred to.**

Case Law Reference:

2006 (3) SCR 617	**Distinguished**	**Para 14**
2007 (13) SCALE 113	**Referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1019 of 2014.

From the Judgment and Order dated 0406.2010 of the High Court of H.P. at Shimla in OSA No. 7 of 2008.

Dhruv Mehta, P.B. Suresh, Vipin Nair, Udayaditya Banerjee (for Temple Law Firm) for the Appellants.

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J.S. Attri, Priyanka Bharihoke (for Rameshar Prasad Goyal), Manish K. Bishnoi for the Respondents.

The Judgment of the Court was delivered by

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

2. Present appeal raises an interesting question of law pertaining to the starting point of limitation for filing the suit for recovery by the State Financial Corporations constituted under the State Financial Corporation Act. We make it clear at the outset itself that we are not treading a virgin path. There are two judgments of this Court touching upon this very issue. At the same time it is also necessary to point out that it has become imperative to clarify the legal position contained in two judgments and to reconcile the ratio thereof as well because of the reason that they are contradictory in nature. It necessitates wider discussion in order to avoid any confusion in the manner such cases are to be dealt with.

3. With the aforesaid preliminary introduction to the subject matter of the present appeal, we now proceed to take note of the facts which have led to the question of limitation that confronts us.

4. Respondent No. 1 viz. Himachal Pradesh State Industrial Development Corporation Limited (hereinafter to be referred as 'the Corporation') is a financial corporation under the State Development Corporation Act (hereinafter to be referred as the Act). It is a statutory body constituted for the purpose of carrying out the objectives of the Act. It is a company incorporated under the Companies Act, 1956, engaged in the business of providing financial aid to companies for setting up and commencing operations. Respondent No. 2 (hereinafter to be referred as the 'Company') is the industrial concern which defaulted in repayment of the loan disbursed by the Respondent No. 1. It is now under liquidation. Respondent No. 3 is the official liquidator, who was appointed by the High Court

of Delhi for the purposes of winding up the Company. Respondent Nos. 4 & 5 were the Directors of the Company at the time of entering into the loan agreements with the Corporation.

5. The appellant who was also a director of the Company, was a Guarantor for the payment of loans taken by the Company vide loan agreements executed between Corporation and the Company. The following loan agreements were executed along with the corresponding amounts and guarantees:

Loan Agreement Date	Amount	Deed of Guarantee Date
5.6.1985	20.67 lacs	5.6.1985
7.4.1986	8.73 lacs	7.4.1986
24.11.1986	15.38 lacs	24.11.1986
28.7.1987	7.76 lacs	
Total	52.54 lacs	

6. The Company defaulted on the repayments of the loan amount disbursed to it by the Corporation. The Corporation issued a Recall Notice bearing No. PAC 84/ 90/ 6705 dated 21.5.1990 recalling an amount of Rs. 77,35,607/-(Rupees seventy seven lakhs thirty five thousand six hundred and seven only) plus further interest to be accrued from 10.9.1990.

7. The Company failed to make the repayment and accordingly the Corporation, proceeded under Section 29 of the State Financial Corporations Act, 1951 to take over the mortgaged/ hypothecated assets of the Company. The assets of the Company were taken over by the Corporation on 10.7.1992. The mortgaged/ hypothecated assets of the Company were sold by the Corporation on 31.3.1994 for a sum of Rs. 96,00,000/- (Rupees Ninety Six [illegible] g

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offers by means of publishing advertisements in the leading newspapers.

8. Since the company was also indebted to HP Financial Corporation, amount realised from the sale of the company's assets was apportioned between these two secured creditors. After adjusting the sale proceeds against the outstanding debts of the Company, in proportion to the term loans advanced by the Corporation and Himachal Pradesh Financial Corporation; a sum of Rs. 68,96,564/- (Rupees Sixty Eight Lakhs Ninety Six Thousand Five Hundred and Sixty Four only) still remained outstanding against the Company.

9. The Corporation preferred a Civil Suit No. 85 of 1995 on 26.12.1994 titled as Himachal Pradesh State Industrial Development Corporation Limited v. M/s RKB Herbals Pvt. Ltd and Ors., for recovery of sum of Rs. 30,60,732/- (Rupees Thirty Lakhs Sixty Thousand Seven Hundred and Thirty Two only). The sum above mentioned was calculated as follows by the Corporation:

Recoverable amount on 31.5.1994	
Principal Amount (Rs./-)	5,16,582
Interest	63,79,982
Total	**68,96,564**
Less Penal Interest	38,35,832
Net Amount for which suit was filed	30,60,732

10. The Civil Suit No. 85 of 1995 was decreed in favour of the Corporation vide judgment and decree dated 6.6.2008 passed by the Single Judge of the High Court of Himachal Pradesh, granting a decree of Rs. 30,60,732/- (Rupees Thirty Lakhs Sixty Thousand Seven Hundred and Thirty Two only) along with interest at the rate of 12% from the date of filing of suit till the realization of the said amount.

11. Before the learned Single Judge of the High Court a plea was taken by the defendants, including the appellant herein, that the suit was time barred as it was filed beyond the period of 3 years from the date of commencement of limitation period. To appreciate this plea we recapitulate some relevant dates:

Date	Event
21.5.1990	Recall notice sent by the Corporation, recalling the outstanding amount.
10.7.1992	Mortgage/ hypothecated assets of the Company taken over by the Corporation.
31.3.1994	The Mortgage/ hypothecated assets of the Company sold by the Corporation.
21.5.1994	Notice issued to all the three Directors of the Company for payment of outstanding amount.
26.12.1994	Suit for recovery of the balance outstanding filed by the Corporation.

12. As per the defendants cause of action for filing the recovery suit arose on 21.5.1990 when recall notice was issued by the Corporation to the Company and the Guarantors. Therefore, the suit was to be filed within a period of 3 years from the said date and calculated in this manner, last date for filing the suit was 20.5.1993. It was, thus, pleaded that the suit filed on 26.12.1994 was beyond the period of 3 years from 21.5.1990 and, therefore, the same was time barred. The Corporation, on the other hand, contended that action for selling the mortgage/ hypothecated properties of the Company was taken under the provisions of Section 29 of the Act and the sale of these assets were fructified on 21.3.1994. It is on the realization of sale proceeds only, the balance amount payable

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by the guarantors could be ascertained. Therefore, the starting point for counting the limitation period is 31.3.1994 and the suit filed by the Corporation on 26.12.1996 was well within the period of limitation.

13. The learned Single Judge deciding in favour of the Corporation, held the suit to be well within limitation. The suit was decreed against all the defendants including the appellant herein, holding them to be jointly and severely liable to pay the decretal amount. The appellant herein preferred an intra court appeal against the judgment and decree dated 6.6.2008. The Division Bench has also negatived the contention of the appellant affirming the finding of the single Judge and holding the suit to be within limitation.

14. We have already taken note of the stand of the parties on either side. It is apparent from the above that the main issue is as to whether the limitation for filing the suit would start on 21.5.1990, when the notice of recall was issued or the starting point would be 31.3.1994, when the assets of the Company were sold and the balance amount payable (for which suit is filed) was ascertained on that date. We have already pointed out in the beginning that there are two judgments of this Court which have dealt with the aforesaid issue. First judgment is known as *Maharashtra State Financial Corporation v. Ashok K. Agarwal & Ors.* 2006 (9) SCC 617. In that case the appellant Maharashtra State Financial Corporation had sanctioned Rs. 5 lakhs in favour of a Company. The Respondents were directors of the said borrower company and stood sureties for the loan. When the company failed to repay the loan, a notice dated 8.3.1983 was issued calling upon the borrower to repay its due. On 25.10.1983, an application under Ss. 31 and 32 of the State Financial Corporations Act, 1951 was filed by the Corporation. On 11.6.1990 the attached properties of the borrower company were put to sale. There was a shortfall in the amount realised and hence notices dated 27.1.1991 were sent to respondent sureties claiming Rs. 16,79,033 together

with interest at the rate of 14.5.% p.a. On 2.1.1992 the appellant Corporation filed an application under Section 31(1)(aa) of the Act for recovery of the said balance amount. The respondent took various objections including that of limitation, contending that Article 137 of the Limitation Act was applicable and not Article 136. According to the respondents, Article 137 of the Limitation Act was applicable and as per that provision such an application could be made within a period of three years. Article 137 applies in cases where no period of limitation is specifically prescribed. It was submitted that as no period of limitation is prescribed for an application under Sections 31 and 32 of the Act, Article 137 would apply. The additional District Judge upheld the contention of the respondents and the application of the Corporation was dismissed as barred by limitation. The appellant Corporation filed an appeal against the said order in the High Court of Judicature at Bombay, Bench at Panaji. The appeal was dismissed by the High Court by the impugned order dated 22.7.1998. The High Court upheld the reasoning of the Additional District Judge. This Court affirmed the order of the High Court holding that Article 137 of the Limitation Act would apply and the suit was to be filed within a period of three years. Contention of the Financial Corporation predicating its case on Article 136 of the Limitation Act on the ground that application under Section 138 was in the nature of execution proceedings and, therefore, period of 12 years for execution of the decrees is available to the Financial Corporation, was repelled by the Court. The Court categorically held that Section 31 of the Act only contains a legal fiction and at best refer to the procedure to be followed, but that would not mean that there is a decree or order of a Civil Court, stricto sensu, which is to be executed, in as much as there is no decree or order of the Civil Court being executed.

15. From the reading of the aforesaid judgment, one thing is clear. The Court was concerned with the proceedings under Section 31 of the Act and the issue was as to whether limitation period would be 3 years as per Article [illegible] n

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Act or it would be 12 years as provided under Article 136 of the Limitation Act. While dealing with that issue the Court, in the process also dealt with the nature of proceedings under Section 31 of the Act namely whether this would be in the nature of a suit or execution of decree. The Court answered by holding that for such proceedings Article 137 of the Limitation Act would apply meaning thereby, period of limitation is 3 years. From the reading of this judgment, it becomes abundantly clear that the issue to which would be the starting date for counting the period of limitation, was neither raised or dealt with. Obviously, therefore, there is no discussion or decision on this aspect in the said judgment.

16. We would like to refer to the law laid down by this Court in *Oriental Insurance Co. Ltd. vs. Smt. Raj Kumari and Ors.;* 2007 (13) SCALE 113. In the said case, well known proposition, namely, it is ratio of a case which is applicable and not what logically flows therefrom is enunciated in a lucid manner. We would like to quote the following observations therefrom:-

> 10. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct," or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an, authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent.(See: *State of Orissa v. Sudhansu Sekhar Misra and Ors.* (1970) ILLJ 662 SC and *Union of India and Ors.v. Dhanwanti Devi and Ors.* (1996) 6 SCC 44. A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In *Quinn v. Leathern* (1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.
>
> 11.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd.v. Horton* 1951 AC 737 Lord Mac Dermot observed:

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> The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.

The aforesaid principle was reiterated in *Government of Karnataka and Ors. vs. Smt. Gowramma and Ors.* 2007 (14) SCALE 613, wherein, the Court observed as under:-

> "10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. vs. Horton* 1951 AC 737, Lord Mac Dermot observed:
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17. Other case of this Court, which is relied upon by the High Court as well, is the decision dated 18.12.2003 in C.A. No. 1971 of 1998 titled as *HP Financial Corporation v.*

Pawana & Ors. In that case recall notice was given to the defaulting Company on 4.1.1977; possession of mortgage/ hypothecated assets of the Company was taken over on 25.10.1982 in exercise of powers under Section 29 of the Act; these assets were sold on 29.3.1984 and 14.3.1985; notice for payment of balance amount was issued to the guarantors on 22.5.1985 and suit for recovery of the balance amount was filed on 15.9.1985.

18. A single Judge of the Himachal Pradesh High Court held that the period of limitation for such a suit started after the sale and when balance was found due and, therefore, suit was within the period of limitation. However, when the suit reached hearing before another Judge of the High Court he disagreed with the earlier view and referred the matter to a larger Bench. The Division Bench of the High Court answered the question by holding that the suit for balance amount was filed as a result of the non- payment of debt by the principle debtor which was the date when cause of action arose. Therefore, the suit should have been filed within 3 years from the date of recall notice. The suit was, thus, dismissed as time barred. This Court reversed the judgment of the High Court. While doing so, it referred to clause 7 of the mortgage deed which was to the following effect:

> "Without prejudice to the above rights and powers conferred on the Corporation by these presents and by Section 29 and 30 of the State Financial Corporations Act, 1951, and as amended in 1956 and 1972 and the special remedies available to the Corporation under the said Act, it is hereby further agreed and declared that if the partners of the industrial concern fail to pay the said principal sum with interest and other moneys due from him under these rpesents, to the Corporation in the manner agreed, the Corporation shall be entitled to realise tis dues by sale of the mortgaged properties, the said fixtures and fittings and other assets, and if the sale p[illegible]e

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insufficient to satisfy the dues of the Corporation, to recover the balance from the partners of the industrial concern and the other properties owned by them though not included in this security." (emphasis supplied).

19. On the basis of the aforesaid clause the Court found fault with the approach of the High Court in as much as clause 7 specifically provided that the Corporation could filed recovery proceedings against the partners of the Industrial concern if the sale proceeds of the assets of the industrial concern were insufficient to satisfy the dues of the Corporation.

20. Mr. Dhruv Mehta, learned Senior Counsel appearing for the appellant tried to distinguish this judgment by vehemently arguing that the aforesaid case was based on interpretation of clause 7 of the mortgage deed which was executed between the parties and in the present case such a clause is conspicuously absent. Had the judgment of this Court rested solely on clause 7 of the mortgage deed, the aforesaid argument of Mr. Dhruv Mehta would have been of some credence. However, we find that the Court also specifically discussed the issue as to when right to sue on the indemnity would arise and specific answer given to this question was that it would be only after the assets were sold of. The judgment was also rested on another pertinent aspect viz. since the mortgage deed was executed, the period of limitation would be 12 years if a mortgage suit was to be filed. Following discussion in the said judgment on this aspect squarely answers the contention of the learned Senior Counsel for the appellant:

"Whilst considering the question of limitation the Division Bench has given a very lengthy judgment running into approximately 50 pages. However they appear to have not noticed the fact that under Clause 7 an indemnity had been given. Therefore, the premise on which the judgment proceeds i.e. that the loan transaction and the mortgage deed, are one composite transaction which was

inseparable is entirely erroneous. It is settled law that a contract of indemnity and/ or guarantee is an independent and separate contract from the main contract. Thus the question which they required to address themselves, which unfortunately they did not, was when does the right to sue on the indemnity arose. In our view, there can be only one answer to this question. The right to sue on the contract of indemnity arose only after the assets were sold off. It is only at that stage that the balance due became ascertained. It is at that stage only that a suit for recovery of the balance could have been filed. Merely because the Corporation acted under Section 29 of the Financial Corporation Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract. It may be that on the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient.

In this case, it is an admitted position that the sale took place on 28.1.1984 and 14.3.1985. it is only after this date that the question of right to sue on the indemnity (contained in Clause 7) arose. The suit having been filed on 15.9.1985 was well within limitation. Therefore, it was erroneous to hold that the suit was barred by the law of limitation.

Even otherwise, it must be mentioned that the Division Bench was in error in stating that the right to personally recover the balance terminates after the expiry of three years. It must be remembered that the question of recovery of balance will only ari[illegible]n

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respect of the mortgage deed has first been exhaustive. If a mortgage suit was to be filed, the period of limitation would be 12 years. Of course, in such a suit, a prayer can also be made for a personal decree on the sale proceeds being insufficient. Even though such prayer may be made, the suit remains a mortgage suit. Therefore, the period of limitation in such cases will remain 12 years". [Emphasis Supplied]

21. We thus, hold that when the Corporation takes steps for recovery of the amount by resorting to the provisions of Section 29 of the Act, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern. As the Corporation would be in a position to know as to whether there is a shortfall or there is excess amount realised, only after the sale of the mortgage/ hypothecated assets. This is clear from the language of sub-Section (1) of Section 29 which makes the position abundantly clear and is quoted below:

"Where nay industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation."

22. It is thus clear that merely because the Corporation acted under Section 29 of the State Financial Corporation Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main

contract. It may be that only the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient. The right to sue on the contract of indemnity arose after the assets were sold. The present case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity/ guarantee would arise when the contract is broken.

23. Therefore, the period of limitation is to be counted from the date when the assets of the Company were sold and not when the recall notice was given.

24. The up-shot of the aforesaid discussion is to hold that the present appeal is bereft of any merits. Upholding the judgment of the High Court, we dismiss the instant appeal, with costs.

D.G. Appeal dismissed.

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SHEESH RAM AND ORS.
v.
THE STATE OF RAJASTHAN
(Criminal Appeal No. 191 of 2004)

JANUARY 29, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND RANJANA PRAKASH DESAI, JJ.]

Penal Code, 1860: s.302 r/w s.34 - Murder - Brutal murder and serious injury to one - Conviction by courts below - On appeal, held: The injured witness narrated the incident and defence could not point out any dent in his evidence - The prosecution witnesses corroborated the evidence of injured witnesses - There was strong motive to commit murder as there was previous enmity between the complainant party and the accused persons - Evidence of eye witnesses was not discrepant on the material aspect of the prosecution case and therefore reliance rightly placed on them by courts below - No interference called for with the conviction.

Witness: Related/Interested witness - Evidentiary value of - Held: Evidence of interested witness is not always a suspect - It has to be scrutinized with caution and can be accepted if it is found reliable.

Evidence: Exaggeration in - Held: If the exaggeration does not change the prosecution story or convert it into an altogether new story, allowance can be made for it - If evidence of a witness is to be disbelieved merely because he has made some improvement in his evidence, there would hardly be any witness on whom reliance can be placed by the courts.

Maxim: 'falsus in uno falsus in omnibus' - Held: Has no application in India - It is merely a rule of caution.

The prosecution case was that appellant and complainant party were on inimical terms due to land disputes and an earlier murder case. On fateful day, complainant was standing with his sons on road side. At that time the offenders were going on a tractor. Seeing the complainant party, they stopped the tractor and got down and attacked them. The complainant and one of his son ran towards the village. The accused gravely assaulted the elder son of the complainant and killed him. They then ran after the other son of the complainant PW-5 and inflicted injuries on him and considering him dead all the accused left the place. The trial court found all the accused guilty and convicted them under Sections 148, 302 r/w Section 149 and Section 307 r/w section 149 IPC. On appeal, the High Court acquitted four accused of all the offences. The High Court further acquitted appellant-SR of offence Sections 148, 302, 307 IPC and instead convicted him under Section 302 r/w Section 34 IPC and Section 307 r/w section 149 IPC; acquitted appellant-RM of the charges under Sections 148, 307 and 302 r/w Section 149, IPC and instead, convicted him under Section 302 r/w Section 34 and Section 307 r/w Section 34 of the IPC; and acquitted Appellant-R of charges under Sections 148, 302 and 307 r/w Section 149 of the IPC and instead, convicted him under Section 302 r/w Section 34 and Section 307 r/w Section 34 of the IPC. The instant appeal was filed against the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. The deceased was most brutally murdered. According to the doctor PW-12, the cause of death was haemorrhage and shock due to head injury leading to injury to brain and injury to carotid artery in neck. PW-5 was also brutally attacked. He received four incised wounds. He suffered a fracture of left parietal bone. Being an injured witness, he was the mos[illegible] s

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in the case. He described the incident in question. The defence could not find any dent in his evidence. In fact, in the cross-examination, he gave more details about the incident in question, which were consistent with what he had stated in the examination-in-chief. He stated that Accused-B was armed with an axe, appellant-R with an axe, appellant-SR with a sword, appellant-RM with a dhariya and others were having lathis. They encircled PW-5, his father and brothers. His father and brother ran towards the village. Accused-R caught hold of his deceased-brother and dealt an axe blow on his head. The deceased fell down. Appellant-SR dealt an axe blow on the deceased when he had fallen down. Accused-RM dealt a blow with a dhariya on the right hand of the deceased. According to PW-5, thereafter, appellant-SR caught hold of him and appellant-RM hit on his left temple with a dhariya. Appellant-SR dealt an axe blow behind his ear. Accused-H dealt a lathi blow on his face. Thereafter, he became unconscious. PW-2, PW-3 and PW-4 had corroborated this witness. Even assuming that these witnesses were related to each other and, therefore, interested witnesses, it is well settled that the evidence of interested witnesses is not always suspect. It has to be scrutinized with caution and can be accepted if it is found reliable. [Paras 6, 7] [163-C-H; 164-A-D]

2. The presence of PW-5 at the scene of offence cannot be disputed since he was an injured witness. His evidence strengthened the prosecution case. The evidence of PWs-3, 4 and 5 also inspired confidence. So far as the acquitted accused were concerned, the evidence of these witnesses qua them was found to be exaggerated. But, on account of that, their entire evidence cannot be discarded. All these witnesses stated that the acquitted accused had lathis and they dealt lathi blows on PW-5. This part of their evidence was disbelieved. It is true that these witnesses have improved

the prosecution story to some extent. But, that improvement or that exaggerated version can be safely separated from the main case of the prosecution. So far as the main prosecution case was concerned, all the witnesses were consistent. This is not a case where truth and falsehood are inextricably mixed up. Witnesses tend to exaggerate the prosecution story. If the exaggeration does not change the prosecution story or convert it into an altogether new story, allowance can be made for it. If evidence of a witness is to be disbelieved merely because he has made some improvement in his evidence, there would hardly be any witness on whom reliance can be placed by the courts. It is trite that the maxim 'falsus in uno falsus in omnibus' has no application in India. It is merely a rule of caution. It does not have the status of rule of law. In *Balaka Singh case, this Court has said that where it is not feasible to separate truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, the Court cannot make an attempt to separate truth from falsehood. But, this is not a case where the grain and chaff are inextricably mixed up. The evidence of eye-witnesses was not discrepant on the material aspect of the prosecution case. Reliance can, therefore, be placed on them. [para 7] [164-D-H; 165-A-C]

3. The appellants examined the defence witnesses. Testimony of defence witnesses was not believed by the trial court as well as the High Court. There is no reason to take a contrary view. The complainant and some of the witnesses were facing trial for murder of the brother of the appellants. There was, therefore, strong motive to kill the deceased. The evidence of eye-witnesses, particularly the evidence of PW-5, the injure[illegible] s

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trustworthy. Therefore, the argument that on account of previous enmity, the appellants have been falsely implicated in this case is rejected. The impugned judgment is not interfered with taking an overall view of the matter and examined in light of *Balaka Singh and **Rizan. [para 8] [166-B-E]

Balaka Singh v. State of Punjab* **(1975) 4 SCC 511: 1975 (0) Suppl. SCR 129; ***Rizan & Anr. v. State of Chhattisgarh* **(2003) 2 SCC 661: 2003 (1) SCR 457 - relied on.**

Case Law Reference:

1975 (0) Suppl. SCR 129	**relied on**	**Paras 7, 8**
2003 (1) SCR 457	**relied on**	**Paras 5, 7, 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 191 of 2004.

From the Judgment and Order dated 29.05.2003 of the High Court of Judicature for Rajasthan at Jaipur Bench Jaipur in D.B. Criminal Appeal No. 322 of 1998.

P.C. Agarwala, Ambuj Agarwal, Chander Shekhar Ashri for the Appellants.

S.S. Shamshery, AAG. Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. The appellants are original Accused Nos.1, 2 and 4 respectively in S.T. No.12 of 1993. The appellants were convicted, inter alia, under Section 302 of the IPC for the murder of one Balram and sentenced to life imprisonment. They have challenged judgment and order dated 29/5/2003 passed in Criminal Appeal No.322 of 1998 by the Rajasthan High Court, confirming their conviction and sentence.

2. One Heera son of Surajmal lodged a complaint (Ex. P-7) at Jagal Tan, Village Lapawali on 04/02/1991 at around 3.50 p.m., stating that on 04/02/1991 at 8.00 a.m., he and his son Rameshwar accompanied his other sons Balram and Bhagwan Singh who were going to Hindaun School to see them off. They were standing on the road near the turn between Lapawali and Dhara. While they were waiting for the bus, Rajdhar of village Lapawali, along with others, arrived there in a tractor. Accused-1 Sheesh Ram, Accused-2 Radhey, Accused-3 Battu, Accused-4 Rameshwar (in S.T. No.12 of 1993), Accused-Ram Kunwar, Accused-Hansey and Accused-Har Sahai (in S.T. No.350 of 1992) stopped the tractor. Accused-3 Battu exhorted "do not let this opportunity slip off". All the persons jumped from the tractor. Complainant Heera and his son Rameshwar saved their life by fleeing towards the village. His elder son Balram fled towards the south from the road. The accused followed them. Accused-2 Radhey caught hold of Balram and assaulted him with a Kulhari. Balram fell down. Later on, Accused-3 Battu dealt an axe blow on his throat. Others too continued assaulting Balram. Balram was badly injured. He succumbed to the injuries. Accused-1 Sheesh Ram followed Bhagwan Singh, caught hold of him and inflicted injuries on him. Other accused also inflicted injuries on him. Under the impression that Bhagwan Singh had died, all the accused left the place. Bhagwan Singh was admitted in the hospital at Karauli. On the basis of this report, a case under Sections 147, 148, 324, 326, 302, 307 read with Section 149 and Section 341 of the IPC was registered. Accused Ram Kunwar was arrested on 23/6/1991. On completion of investigation, charge-sheet was laid against Ram Kunwar. Another charge-sheet was laid against accused Hanse, Har Sahai and Rajdhar. The case was committed to the Sessions Court and numbered as S.T. No.356 of 1992. Against the appellants, charge-sheet was laid on 3/2/1993. After committal of the said case to the Sessions Court, it was numbered as S.T. No. 12 of 1993. Both the cases were tried together as they arose out of the same FIR.

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3. In support of its case, the prosecution examined 20 witnesses out of which, four are eye-witnesses. The eye-witnesses are PW-2 Khushiram, PW-3 Rameshwar, PW-4 Yadram and PW-5 Bhagwan Singh, who is an injured witness. The accused pleaded not guilty to the charge and examined seven witnesses in their defence. The trial court convicted all the accused under Sections 148, 302 read with Section 149 and Section 307 read with Section 149 of the IPC. On appeal, the High Court acquitted Hansey, Har Sahai, Rajdhar and Ram Kunwar. The High Court acquitted Accused Battu of the charges under Sections 148 and 307 of the IPC. His conviction and sentence under Section 302 of the IPC was confirmed. He has not appealed against the order convicting and sentencing him. Appellant-Sheesh Ram was acquitted of the charges under Sections 148, 302 and 307 of the IPC. Instead, he was convicted under Section 302 read with Section 34 of the IPC and Section 307 read with Section 34 of the IPC. He was sentenced to suffer imprisonment for life and a fine of Rs.1,000/-, in default, to further suffer six months rigorous imprisonment and to suffer rigorous imprisonment for five years and fine of Rs.2,000/-, in default, to further suffer simple imprisonment for three months, respectively. Appellant-Rameshwar was acquitted of the charges under Sections 148, 307 and 302 read with Section 149 of the IPC. Instead, he was convicted under Section 302 read with Section 34 and Section 307 read with Section 34 of the IPC. He was sentenced to suffer imprisonment for life and a fine of Rs.1,000/-, in default, to suffer further six months rigorous imprisonment and to suffer rigorous imprisonment for five years and a fine of Rs.2,000/-, in default, to further suffer simple imprisonment for three moths, respectively. Appellant-Radhey was acquitted of charges under Sections 148, 302 and 307 read with Section 149 of the IPC. Instead, he was convicted under Section 302 read with Section 34 and Section 307 read with Section 34 of the IPC. He was sentenced to suffer imprisonment for life and a fine of Rs.1,000/-, in default, to suffer six months rigorous imprisonment and to

suffer rigorous imprisonment for five years and a fine of Rs.2,000/-, in default, to further suffer simple imprisonment for three months, respectively. This judgment is challenged in the instant appeal.

4. Mr. P.C. Agarwala, learned senior counsel appearing for the appellants submitted that out of the eight accused, the High Court acquitted four accused. The High Court has, in fact, observed that the four acquitted accused have been falsely implicated. Counsel submitted that it is, therefore, risky to rely on the evidence of the prosecution witnesses to convict the appellants. These witnesses exaggerated the prosecution story and involved the acquitted accused. It is possible that even so far as the appellants are concerned, they have not come out with the truth. This is a case where truth and falsehood are inextricably mixed and truth cannot be separated from falsehood. The doctrine of 'falsus in uno falsus in omnibus', is clearly attracted to this case. Counsel pointed out that the eye-witnesses appear to be tutored. They are related to each other and, hence, are interested witnesses. Their evidence will have to be read cautiously. Moreover, complainant Heera has not been examined. Admittedly, there is enmity between the two sides. There is a land dispute between complainant Heera and accused Rajdhar. Ram Kunwar's son Kamal was murdered and, in that connection, complainant Heera and others, are facing trial. During the pendency of this trial, complainant Heera's son Balram was murdered. False involvement on account of long standing enmity cannot be ruled out. The conviction of the appellants, therefore, deserves to be set aside.

5. Mr. S.S. Shamshery, learned Addl. Advocate General appearing for the State, on the other hand, submitted that the evidence of four eye-witnesses is consistent. PW-2 Khushiram and PW-4 Yadram are independent witnesses. There is no reason to cast any doubt on their testimony. Counsel submitted that in a catena of judgments, this C[illegible]e

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doctrine 'falsus in uno falsus in omnibus' is not applicable in India. Even if some portion of the evidence of a witness is found to be deficient, the remaining portion can be relied upon, if it is sufficient to establish prosecution case. In this connection, he relied on *Rizan & Anr. v. State of Chhattisgarh*[1]. Counsel submitted that there is enough credible evidence on record which bears out the prosecution case. The appeal, be therefore, dismissed.

6. Deceased Balram was most brutally murdered. According to PW-12 Dr. Meena, the cause of death was haemorrhage and shock due to head injury leading to injury to brain and injury to carotid artery in neck. PW-5 Bhagwan Singh was also brutally attacked. He received four incised wounds. He suffered a fracture of left parietal bone. Being an injured witness, he is the most important witness in this case. He has described the incident in question. The defence has not made any dent in his evidence by cross-examining him. In fact, in the cross-examination, he has given more details about the incident in question, which are consistent with what he has stated in the examination-in-chief. He has stated that he, deceased Balram, his father Heera and his other brother Rameshwar were standing near the road near the boundaries of village Dehra and Lapawali. At that time, a tractor driven by Rajdhar came from village Lapawali side. Rajdhar halted the tractor near them. The appellants, who were sitting in the tractor, got down. Accused Battu was armed with an axe. Appellant Radhey was also armed with an axe. Appellant Sheesh Ram was armed with a sword. Appellant Rameshwar was armed with a dhariya and others were having lathis. They encircled PW-5 Bhagwan Singh, his father and brothers. His father and brother Rameshwar ran towards the village. Balram also ran towards the village. He ran towards Katara village. Accused Radhey caught hold of the collar of Balram and dealt an axe blow on Balram's head. Balram fell down. Appellant Sheesh Ram dealt an axe blow on Balram when he had fallen down. Accused Rameshwar dealt a blow with a dhariya on the right hand of Balram. According

to PW-5 Bhagwan Singh, thereafter, appellant Sheesh Ram caught hold of him (Bhagwan Singh). Appellant Rameshwar hit on his left temple with a dhariya. He fell down. Appellant Sheesh Ram dealt an axe blow behind his ear when he had fallen down. Accused Hanse dealt a lathi blow on his face. Thereafter, he became unconscious.

7. PW-2 Khushiram, PW-3 Rameshwar and PW-4 Yadram have corroborated this witness. It is submitted that all these witnesses are related and therefore their evidence cannot be drelied upon. Assuming they are related to each other and, hence, interested witnesses, it is well settled that the evidence of interested witnesses is not always suspect. It has to be scrutinized with caution and can be accepted if it is found reliable. Presence of PW-5 Bhagwan Singh at the scene of offence can hardly be disputed since he is an injured witness. His evidence has strengthened the prosecution case. Evidence of PWs-3, 4 and 5 also inspires confidence. So far as the acquitted accused are concerned, the evidence of these witnesses qua them is found to be exaggerated. But, on account of that, their entire evidence cannot be discarded. All these witnesses stated that the acquitted accused had lathis and they dealt lathi blows on PW-5 Bhagwan Singh. This part of their evidence is disbelieved. It is true that these witnesses have improved the prosecution story to some extent. But, that improvement or that exaggerated version can be safely separated from the main case of the prosecution. So far as the main prosecution case is concerned, all the witnesses are consistent. This is not a case where truth and falsehood are inextricably mixed up. Witnesses tend to exaggerate the prosecution story. If the exaggeration does not change the prosecution story or convert it into an altogether new story, allowance can be made for it. If evidence of a witness is to be disbelieved merely because he has made some improvement in his evidence, there would hardly be any witness on whom reliance can be placed by the courts. It is trite that the maxim 'falsus in uno falsus in omnibus' has nc It

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is merely a rule of caution. It does not have the status of rule of law. In *Balaka Singh v. State of Punjab*[2], this Court has said that where it is not feasible to separate truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, the Court cannot make an attempt to separate truth from falsehood. But, as we have already noted, this is not a case where the grain and chaff are inextricably mixed up. The evidence of eye-witnesses is not discrepant on the material aspect of the prosecution case. Reliance can, therefore, be placed on them. In this connection, reliance placed by the counsel for the State on *Rizan* is apt. The same principle is reiterated by this Court in *Rizan*. We may quote the relevant paragraph from *Rizan*.

> *"Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P AIR 1957 SC 366.)"*

8. The appellants examined defence witnesses. Testimony of defence witnesses is not believed by the trial court as well as the High Court. We find no reason to take a contrary view. It is pertinent to note that Kamal, the brother of the appellants was murdered and for that murder, complainant Heera and some of the witnesses are facing trial. There is, therefore, strong motive to kill Balram, son of Heera. It is not possible, however, to come to a conclusion that because of this enmity, the appellants have been falsely implicated. We have already discussed the evidence on record. The evidence of eye-witnesses, particularly the evidence of PW-5 Bhagwan Singh, the injured eye-witness, is trustworthy. Therefore, the argument that on account of previous enmity, the appellants have been involved in this case is rejected. Taking an overall view of the matter and examined in light of *Balaka Singh* and *Rizan*, we are of the opinion that no interference is necessary with the impugned judgment. The appeal is dismissed.

D.G. Appeal dismissed.

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SURJIT KAUR GILL & ANR.
v.
ADARSH KAUR GILL & ANR.
(Civil Appeal No. 8221 of 2011)

JANUARY 30, 2014

[H.L. GOKHALE AND KURIAN JOSEPH, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

O. 7, r.11 - Suit for partition and rendition of account on the basis of a will - Application for rejection of plaint - Held: For deciding an application under O.7, r. 11, one has to look at the plaint and decide whether it deserved to be rejected for the ground raised --The issue of limitation is always a mixed question of facts and law and, therefore, it could not be held that no case was made out for proceeding for a trial -- The application made under O. 7, r. 11 will stand rejected.

A suit was filed before the High Court, inter alia, for partition of property, rendition of accounts etc. on the basis of a will. The plaintiff filed the suit in the capacity of the administrator of the will of his deceased sister. After the issues had been framed and the plaintiff had tendered his affidavit in lieu of the examination-in-chief, an application was made under O 7, r. 11 of the Code of Civil Procedure, 1908, contending that the suit was barred by law and, therefore, it ought to be rejected under O. 7, r. 11 (d). The single Judge of the High Court dismissed the application holding that all the prayers were inter-connected, and they were related essentially to the principal prayer (a) for partition of the property of the deceased. However, the Division Bench of the High Court allowed the appeal in part and allowed the application moved by respondent No.1 under O. 7, r. 11 to the extent of prayer clauses (b) to (f) holding the same

as time barred.

Allowing the appeal, the Court

HELD: 1.1 The issue of limitation is always a mixed question of facts and law and, therefore, it could not be held that no case was made out for proceeding for a trial. The submission that respondent No.1 disputed the writing dated 12.2.1991 and it had to be forensically tested, all the more justifies that the trial had to proceed. [para 9] [174-D-E]

1.2 For deciding an application under O.7, r. 11, one has to look at the plaint and decide whether it deserved to be rejected for the ground raised. The view taken by the Division Bench of the High Court being clearly erroneous, its judgment and order impugned is set aside. The application made under O. 7, r. 11 moved by respondent No.1 will stand rejected. [para 9] [174-F-G]

Popat and Kotecha Property vs. State Bank of India Staff Association, **2005 (2) Suppl. SCR 1030 = (2005) 7 SCC 510 -referred to.**

Case Law Reference:

2005 (2) Suppl. SCR 1030 referred to para 4

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8221 of 2011.

From the Judgment and Order dated 27.01.2009 of the High Court of Delhi at New Delhi in FAO (OS) No. 290 of 2008.

Shyam Diwan, Gaurav Choudhary, Nirman Sharma, Gaurav Kejriwal for the Appellants.

C.A. Sundaram, Rohini Musa, Zafar Inayak, Govin Singh for the Respondents.

The Judgment of the Court was de

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H.L. GOKHALE, J. 1. This appeal seeks to challenge the judgment and order dated 27.1.2009 rendered by a Division Bench of the High Court of Delhi in FAO (OS) No.290 of 2008 whereby the Division Bench has set aside in part the decision rendered by a learned Single Judge who had dismissed the application moved by the respondent No.1 (defendant No.1) under Order VII Rule 11 of the Code of Civil Procedure,1908 by his judgment and order dated 7th April, 2008.

2. Heard Mr. Shyam Diwan learned senior counsel appearing on behalf of the appellants and Mr. C.A. Sundaram learned senior counsel appearing on behalf of the respondents.

3. The brief facts leading to this appeal are that one Ajit Singh filed a Suit bearing No.2167 of 1993, on the Original Side of Delhi High Court for partition of property against his sister Ms. Adarsh Kaur Gill and some others. He filed the suit in his capacity as the Administrator of the Will of his deceased sister Smt. Abnash Kaur. The prayers in the suit were as follows:

(a) pass a preliminary decree of partition of the property bearing No.3, South end Road, New Delhi, more particularly shown on the plan, and thereafter, pass a final decree partitioning the said property by metes and bounds and put each of the parties to the suit in actual physical possession of the portion of the property allotted to him/her. If the partition of the property by metes and bounds is not feasible, then the property may ordered to be sold by public auction through Court and proceeds thereof be divided between the parties to the suit in accordance with their share and entitlement;

(b) pass a preliminary decree for partition of the movable assets belonging to the estate of Smt. Abnash Kaur, as mentioned in the Schedule to the plaint and, thereafter, pass a final decree and give to each of the party to the suit his/her share of the said property. In case it is not feasible to distribute the movable assets belonging to the

estate of Smt. Abnash Kaur in the hands of defendants Nos.1 & 2 to each of the beneficiaries, as per the share and entitlement, then the said movable assets may be ordered to be sold by public auction through this Hon'ble Court and the proceeds thereto may be divided amongst the parties, as per their share and entitlement;

(c) pass a decree for rendition of accounts and enquiry into the same with respect to the rental income of the property received by defendant No.1 from the tenant of property bearing No.3, South End Road, New Delhi, w.e.f. 1.1.1980 to 30.11.1990;

(d) pass a decree for rendition of accounts and enquiry into the same with respect to the profits made by defendant Nos.1 and 2 from the business which they have been carrying on by investing the funds from the estate of Smt. Abnash Kaur;

(e) Pass a decree for declaration that there has been no lease deed executed by Smt. Abnash Kaur in favour of Defendant No.1 and that defendant No.1 is not a lessee in the property, 3, South End Road, New Delhi, and she is not entitled to give the said property to any person on sub-lease basis;

(f) pass a decree of declaration to the effect that defendant No.1 is not a subrogatee of the mortgage deeds executed by late Smt. Abnash Kaur with respect to the property in favour of Smt. Sushila Daphtary and her son Mr. Anil Daphtary said mortgage deeds have been redeemed out of the estate left by Smt. Abnash Kaur;

(g) Pass a decree of declaration to the effect that defendants Nos.1 & 2 have dis-entitled themselves from getting any share in the estate left by Smt. Abnash Kaur and that the plaintiff and defendants Nos.3, 4 & 5 are the only beneficiaries under the Will of d

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are entitled to get the entire estate left by Smt. Abnash Kaur divided and partitioned in four equal shares;

(h) Pass a decree for permanent injunction against Defendant No./1 restraining her permanently from transferring, alienating, letting out or parting with the possession of the property No.3, South End Road, New Delhi, or any part thereof and from making any additions and alterations in the same in any manner whatsoever;

(i) Any relief which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be granted to the plaintiff and other beneficiaries under the Will of Smt. Abnash Kaur; and

(j) Cost of the Suit may also be awarded against defendants Nos.1 and 2.

4. There is no dispute that after the suit was filed issues have been framed and at a later stage the plaintiff had tendered his affidavit in lieu of the examination-in-chief. It is at that stage that the application made under Order VII Rule 11 (though made earlier), came to be pressed into service and decided by the learned Single Judge. The contention on behalf of the respondent-defendant was that as can be seen from the statements in the plaint, the suit was barred by law, and therefore it ought to be rejected under Order 7 Rule 11 sub-clause (d). The learned Single Judge went into the issues and came to the conclusion that all the prayers were inter-connected, and they were related essentially to the principal prayer (a) for partition of the property of deceased Smt.Abnash Kaur on the basis of the Will which she had executed.The learned Single Judge relied upon the dicta of this Court in *Popat and Kotecha Property vs. State Bank of India Staff Association* reported in (2005) 7 SCC 510 which held that the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. The language of various paragraphs in the plaint and the pleadings

have to be seen in their entirety to ascertain its terms. The application was, therefore, dismissed by the learned Judge by his judgment and order dated 7.4.2008.

5. Being aggrieved by the said judgment and order an appeal was preferred to the Division Bench of the Delhi High Court, and the Division Bench by the impugned judgment and order has allowed that appeal in part. It has allowed the application moved by the respondent No.1 under Order 7 Rule 11 to the extent of prayer clauses (b) to (f) as time barred. Being aggrieved by that judgment this appeal has been filed.

6. Mr. Diwan, learned senior counsel appearing for the appellants pointed out that all the abovereferred prayers are inter related, and they are essentially concerning the partition which the original plaintiff was seeking. The original plaintiff having died, the appellant has transposed herself as the appellant. He pointed out that the estate was essentially of Smt.Abnash Kaur who had received it from her husband, and there were disputes between her step sons and herself, and to protect the property certain arrangements had been made amongst the siblings of Smt. Abnhash Kaur. It is as a result of that arrangement that a lease deed was executed by Smt. Abnash Kaur in favour of the respondent No.1 herein. Similarly various other arrangements were made with the understanding of all the family members. It was in 1992 that the respondent, for the first time, resiled from all those arrangements and understanding, and that is how it became necessary for the original plaintiff to file the suit. The suit filed in 1993 was well within time and the prayers therein could not be segregated.

7. Mr. C.A. Sundaram learned senior counsel, on the other hand, took us through the various prayers of the suit, particularly the prayers (b) to (f). As far as prayer (b) is concerned he pointed out that this prayer seeks the partition of the movable assets belonging to said Smt Abnash Kaur. Smt Abnash Kaur died in 1976 and therefore this prayer is time barred under Article 69 of the Schedule to the Limitati s

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claim is not made within three years therefrom. In respect of prayer clause(c), he pointed out that the accounts are sought with respect to the rental income for the period from 1.1.80 to 30.11.90 and since the suit is filed in September, 1993, at the highest the claim could be maintainable for the last four months, and the claim for the earlier period would be time barred under Article 69 of the Limitation Act. With respect to prayer clause (d), though he opposed the inclusion of the prayer in the plaint, he very fairly stated that perhaps this prayer could have been allowed by the Division Bench.

8. His main objection was to prayer clauses (e) and (f) which according to him, the Division Bench has rightly struck off. According to him they contained separate causes of action. The prayer clause (e) seeks a declaration that there has been no lease deed executed by Smt Abnash Kaur in favour of the defendant No.1, and that she was not the lessee of the concerned property situated at 3, South end Road, New Delhi and that she was not entitled to give the property to any other person on sub-lease basis. Mr. C.A. Sundaram submitted that in the Will itself it is pointed out that the lease has been given to the respondent No.1 herein, and this was all to the knowledge of the plaintiff, and therefore the said declaration could not be sought by filing a suit in 1993. It would be barred under Article 58 of the Limitation Act. With reference to prayer clause (f) which seeks a declaration that the defendant No.1 is not a subrogatee in respect of the mortgage deed executed by Smt. Abnash Kaur with respect to the property in favour of Smt. Shushila Daphtary and Mr. Anil Daphtary, Mr.C.A. Sundaram submitted that, this transaction had taken place on 20.2.78 and that being so, again the prayer would be hit by Article 59 of the Limitation Act.

9. with respect to these submission, Mr. Diwan pointed out that in fact there is a clear writing of the respondent No.1 herein executed on 12.2.91 which clearly states, amongst others, in paragraph (d) that she will not claim any tenancy right or charge on the above referred property. In paragraph (b) of that writing she agreed to render the accounts with respect to the rental

income received from 1.1.80 to 30.11.90. In paragraph (c) of that writing she states that with respect to the two mortgages redeemed in her name, she will not claim any charge as the amounts paid for redeeming the said mortgages were paid from the estaste of Smt. Abnash Kaur. Mr. Diwan states that after executing this writing, the disputes between the parties were supposed to get settled, but then unfortunately it did not happen. The respondent No.1 started construction on the particular property in her own right. This having happened in 1992, the original plaintiff was constrained to file the suit for the partition of the property belonging to Smt.Abnash Kaur. Smt. Abnash Kaur having made a Will about her property, the original plaintiff had to see to it as the administrator of the will that the property is distributed in accordance therewith. This being the position, in his submission it is Article 58 which is the relevant Article for all these prayers, which provides for a period of 3 years when the right to sue first accrues. In the present case, it will be when the dispute arose because of the conduct of the respondent No.1 herein. The issue of limitation is always a mixed question of facts and law, and therefore, it could not be held that no case was made out for proceeding for a trial. Mr. C.A. Sundaram submitted that the respondent No.1 disputed the writing dated 12.2.1991, and it had to be forensically tested. This submission all the more justifies that the trial had to proceed. For deciding an application under Order 7 rule 11, one has to look at the plaint and decide whether it deserved to be rejected for the ground raised. In our view, the view taken by the Division Bench is clearly erroneous. The appeal is therefore allowed and the judgment and order of the Division Bench is set aside. The application made under Order 7 Rule 11 moved by the respondent No.1 herein will stand rejected. We may however clarify that all the observations herein are only for the purpose of deciding this appeal.

10. We request the learned Single Judge to hear and decide the suit expeditiously since it is pending for the last 10 years. The parties will bear their own costs.

R.P.

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SASI ENTERPRISES
v.
ASSISTANT COMMISSIONER OF INCOME TAX
(Criminal Appea No. 61 of 2007)

JANUARY 30, 2014

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

INCOME TAX ACT, 1961:

ss. 139 and 276 CC - Income-tax return - Non-filing of - Prosecution - Held: s.139 as it stood at the relevant time, states that it is mandatory on the part of the assessee to file the return before the due date.

s.144 r/w ss.139 and 276 - Best judgment assessment - Effect of on liability of assessee to file return - Held: The firm is independently required to file the return and merely because there has been a best judgment assessment u/s 144 would not nullify the liability of the firm to file the return as per s. 139(1).

s.276CC r/w ss.142 and 148 - Held: Offence u/s 276CC is attracted on failure to comply with the provisions of s. 139(1) or failure to respond to the notice issued u/s 142 or s. 148 of the Act within the time limit specified therein.

s.276CC - Prosecution - Pendency of appeal - Effect of - Held:Pendency of the appellate proceedings cannot be said to be a relevant factor for not initiating prosecution u/s 276CC of the Act - Interpretation of statues.

s.278E - Non-filing of return - Presumption - Held: Court in a prosecution of offence, like s. 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt -- Appellants have to prove the circumstances which prevented them from

filing the returns as per s.139(1) or in response to notices u/ ss 142 and 148.

The appellant in Crl. A. No. 61 of 2007, a registered partnership firm, and its partners, appellants in Crl. A. No.s. 62 and 63, namely, A-2 and A-3, were prosecuted for committing offences punishable u/s 276 CC of the Income Tax Act, 1961 as they did not file return for the assessment years 1991-92 and 1992-93 in respect of the firm and for the assessment year 1993-94 in their individual capacity. The appellants filed two discharge petitions u/s 245(2) Cr.P.C., which were dismissed by the Chief Metropolitan Magistrate and their criminal revisions were dismissed by the High Court.

In the instant appeals filed by the assessees the questions for consideration before the Court were as under:

"(1) Whether an assessee has the liability/duty to file a return u/s 139(1) of the Act within the due date prescribed therein?

(2) What is the effect of best judgment assessment u/s 144 of the Act and will it nullify the liability of the assessee to file its return u/s 139(1) of the Act?

(3) Whether non-filing of return u/s 139(1) of the Act, as well as non-compliance of the time prescribed u/ss 142 and 148 of the Act are grounds for invocation of the provisions of s 276CC of the Act?

(4) Whether the pendency of the appellate proceedings relating to assessment or non-attaining finality of the assessment proceedings is a bar in initiating prosecution proceedings u/s 276CC due to non-filing of returns?

(5) What is the scope of s 278E o **at**

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stage the presumption can be drawn by the Court?"

Dismissing the appeals, the Court

HELD: 1.1. Section 139 of the Income Tax Act, 1961 placed a statutory mandate on every person to file income tax return in the prescribed form and in the prescribed manner. The Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1989 made various amendments to the Income Tax Act, by which the assessing officer has no power to extend the time for filing a return of income u/s 139(1) and to extend the time for filing u/s 139(3), a return of loss intended to be carried forward. The time prescribed for filing a belated return u/s 139(4) or a revised return u/s139(5) was reduced to one year from the end of the relevant assessment year. The provision of s 139(2) stood incorporated in s 142(1)(i). The notice u/s 142(1)(i) to furnish a return of income cannot be issued in the course of the assessment year itself and need not give the person concerned a minimum period of 30 days for furnishing the return. Non-compliance with a notice u/s 142(1)(i) may attract prosecution u/s 276CC. [para 16] [190-F-H; 191-A-C]

1.2. The Income Tax Act had stipulated both the penalty u/s 271(1)(a) and prosecution u/s 276CC, the former for depriving taxes due to the exchequer and latter for the offence/infraction committed. By the Taxation Laws (Amendment) Act, 1989, penalty provision u/s 271(1)(a) had been deleted w.e.f. 01.04.1989 and a provision for levy of mandatory/compulsory interest u/s 234A of the Act was introduced. But, legislature has never waived or relaxed its prosecuting provisions u/s 276CC of the Act for the infraction or non-furnishing of return of income. [para 17] [191-D-F]

1.3 A plain reading of s.139 of the Act, as it stood at the relevant time, states that it is mandatory on the part

of the assessee to file the return before the due date. Explanation (a) to the said section defines the term "due date", which is 30th November of the assessment year in the case of a company. The consequence of non-filing of return on time has also been stipulated in the Act. [para 19] [193-D-E]

1.4 The constitutional validity of s. 276CC, was upheld by the Karnataka High Court in Sonarome Chemicals Pvt. Ltd. Section punishes the person who "willfully fails to furnish the return of income in time". [para 22] [195-F-G]

Sonarome Chemicals Pvt. Ltd. and others v. Union of India and others **(2000) 242 ITR 39 (Kar) - approved.**

2. On failure to file the returns by the appellants, income tax department made a best judgment assessment u/s 144 of the Act and later show cause notices were issued for initiating prosecution u/s 276CC of the Act. The declaration or statement made in the individual returns by partners that the accounts of the firm are not finalized and, therefore, no return has been filed by the firm, will not absolve the firm in filing the 'statutory return u/s 139(1) of the Act. The firm is independently required to file the return and merely because there has been a best judgment assessment u/s 144 would not nullify the liability of the firm to file the return as per s. 139(1) of the Act. [para 26 and 29] [197-E; 199-B-C]

3.1 Section 276CC applies to situations where an assessee has failed to file a return of income as required u/s 139 of the Act or in response to notices issued to the assessee u/s 142 or s 148 of the Act. The proviso to s 276CC gives some relief to genuine assesses. Section 276CC takes in sub-s. (1) of s. 139, s.142(1)(i) and s.148. But, the proviso to s. 276CC takes in only sub-s. (1) of s. 139 of the Act and the provisions of [illegible] e

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conspicuously absent. Consequently, the benefit of proviso is available only to voluntary filing of return as required u/s 139(1) of the Act. Thus, the proviso would not apply after detection of the failure to file the return and after a notice u/s 142(1)(i) or 148 of the Act is issued calling for filing of the return of income. Proviso, therefore, envisages the filing of even belated return before the detection or discovery of the failure and issuance of notices u/s 142 or 148 of the Act. [para 23-24] [196-B-C, G-H; 197-A-B]

3.2 Both s. 139(1) and sub-s. (1) of s.142 are referred to in sub-s. (4) to s. 139, which specify time limit. Therefore, the expression "whichever is earlier" has to be read with the time if allowed sub-s. (1) to s.139 or within the time allowed under notice issued under sub-s. (1) of s. 142, whichever is earlier. So far as the instant case is concerned, the assessee had not filed the return either within the time allowed under sub-s. (1) of s. 139 or within the time allowed under notices issued under sub-s. (1) to s. 142. [para 25] [197-C-D]

Prakash Nath Khanna and another v. Commissioner of Income Tax and another **2004 (2) SCR 434 = (2004) 9 SCC 686 - relied on.**

3.3 It cannot be accepted that there has not been any willful failure to file the return by the appellants. On facts, offence u/s 276CC of the Act has been made out in all these appeals and the rejection of the application for the discharge calls for no interference by this Court. [para 27] [198-B-C]

Wellington v. Reynold (1962) 40 TC 209 -- referred to.

4. Pendency of the appellate proceedings cannot be said to be a relevant factor for not initiating prosecution proceedings u/s 276CC of the Act. Section 276CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for second part of the offence for determination of the sentence of the offence, the department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of s. 276CC is clear so also the legislative intention. It is trite law that "the language employed in a statute is the determinative factor of the legislative intent. It is well settled principle of law that a court cannot read anything into a statutory provision which is plain and unambiguous". If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in s. 276CC itself. Therefore, it cannot be said that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per s. 139(1) of the Act or following the notices issued u/s 142 or s. 148 does not arise. [para 28] [198-D-H; 199-A]

B. Permanand v. Mohan Koikal **2011 (3) SCR 932 = (2011) 4 SCC 266 - referred to.**

5. Section 278E deals with the presumption as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. Court in a prosecution of offence, like s. 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per s.139(1) or in response to notices u/ss 142 and 148 of the Act. [para 30] [199-D-E, F]

6. Therefore, there is no reason to interfere with the order passed by the High Court. T[illegible] s

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directed to complete the trial expeditiously. [para 31] [199-G-H]

Commissioner of Wealth Tax, Gujarat v. Vimlaben Vadilal Mehta (Smt.) **1984 (1) SCR 480 = (1983) 4 SCC 692,** *Commissioner of Wealth Tax, Gujarat, Ahmedabad v. Vadilal Lallubhai & Ors.* **1984 (1) SCR 485 = (1983) 4 SCC 697 and** *State of H.P. and others v. Gujarat Ambuja Cement Ltd. and another* **2005 (1) Suppl. SCR 684 = (2005) 6 SCC 499;** *Prakash Nath Khanna and another v. Commissioner of Income Tax and another* **2004 (2) SCR 434 = (2004) 9 SCC 686;** Maya Rani Punj (Smt.) v. Commissioner of Income Tax, Delhi **1985 (3) Suppl. SCR 827 = (1986) 1 SCC 445;** *P.R. Metrani v. Commissioner of Income Tax, Bangalore* **2006 (9) Suppl. SCR 1 = (2007) 1 SCC 789,** *Kumar Exports v. Sharma Carpets* **2008 (17) SCR 572 = (2009) 2 SCC 513;** *Ravinder Singh v. State of Haryana* **1975 (3) SCR 453 = (1975) 3 SCC 742 and** *Standard Chartered Bank and others v. Directorate of Enforcement and others* **2006 (2) SCR 709 = (2006) 4 SCC 278 - cited.**

Case Law Reference:

1984 (1) SCR 480	**cited**	**para 10**
1984 (1) SCR 485	**cited**	**para 10**
2005 (1) Suppl. SCR 684	**cited**	**para 10**
2004 (2) SCR 434	**relied on**	**para 10**
1985 (3) Suppl. SCR 827	**cited**	**para 11**
2006 (9) Suppl. SCR 1	**cited**	**para 12**
2008 (17) SCR 572	**cited**	**para 12**
1975 (3) SCR 453	**cited**	**para 12**
2006 (2) SCR 709	**cited**	**para 12**
(2000) 242 ITR 39 (Kar)	**approved**	**para 22**
2011 (3) SCR 932	**referred to**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 61 of 2007.

From the Judgment and order dated 02.12.2006 of the High Court of Judicature at Madras in Criminal R.C. Nos. 782 and 784 of 2006.

WITH

Criminal Appeal No. 62 of 2007.

Criminal Appeal No. 63 of 2007.

Criminal Appeal No. 64 of 2007.

Shekhar Naphade, Gaurav Aggarwal, Senthil, Meha Aggarwal, Varun Tandon, Subramonium Prasad, Pranab Kumar Mullick for the Appellant.

Sidharth Luthra, ASG, K. Radhakrishnan, K. Ramaswami, W.A. Quadri, Arijit Prasad, Rajat Mathur, Gargi Khanna, Rahul Kaushik, Pranay Aggarwal, B.V. Balaram Das, Ajay Bansal, Rakesh Kumar, A.A. Chaudhary, Rajeev Kumar, Dheeraj Gupta for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are concerned with four Criminal Appeals No.61 to 64 of 2007, out of which two Criminal Appeals No.61 of 2007 and 63 of 2007 relate to M/s Sasi Enterprises, a registered partnership firm, of which Ms. J. Jayalalitha and Mrs. N. Sasikala are partners, which relate to the assessment years 1991-92 and 1992-93 respectively. Criminal Appeal Nos.62 and 63 of 2007 relate to J. Jayalalitha and N. Sasikala respectively for the assessment years 1993-94. Proceedings giving rise to these appeals originated from the complaints filed by the Assistant Commissioner of Income Tax, Chennai, before the Additional Chief Metropolitan Magistrate (Egmore), Chennai, for the ... e

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failure to file returns for the assessment years 1991-92, 1992-93 and hence committing offences punishable under Section 276 CC of the Income Tax Act, 1961 (for short "the Act"). Complaints were filed on 21.8.1997 after getting the sanction from the Commissioner of Income Tax, Central II, Chennai under Section 279(1) of the Income Tax Act. Appellants filed two discharge petitions under Section 245(2) Cr.P.C., which were dismissed by the Chief Metropolitan Magistrate vide order dated 14.6.2006. Appellants preferred Crl. R.C. Nos.781 to 786 of 2006 before the High Court of Madras which were dismissed by the High Court vide its common order dated 2.12.2006, which are the subject matters of these appeals.

2. M/s Sasikala Enterprises was formed as a partnership firm by a deed dated 06.02.1989 with N. Sasikala and T.V. Dinakaran as its partners, which was later reconstituted with effect from 04.05.1990 with J. Jayalalitha and N. Sasikala as partners. The firm did the business through two units, namely, M/s Fax Universal and M/s J.S. Plan Printers, which, inter alia, included the business in running all kinds of motor cars, dealing in vehicles and goods etc. In the complaint E.O.C.C. No.202 of 1997 filed before the Chief Metropolitan Magistrate, Egmore, M/s Sasi Enterprises was shown as the first accused (A-1) and J. Jayalalitha and N. Sasikala were shown as (A-2) and (A-3) respectively, who were stated to be responsible for the day-to-day business of the firm during the assessment years in question and were individually, jointly and severally made responsible and liable for all the activities of the firm. Partnership deed dated 04.05.1990 itself stated that the partners, A-2 and A-3 are responsible and empowered to operate bank accounts, have full and equal rights in the management of the firm in its business activities, deploy funds for the business of the firm, appoint staff, watchman etc. and to represent the firm before income tax, sales tax and other authorities.

3. M/s Sasi Enterprises, the firm, did not file any returns

for the assessment year 1991-92 and 1992-93, for which the firm and its partners are being prosecuted under Section 276 CC of the Act. J. Jayalalitha and N. Sasikala did not file returns for the assessment year 1993-94 and hence they are being prosecuted for that breach (in their individual capacity) separately but not for the assessment years 1991-92 or 1992-93 and their returns have been filed as individual assessee by them for the assessment years 1991-92 and 1992-93, though belatedly on 20.11.1994 and 23.02.1994 respectively. In those returns it was mentioned that accounts of the firm had not been finalized and no returns of the firm had been filed.

4. The Assistant Commissioner of Income Tax in his complaint stated that the firm through its partners ought to have filed its returns under Section 139(1) of the Act for the assessment year 1991-92 on or before 31st August, 1991 and for the assessment year 1992-93 on or before 31st August, 1992 and A-2 in her individual capacity also should have filed her return for the year 1993-94 under Section 139(1) on or before 31.08.1993 and A-3 also ought to have filed her return for the assessment year 1993-94 on or before 31st August, 1993, as per Section 139(1) of the Act. The accused persons, it was pointed out, did not bother to file the returns even before the end of the respective assessment years, nor had they filed any return at the outer statutory limit prescribed under Section 139(4) of the Act i.e. at the end of March of the assessment year. It was also pointed out that a survey was conducted in respect of the firm under Section 133A on 25.08.1992 and following that a notice under Section 148 was served on the partnership firm on 15.2.1994 to file the return of income tax for the years in question. Though notice was served on 16.2.1994, no return was filed within the time granted in the notice. Neither return was filed, nor particulars of the income were furnished. For the assessment year 1991-92, it was stated that pre-assessment notice was served on 18.12.1995, notice under Section 142(1)(ii) giving opportunities was also issued on 20.07.1995. The department mad[illegible]t

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assessment for the assessment year 1991-92 under Section 144 on a total income of Rs.5,84,860/- on 08.02.1996 and tax was determined as Rs.3,02,434/- and demand notice for Rs.9,95,388/- was issued as tax and interest payable on 08.02.1996.

5. For the assessment year 1992-93, the best judgment assessment under Section 144 was made on 9.2.1996 on the firm on a total income of Rs.14,87,930/- and tax determined at Rs.8,08,153/-, a demand notice was issued towards the tax and interest payable.

6. We may indicate, so far as A-2 is concerned, the due date for filing of return of income as per Section 139(1) of the Act for the assessment year 1993-94 was 31.8.1993. Notice under Section 142(1)(i) was issued to A-2 calling for return of income on 18.1.1994. The said notice was served on her on 19.1.1994. Reminders were issued on 10.2.1994, 22.8.1994 and 23.8.1995. No return was filed as required under Section 139(4) before 31.3.1995. The Department on 31.7.1995 issued notice under Section 142(1)(ii) calling for particulars of income and other details for completion of assessment. Neither the return of income was filed nor the particulars of income were furnished. Best judgment assessment under Section 144 was made on 9.2.1996 on a total income of Rs.1,04,49,153/- and tax determined at Rs.46,68,676/- and demand of Rs.96,98,801/-, inclusive of interest at Rs.55,53,882/- was raised after adjusting pre-paid tax of Rs.5,23,756/-. The Department then issued show-cause notice for prosecution under Section 276CC on 14.6.1996. Later, sanction for prosecution was accorded by the Commissioner of Income Tax on 3.10.1996.

7. A-3 also failed to file the return of income as per Section 139(1) for the assessment year 1993-94 before the due date i.e. 31.8.1993. Notice under Section 142(1)(i) was issued to A-3 calling for filing of return of income on 8.11.1995. Further, notice was also issued under Section 142(1)(ii) on 21.7.1995 calling for particulars of income and other details for completion

of assessment. Neither the return of income was filed nor the particulars of income were furnished. Best judgment assessment under Section 144 was made on 8.2.1996 on a total income of Rs.70,28,110/- and tax determined at Rs.26,86,445/-. The total tax payable, inclusive of interest due was Rs.71,19,527/-. After giving effect to the appellate order, the total income was revised by Rs.19,25,000/-, resulting in tax demand of Rs.20,23,279/-, inclusive of interest levied. Later, a show-cause notice for prosecution under Section 276CC was issued to A-3 on 7.8.1996. A-3 filed replies on 24.11.1996 and 24.3.1997. The Commissioner of Income Tax accorded sanction for prosecution on 4.8.1997.

8. We may incidentally also point out, the final tax liability so far as the firm is concerned, was determined as Rs.32,63,482/- on giving effect to the order of the Income Tax Appellate Tribunal (B Bench), Chennai dated 1.9.2006 and after giving credit of pre-paid tax for the assessment year 1991-92. For the assessment year 1992-93 for the firm, final tax liability was determined at Rs.52,47,594/- on giving effect to the order of the Income Tax Appellate Tribunal (B Bench), Chennai dated 1.9.2006 and after giving credit of pre-paid tax. So far as A-2 is concerned, for the assessment year 1993-94 final tax liability was determined at Rs.12,54,395/- giving effect to the order of Income Tax Appellate Tribunal (B Bench), Chennai dated 11.10.2008 after giving credit to pre-paid tax. So far as A-3 is concerned, for the assessment year 1993-94, final tax liability was determined as Rs.9,81,870/- after giving effect to the order of Income Tax Appellate Tribunal (B Bench), Chennai dated 14.9.2004 and after giving credit to pre-paid tax.

9. We have already indicated, for not filing of returns and due to non-compliance of the various statutory provisions, prosecution was initiated under Section 276CC of the Act against all the accused persons and the complaints were filed on 21.08.1997 before the Chief Metropolitan Magistrate, which the High Court by the impugned order h[illegible]n.

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10. Shri Shekhar Naphade, learned senior counsel appearing for the appellants, submitted that the High Court did not appreciate the scope of Section 276CC of the Act. Learned senior counsel pointed out that once it is established that on the date of the complaint i.e. on 21.08.1997 the assessment had not attained finality, the complaint became pre-mature as on the date of the complaint and no offence had taken place and all the ingredients of offence under Section 276 of the Act were not satisfied. Learned senior counsel pointed out that unless and until it is shown that failure to file the return was willful or deliberate, no prosecution under Section 276CC could be initiated. Learned senior counsel pointed out that in fact, the second accused in her individual return had disclosed that the firm was doing the business and that it had some income and hence, it cannot be said that A-2 had concealed the fact that the firm had any intention to evade tax liability. Learned senior counsel also submitted that whether the assessee had committed any offence or not will depend upon the final assessment of income and tax liability determined by the appropriate authority and not on the assessment made by the assessing officer. Placing reliance on the proviso to Section 276CC learned senior counsel submitted that, that is the only interpretation that could be given to Section 276CC. In support of his contention reliance was placed on the Judgment of this Court in *Commissioner of Wealth Tax, Gujarat v. Vimlaben Vadilal Mehta (Smt.)* (1983) 4 SCC 692, *Commissioner of Wealth Tax, Gujarat, Ahmedabad v. Vadilal Lallubhai & Ors.* (1983) 4 SCC 697 and *State of H.P. and others v. Gujarat Ambuja Cement Ltd. and another* (2005) 6 SCC 499. Referring to Section 278E of the Act, learned senior counsel submitted that till the assessment does not attain finality, Section 276CC is not complete and the presumption under Section 278E is not attracted. Learned senior counsel also submitted that the High Court has wrongly applied the principles laid down by this Court in *Prakash Nath Khanna and another v. Commissioner of Income Tax and another* (2004) 9 SCC 686, in any view, which calls for reconsideration. Learned senior

counsel submitted that the said Judgment deals with the factum of proviso to Section 276CC of the Act which lays down that there is no offence if the tax amount does not exceed Rs. 3,000/-.

11. Shri Sidharth Luthra, learned Additional Solicitor General of India, appearing for the Revenue, on the other hand, submitted that Section 139 of the Act placed a statutory mandate on every person to file an income tax return in the prescribed form and in the prescribed manner before the due date i.e. 31st August of the relevant assessment year. Learned ASG submitted that on breach of Section 139(1) of the Act, cause of action to prosecute the assessee arises subject to other ingredients of Section 276CC of the Act. Learned ASG pointed out that what is relevant in the proceedings, is not only the due date prescribed in Section 139(1) of the Act, but also time prescribed under Section 142 and 148 of the Act, by which further opportunities have been given to file the return in the prescribed time. In other words, Section 276CC, according to the learned ASG, applies to a situation where assessee has failed to file the return of income as required under Section 139 of the Act or in response to notices issued to the assessee under Section 142 or Section 148 of the Act. Learned ASG also submitted that the scope of proviso to Section 276CC to protect the genuine assessees who either file their return belatedly but within the end of the assessment year or those who paid substantial amount of their tax dues by pre-paid taxes. Considerable reliance was placed on the Judgment of this Court in *Prakash Nath Khanna and another* (supra). Reliance was also placed on the Judgment of this Court in *Maya Rani Punj (Smt.) v. Commissioner of Income Tax, Delhi* (1986) 1 SCC 445.

12. Learned ASG also explained the scope of Section 278E by placing reliance on *P.R. Metrani v. Commissioner of Income Tax, Bangalore (2007) 1 SCC 789, Kumar Exports v. Sharma Carpets* (2009) 2 SCC 51[illegible] at

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pendency of the appellate proceedings is not a relevant factor in relation to prosecution under Section 276CC. Reference was also made to *Ravinder Singh v. State of Haryana* (1975) 3 SCC 742 and *Standard Chartered Bank and others v. Directorate of Enforcement and others* (2006) 4 SCC 278. Learned ASG submitted that the Judgment in Prakash Nath Khanna (supra) calls for no reconsideration, as the same has been uniformly applied by this Court as well as by the various High Courts. Learned ASG also pointed out that the appellants have been indulging in litigative exercises by which they could hold up the proceedings for almost two decades and that the trial court has rightly rejected the application for discharge, which was affirmed by the High Court and the same calls no interference by this Court.

13. We may formulate the questions that arise for our consideration, which are as under:

(1) Whether an assessee has the liability/duty to file a return under Section 139(1) of the Act within the due date prescribed therein?

(2) What is the effect of best judgment assessment under Section 144 of the Act and will it nullify the liability of the assessee to file its return under Section 139(1) of the Act?

(3) Whether non-filing of return under Section 139(1) of the Act, as well as non-compliance of the time prescribed under Sections 142 and 148 of the Act are grounds for invocation of the provisions of Section 276CC of the Act?

(4) Whether the pendency of the appellate proceedings relating to assessment or non-attaining finality of the assessment proceedings is a bar in initiating prosecution proceedings under Section 276CC due to non-filing of returns?

(5) What is the scope of Section 278E of the Act, and at what stage the presumption can be drawn by the Court?

14. We may, at the outset, point out that the appellants had earlier approached this Court and filed SLP(C) Nos.3655-3658 of 2005 which were disposed of by this Court directing the trial court to dispose of the petition for discharge within a period of two months by its order dated 03.03.2006. Learned Chief Metropolitan Magistrate rejected the petitions vide its order dated 14.06.2006. Though the High Court affirmed the said order vide its judgment dated 02.12.2006, these appeals were kept pending before this Court over six years for one reason or another.

15. We are, in these appeals, concerned with the question of non-filing of returns by the appellants for the assessment year 1991-92, 1992-93 and 1993-94. Each and every order passed by the revenue as well as by the Courts were taken up before the higher courts, either through appeals, revisions or writ petitions. The details of the various proceedings in respect of these appeals are given in paragraph 30 of the written submissions filed by the revenue, which reveals the dilatory tactics adopted in these cases. Courts, we caution, be guarded against those persons who prefer to see it as a medium for stalling all legal processes. We do not propose to delve into those issues further since at this stage we are concerned with answering the questions which have been framed by us.

16. Section 139 of the Act prior to 1989-90 and after, placed a statutory mandate on every person to file an income tax return in the prescribed form and in the prescribed manner. The Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1989 made various amendments to the Income Tax Act, by which the assessing officer has no power to extend the time for filing a return of income under Section 139(1) and to extend the time for filing under Section 139(3), a return of loss intended to be carried forward. The time prescribed for filing a belated return under Section 139(4) or a revised return under Section 139(5) was reduced to one year from the end of the relevant assessment year. The provision of [illegible] d

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incorporated in Section 142(1)(i). The notice under Section 142(1)(i) to furnish a return of income cannot be issued in the course of the assessment year itself and need not give the person concerned a minimum period of 30 days for furnishing the return. When a return is furnished pursuant to a notice under Section 142(1)(i), the assessment may be made under Section 143 without recourse to Section 147. Further, with the deletion of Section 271(1)(a), a penalty for failure to furnish in due time a return of income under Section 139(1), is abolished. Levy of punitive interest under Section 234A made mandatory and the discretion of the assessing officer to reduce or waive the interest was taken away. Non-compliance with a notice under Section 142(1)(i) may attract prosecution under Section 276CC.

17. The Income Tax Act, therefore, had stipulated both the penalty under Section 271(1)(a) and prosecution under Section 276CC, the former for depriving taxes due to the exchequer and later for the offence/infraction committed. As already indicated by the Taxation Laws (Amendment) Act, 1989, penalty provision under Section 271(1)(a) had been deleted w.e.f. 01.04.1989 and a provision for levy of mandatory/compulsory interest under Section 234A of the Act was introduced. But, legislature has never waived or relaxed its prosecuting provisions under Section 276CC of the Act for the infraction or non-furnishing of return of income.

18. Section 139 of the Act, as it stood at the relevant time, reads as under:

> **"139.** (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such

> other particulars as may be prescribed.
>
> *Explanation:* In this sub-section, "due date" means-
>
> (a) where the assessee is a company, the 30th day of November of the assessment year;
>
> (b) where the assessee is a person, other than a company.-
>
> (i) in a case where the accounts of the assessee are required under this Act or nay other law to be audited, or where the report of any accountant is required to be furnished under section 80HHC or Section 80HHD or in the case of a co-operative society, the 31st day of October of the assessment year:
>
> (ii) in a case where the total income referred to in this sub-section includes any income from business or profession, not being a case falling under sub-clause (i), the 31st day of August of the assessment year :
>
> (iii) in any other case, the 30th day of June of the assessment year.
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> (3) If any person who has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (1) or sub-section (3) of section 74, or sub-section (3) of section 74A, he may furnish, within the time allowed under sub-section (1), a return of loss in the prescribed form and verified in the prescribed manner and containing such other pa e

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prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

(4) Any person who has not furnished a return within the time allowed to him under sub-section (1), or within the time allowed under a notice issued under sub-section (1) of section 142, may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier:

xxx xxx xxx

xxx xxx xxx"

19. A plain reading of the above provisions indicates that it is mandatory on the part of the assessee to file the return before the due date. Explanation (a) to the said section defines the term "due date", which is 30th November of the assessment year. The consequence of non-filing of return on time has also been stipulated in the Act. Further a reference to Sections 142 and 148 is also necessary to properly understand the scope of Section 276CC. Relevant portion of Section 142, as it stood at the relevant time, is quoted below:

"142. Inquiry before assessment.- (1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under section 139 or in whose case the time allowed under sub- section (1) of that section for furnishing the return has expired] a notice requiring him, on a date to be therein specified,-

(i) where such person has not made a return within the time allowed under sub-section (1) of section 139, to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and

setting forth such other particulars as may be prescribed, or

xxx xxx xxx

xxx xxx xxx"

20. Section 148 refers to the issue of notice where income has escaped assessment. Relevant portion of the same is also extracted hereinbelow for ready reference:

"148. (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

21. Sub-section (1) of Section 139, clause (i) sub-section (1) of Section 142 and Section 148 are mentioned in Section 276CC of the Act. Section 276CC is extracted as under:

"276CC. Failure to furnish returns of income. If a person wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (i) of sub-section (1) of section 142 or s[illegible] e

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(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine:

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under sub-section (1) of section 139-

(i) for any assessment year commencing prior to the 1st day of April, 1975 ; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975 , if-

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees."

22. The constitutional validity of Section 276CC, was upheld by the Karnataka High Court in *Sonarome Chemicals Pvt. Ltd. and others v. Union of India and others* (2000) 242 ITR 39 (Kar) holding that it does not violate Article 14 of 21 of the Constitution. Section punishes the person who "willfully fails to furnish the return of income in time". The explanation willful default, as observed by Wilber Force J. in *Wellington v. Reynold* (1962) 40 TC 209 is "some deliberate or intentional failure to do what the tax payer ought to have done, knowing that to omit to do so was wrong". The assessee is bound to file the return under Section 139(1) of the Act on or before the

due date. The outer limit is fixed for filing of return as 31st August of the assessment year, over and above, in the present case, not only return was not filed within the due date prescribed under Section 139(1) of the Act, but also the time prescribed under Section 142 and 148 of the Act and the further opportunity given to file the return in the prescribed time was also not availed of.

23. Section 276CC applies to situations where an assessee has failed to file a return of income as required under Section 139 of the Act or in response to notices issued to the assessee under Section 142 or Section 148 of the Act. The proviso to Section 276CC gives some relief to genuine assesses. The proviso to Section 276CC gives further time till the end of the assessment year to furnish return to avoid prosecution. In other words, even though the due date would be 31st August of the assessment year as per Section 139(1) of the Act, an assessee gets further seven months' time to complete and file the return and such a return though belated, may not attract prosecution of the assessee. Similarly, the proviso in clause ii(b) to Section 276CC also provides that if the tax payable determined by regular assessment has reduced by advance tax paid and tax deducted at source does not exceed Rs.3,000/-, such an assessee shall not be prosecuted for not furnishing the return under Section 139(1) of the Act. Resultantly, the proviso under Section 276CC takes care of genuine assesses who either file the returns belatedly but within the end of the assessment year or those who have paid substantial amounts of their tax dues by pre-paid taxes, from the rigor of the prosecution under Section 276CC of the Act.

24. Section 276CC, it may be noted, takes in sub-section (1) of Section 139, Section 142(1)(i) and Section 148. But, the proviso to Section 276CC takes in only sub-section (1) of Section 139 of the Act and the provisions of Section 142(1)(i) or 148 are conspicuously absent. Consequently, the benefit of proviso is available only to voluntary filing of return as required under Section 139(1) of the Act. In other words, the proviso would not apply after detection of the f[illegible]n

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and after a notice under Section 142(1)(i) or 148 of the Act is issued calling for filing of the return of income. Proviso, therefore, envisages the filing of even belated return before the detection or discovery of the failure and issuance of notices under Section 142 or 148 of the Act.

25. We may in this respect also refer to sub-section (4) to Section 139 wherein the legislature has used an expression "whichever is earlier". Both Section 139(1) and Sub-Section (1) of Section 142 are referred to in sub-section (4) to Section 139, which specify time limit. Therefore, the expression "whichever is earlier" has to be read with the time if allowed under sub-section (1) to Section 139 or within the time allowed under notice issued under sub-section (1) of Section 142, whichever is earlier. So far as the present case is concerned, it is already noticed that the assessee had not filed the return either within the time allowed under sub-section (1) to Section 139 or within the time allowed under notices issued under sub-section (1) to Section 142.

26. We have indicated that on failure to file the returns by the appellants, income tax department made a best judgment assessment under Section 144 of the Act and later show cause notices were issued for initiating prosecution under Section 276CC of the Act. Proviso to Section 276CC nowhere states that the offence under Section 276CC has not been committed by the categories of assesses who fall within the scope of that proviso, but it is stated that such a person shall not be proceeded against. In other words, it only provides that under specific circumstances subject to the proviso, prosecution may not be initiated. An assessee who comes within clause 2(b) to the proviso, no doubt has also committed the offence under Section 276CC, but is exempted from prosecution since the tax falls below Rs.3,000/-. Such an assessee may file belated return before the detection and avail the benefit of the proviso. Proviso cannot control the main section, it only confers some benefit to certain categories of assesses. In short, the offence

under Section 276CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein.

27. We may indicate that the above reasoning has the support of the Judgment of this Court in *Prakash Nath Khanna* (supra). When we apply the above principles to the facts of the case in hand, the contention of the learned senior counsel for the appellant that there has not been any willful failure to file their return cannot be accepted and on facts, offence under Section 276CC of the Act has been made out in all these appeals and the rejection of the application for the discharge calls for no interference by this Court.

28. We also find no basis in the contention of the learned senior counsel for the appellant that pendency of the appellate proceedings is a relevant factor for not initiating prosecution proceedings under Section 276CC of the Act. Section 276CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for second part of the offence for determination of the sentence of the offence, the department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of Section 276CC, in our view, is clear so also the legislative intention. It is trite law that as already held by this Court in *B. Permanand v. Mohan Koikal* (2011) 4 SCC 266 that "the language employed in a statute is the determinative factor of the legislative intent. It is well settled principle of law that a court cannot read anything into a statutory provision which is plain and unambiguous". If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in Section 276CC itself. Therefore, the contention of the learned senior counsel for the appellant that no prosecution coul[illegible]e

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culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per Section 139(1) of the Act or following the notices issued under Section 142 or Section 148 does not arise.

29. We are also of the view that the declaration or statement made in the individual returns by partners that the accounts of the firm are not finalized, hence no return has been filed by the firm, will not absolve the firm in filing the 'statutory return under section 139(1) of the Act. The firm is independently required to file the return and merely because there has been a best judgment assessment under Section 144 would not nullify the liability of the firm to file the return as per Section 139(1) of the Act. Appellants' contention that since they had in their individual returns indicated that the firm's accounts had not been finalized, hence no returns were filed, would mean that failure to file return was not willful, cannot be accepted.

30. Section 278E deals with the presumption as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The question is on whom the burden lies, either on the prosecution or the assessee, under Section 278E to prove whether the assessee has or has not committed willful default in filing the returns. Court in a prosecution of offence, like Section 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per Section 139(1) or in response to notices under Sections 142 and 148 of the Act.

31. We, therefore, find no reason to interfere with the order passed by the High Court. The appeals, therefore, lack merits and the same are dismissed and the Criminal Court is directed to complete the trial within four months from the date of receipt of this Judgment.

R.P. Appeals dismissed.

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

JANUARY 30, 2014

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

Prevention of Cruelty to Animals (Establishment and Registration of Societies for Prevention of Cruelty to Animal) Rules, 2000; Prevention of Cruelty to Animals (Slaughter House) Rules, 2000; Solid Waste (Management and Handling) Rules, 2000; Environment Protection Act, 1986:

By Orders dated 23.8.2012 and 10.10.2012, Supreme Court directed constitution of State Committees for supervising and monitoring the implementation of the provisions of these statutes - By Order dated 27.8.2013 directed State Committees to file Action Taken Report - Held : Action taken Reports indicated that in many States, slaughter houses have been functioning without any licence and even the licenced slaughter houses are also not following the various provisions as well as the guidelines issued by the MoEF - There is no periodical supervision or inspection of the various slaughter houses functioning in various parts of the country - The presence of an experienced Judicial Officer in the State Committees would give more life and light to the Committees, who can function as its Convener - The Convener, so appointed, would see that the Committees meet quite often and follow and implement the provisions of the Act as well as the guidelines issued by the MoEF, which has been made a part of order dated 27.8.2013 - In such circumstances, request made to the Chief Justices of the various High Courts in the country to nominate the name of a retired District Judge

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for a period of two years as a Convener of the Committee so as to enable him to send the quarterly reports to Supreme Court.

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

Writ Petition (Civil) No. 309 of 2003.

WITH

W.P. (C) No. 330 of 2001.

W.P. (C) No. 688 of 2007.

W.P. (C) No. 44 of 2004.

S.L.P. (C) No. 14121 of 2009.

Rakesh K. Khanna, ASG, Manjit Singh, AAG, Pranab Kumar Mullick, Vijay Panjwani, Seema Rao, Priyanka Sinha, M.R. Shamshad, Shashank Singh, Sapam Biswajit Meitei (for Ashok Kr. Singh), Upendra Mishra (for Samir Ali Khan), Tarjit Singh, Irshad Ahmad, M. Yogesh Kanna, A. Santha Kumara, Pragati Neekhra, Vanshaja Shukla (for Mishra Saurabh), Jayesh Gaurav (for Gopal Prasad) for the appearing parties.

The Order of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We, in our order dated 23.8.2012, had highlighted the extreme necessity of constituting State Committees for the purpose of supervising and monitoring the implementation of the provisions of the Prevention of Cruelty to Animals (Establishment and Registration of Societies for Prevention of Cruelty to Animals) Rules, 2000, the Environment Protection Act, 1986, the Solid Waste (Management and Handling) Rules, 2000, the Prevention of Cruelty to Animals (Slaughter House) Rules, 2000 etc.

2. We passed another order on 10.10.2012 and, following that order, almost all the States and Union Territories have constituted the State Committees. On 27.8.2013, we passed a detailed order directing those Committees to implement the

broad framework prepared by the MoEF, which we have incorporated in the said order. We also directed the various State Committees to file an Action Taken Report. Few Committees have filed their Action Taken Reports.

3. We notice that there is no periodical supervision or inspection of the various slaughter houses functioning in various parts of the country. Action Taken Reports would indicate that, in many States, slaughter houses are functioning without any licence and even the licenced slaughter houses are also not following the various provisions as well as the guidelines issued by the MoEF, which we have already referred to in our earlier orders. We feel that the presence of an experienced Judicial Officer in the State Committees would give more life and light to the Committees, who can function as its Convener. The Convener, so appointed, would see that the Committees meet quite often and follow and implement the provisions of the Act as well as the guidelines issued by the MoEF, which has been made a part of our order dated 27.8.2013.

4. In such circumstances, we are inclined to request the Chief Justices of the various High Courts in the country to nominate the name of a retired District Judge for a period of two years as a Convener of the Committee so as to enable him to send the quarterly reports to this Court. First report be sent within two months. Communicate this order to the Chief Justices of the various High Courts in the country, along with a copy of this Court's orders dated 23.8.2012, 10.10.2012 and 27.8.2013. We fix a consolidated remuneration of Rs. 20,000/- per month as honorarium to be paid to the District Judge (Retd.), which will be borne by the respective State Governments/Union Territories, as the case may be. Union of India and various State Governments have raised no objection in adopting such course, so that the Committees could function efficiently and the provisions of the Act and the framework prepared by the MoEF could be given effect to in its letter and spirit.

D.G.

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GODREJ & BOYCE MFG. CO. LTD. & ANR.
v.
THE STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 1102 of 2014)

JANUARY 30, 2014

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

FOREST ACT, 1927:

s.35(3) - Mere issuance of a notice u/s.35(3) is not sufficient for any land being declared a "private forest" within the meaning of that expression as defined in s.2(f)(iii) of the Maharashtra Private Forests (Acquisition) Act, 1975 - s.35(3) is not intended to end the process with the mere issuance of a notice but it also requires service of a notice on the owner of the forest - The need for ensuring service is also to prevent damage to or destruction of a forest - In the absence of any time period having been specified for deciding a show cause notice issued u/s.35, it must be presumed that it must be decided within a reasonable time - In the instant case, notice issued u/s.35(3) after its publication in the Gazette was not acted upon either under the provisions of the Forest Act as amended from time to time or under the Private Forests Act - Admittedly, no attempt was made by the State to take over possession of the disputed land at any point of time - On the contrary, permissions were granted from time to time for construction of buildings on the disputed land - Under the circumstances, it cannot be said that any of these disputed lands were 'forest' within the primary meaning of that word, or even within the extended meaning given in s.2(c-i) of the Private Forests Act - Maharashtra Private Forests Acquisition Act, 1975 - s.2(c-i), 2(f)(iii).

s.35(3) - Service of notice - Notice was issued to the appellant in 1957 but no decision was taken thereon till 1975, that is, for about 18 years - This is an unusually long period and undoubtedly much more than a reasonable time had elapsed for enabling the State to take a decision on the notice - Therefore, the said notice must, for all intents and purposes be treated as having become a dead letter - The said notice cannot be described as a 'pipeline notice' since it cannot be reasonably said that the pipeline extends from 1956-57 up to 1975 - No citizen can reasonably be told after almost half a century that he/she was issued a show cause notice (which was not served also) and based on the said notice his land was declared a private forest about three decades ago and that it vests in the State - State cannot be allowed to demolish the massive constructions made thereon over the last half a century - Basic principles of good governance must be followed by every member of the Executive branch of the State at all times keeping the interests of all citizens in mind as also the larger public interest.

MAHARASHTRA PRIVATE FORESTS ACQUISITION ACT, 1975: s.2(f)(iii) - Service of notice - Word "issued" in s.2(f)(iii) of the Act, 1975 r/w s.35 of the Forest Act, 1927 - Interpretation of - Held: It must be given a broad meaning in the surrounding context in which it is used - The scheme of s.35 of the Forest Act needs to be kept in mind while considering "issued" in s.2(f)(iii) of the Private Forests Act - A notice u/s.35(3) of the Forest Act is intended to give an opportunity to the owner of a forest to show cause why, inter alia, a regulatory or a prohibitory measure be not made in respect of that forest - Such a notice pre-supposes the existence of a forest - The owner of the forest is expected to file objections within a reasonable time as specified in the notice and is also given an opportunity to lead evidence in support of the objections - After these basic requirements are met, the owner of the forest is entitled to a hearing on the objections - This entire procedure obviously cannot be followed by the State and the owner o[illegible]e

owner is served with the notice - s.2(f)(iii) of the Private Forests Act is not intended to apply to notices that had passed their shelf-life and that only 'pipeline notices' issued in reasonably close proximity to the coming into force of the Private Forests Act are 'live' and could be acted upon.

INTERPRETATION OF STATUTES: Literal interpretation or contextual interpretation - Held: Words in a statute must be interpreted literally - But at the same time if the context in which a word is used and the provisions of a statute inexorably suggest a subtext other than literal, then the context becomes important - It is true that ordinary rule of construction is to assign the word a meaning which it ordinarily carries - But the subject of legislation and the context in which a word or expression is employed may require a departure from the rule of literal construction.

The disputed land was given on perpetual lease in 1835 to FCB. In 1948, Godrej (Petitioner-G) acquired the said land from NP successor in interest of FCB. The land was described in the perpetual lease as "waste land". On 27.8.1951, Salsette Estates (Land Revenue Exemption Abolition) Act, 1951 was passed which provided that waste land not appropriated for cultivation vested in the State. The State claimed that disputed land was not brought under cultivation before 14.8.1951 and, therefore, vested in it. Aggrieved, Petitioner-G filed suit. A consent decree was passed on 8.1.1962 to the effect that disputed land was appropriated and brought under cultivation before 14.8.1951 and was property of Petitioner-G. This confirmed that the disputed land was waste land and not forest.

In development plans of 1967 and 1971, the disputed land was shown as residential and was built upon after municipal sanctions. In 1976, Petitioner-G obtained sanction under Urban Land (Ceiling and Regulation) Act, 1976 for housing and then built multistoried houses. In

1948, the Government amended Forest Act, 1927 taking out waste land from definition and made inclusive definition of forest. More amendments were made in 1955 and 1961.

In 2006, Petitioner-G received six stop work notices on the ground that the disputed land was "affected" by the reservation of a private forest and therefore no construction could be carried out therein without the permission of the Government under the Forest (Conservation) Act, 1980. Petitioner-G learnt that as per mutation records, the disputed land vested in the State and there was a notice no.WT/53 published in the Gazette on 6.9.1956. Petitioner-G filed writ petitions. The High Court dismissed the writ petitions.

The questions which arose for consideration in the instant appeals were whether the disputed land was at all a forest within the meaning of section 2(c-i) of the Private Forests Act; whether mere issuance of a notice under the provisions of Section 35(3) of the Indian Forest Act, 1927 was sufficient for any land being declared a "private forest" within the meaning of that expression as defined in Section 2(f)(iii) of the Maharashtra Private Forests (Acquisition) Act, 1975; whether the word "issued" in Section 2(f) (iii) of the Maharashtra Private Forests Acquisition Act, 1975 read with Section 35 of the Indian Forest Act, 1927 must be given a literal interpretation or a broad meaning; and even assuming the disputed lands were forest lands, can the State be allowed to demolish the massive constructions made thereon over the last half a century.

Allowing the appeals, the Court

HELD: 1. The narrative of the events disclosed that Notice No. WT/53 after its publication in the Gazette was not acted upon either under the pro

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Act as amended from time to time or under the Private Forests Act. Admittedly, no attempt was made by the State to take over possession of the disputed land at any point of time. On the contrary, permissions were granted to Petitioner-G from time to time for construction of buildings on the disputed land, which permissions were availed of by Petitioner-G for the benefit of thousands of its employees. [para 23] [234-E-F; 235-A]

2. The constitutional validity of the Private Forests Act (including Section 3 thereof) was challenged in the High Court by *Waghmare on the ground of legislative competence of the State Legislature. The High Court held that a land owner who had been issued a notice under Section 35(3) of the Forest Act (but was not heard) has an opportunity to contend that his or her land is not a 'forest' within the meaning of Section 2(c-i) of the Private Forests Act and that the land does not vest automatically in the State by virtue of Section 3 of the Private Forests Act. This position was not contested and became final. The view of the High Court was accepted by the State of Maharashtra and was not challenged and attained finality. [Paras 24, 25, 27] [235-B, E-F; 237-C]

3. The right to file objections to a notice under Section 35(3) of the Forest Act came up for consideration in **Chintamani in which it was noticed that where a final notification is issued under Section 35(1) of the Forest Act (obviously after hearing the objections of the land owner in compliance with the requirements of Section 35(3) thereof), the entire land of the land owner would automatically vest in the State on the appointed date, that is, 30th August 1975 when the Private Forests Act came into force. In such a case, the land owner would, ex hypothesi have an opportunity of showing in the objections to the notice under Section 35(3) that the land is not a 'forest' as defined under Section 34A of the Forest

Act. If the land owner succeeded in so showing, then clearly a final notification under Section 35(1) of the Forest Act could not be issued. But if the land owner did not succeed in so showing, only then could a final notification under Section 35(1) of the Forest Act be issued. The words "or land" under Section 35(3) of the Forest Act had been deleted by the Indian Forest (Bombay Amendment) Act, 1948 and, additionally therefore, such an objection could validly have been raised. Consequently, the situation that presented itself in **Chintamani was that though a notice was issued to the land owner under Section 35(3) of the Forest Act before 30th August 1975, it could not be decided before that date when the Private Forests Act came into force. (Such a notice was referred to as a 'pipeline notice'). Clearly, the recipient of a pipeline notice would be entitled to the benefit of *Waghmare but apparently have been overlooked by this Court in **Chintamani. However, to mitigate the hardship to a pipeline noticee who is not given the benefit of *Waghmare this Court read Section 2(f)(iii) of the Private Forests Act and observed (perhaps as a sop to the land owner) that the "Maharashtra Legislature thought that the entire property covered by the notice in the State need not vest but it excluded 2 hectares out of the forest land held by the landholder. That was the consideration for not allowing the benefit of an inquiry under Section 35(3) and for not allowing the notification to be issued under Section 35(1) of the 1927 Act". In this background, this Court narrowly construed the words "a notice has been issued under sub-section (3) of section 35 of the Forest Act" occurring in Section 2(f)(iii) of the Private Forests Act as not requiring "service of such notice before 30-8-1975, nor for an inquiry nor for a notification under Section 35(1)." In a sense, therefore, not only is there a difference of views between *Waghmare and **Chintamani but **Chintamani has gone much further in taking away the rig[...] It

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is quite clear from a reading of *Waghmare that the "means and includes" definition of forest in Section 2(c-i) of the Private Forests Act does not detract or take away from the primary meaning of the word 'forest'. [Paras 30-33, 47] [238-B-H; 239-A-D; 246-H; 247-A]

***Chintamani Gajanan Velkar v. State of Maharashtra* **(2000) 3 SCC 143 - Partly overruled.**

Banarsi Debi v. ITO **(1964) 7 SCR 539;** *CWT v. Kundan Lal Behari Lal* **(1975) 4 SCC 844: 1976 AIR 1150;** **Janu Chandra Waghmare v. State of Maharashtra* **AIR 1978 Bombay 119 - referred to.**

4. In the case of Petitioner-G, the admitted position, as per the consent decree dated 8th January 1962 was that the disputed land was not a waste land nor was it a forest. In so far as the other appeals were concerned, the disputed lands were built upon, from time to time, either for industrial purposes or for commercial purposes or for residential purposes. Under the circumstances, by no stretch of imagination can it be said that any of these disputed lands are 'forest' within the primary meaning of that word, or even within the extended meaning given in Section 2(c-i) of the Private Forests Act. [para 51] [248-B-D]

5. The notice said to have been issued to Petitioner-G being Notice No. WT/53 cannot be described as a 'pipeline notice'. It cannot be reasonably said that the pipeline extends from 1956-57 up to 1975. Assuming that a notice issued in 1956-57 is a pipeline notice even in 1975, the question would, nevertheless, relate to the meaning and impact of "issued" of Section 2(f)(iii) of the Private Forests Act read with Section 35 of the Forest Act. Undoubtedly, the first rule of interpretation is that the words in a statute must be interpreted literally. But at the same time if the context in which a word is used and the provisions of a statute inexorably suggest a subtext other

than literal, then the context becomes important. It is true that ordinary rule of construction is to assign the word a meaning which it ordinarily carries. But the subject of legislation and the context in which a word or expression is employed may require a departure from the rule of literal construction. The scheme of Section 35 of the Forest Act needs to be kept in mind while considering "issued" in Section 2(f)(iii) of the Private Forests Act. A notice under Section 35(3) of the Forest Act is intended to give an opportunity to the owner of a forest to show cause why, inter alia, a regulatory or a prohibitory measure be not made in respect of that forest. Such a notice pre-supposes the existence of a forest. The owner of the forest is expected to file objections within a reasonable time as specified in the notice and is also given an opportunity to lead evidence in support of the objections. After these basic requirements are met, the owner of the forest is entitled to a hearing on the objections. This entire procedure obviously cannot be followed by the State and the owner of the forest unless the owner is served with the notice. Therefore, service of a notice issued under Section 35(3) of the Forest Act is inherent in the very language used in the provision and the very purpose of the provision. [paras 52-56] [248-D-H; 249-E-F; 250-A-D]

6. Additionally, Section 35(4) of the Forest Act provides that a notice under Section 35(3) of the Forest Act may provide that for a period not exceeding six months (extended to one year in 1961) the owner of the forest can be obliged to adhere to one or more of the regulatory or prohibitory measures mentioned in Section 35(1) of the Forest Act. On the failure of the owner of the forest to abide by the said measures, he/she is liable to imprisonment for a term upto six months and/or a fine under Section 35(7) of the Forest Act. Surely, given the penal consequence of non-adheren 4)

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direction in a Section 35(3) notice, service of such a notice must be interpreted to be mandatory. On the facts of the case in Petitioner-G, such a direction was in fact given and Petitioner-G was directed, for a period of six months, to refrain from the cutting and removal of trees and timber and the firing and clearing of vegetation. Strictly speaking, therefore, despite not being served with Notice No. WT/53 and despite having no knowledge of it, Petitioner-G was liable to be punished under Section 35(7) of the Forest Act if it cut or removed any tree or timber or fired or cleared any vegetation. [para 57] [250-D-H; 251-A]

Jagir Singh v. State of Bihar **(1976) 2 SCC 942: 1976 (2) SCR 809;** *Black Diamond Beverages v. Commercial Tax Officer* **(1998) 1 SCC 458 1997 (4) Suppl. SCR 133;** *R.L. Arora v. State of U.P.* **(1964) 6 SCR 784;** *Tata Engg. & Locomotive Co. Ltd. v. State of Bihar* **(2000) 5 SCC 346 2000 (3) SCR 219;** *Joginder Pal v. Naval Kishore Behal* **(2002) 5 SCC 397 2002 (3) SCR 1078 - relied on.**

Robinson v. Barton-Eccles Local Board **(1883) 8 AC 798 - referred to.**

7. This interplay may be looked at from another point of view, namely, the need to issue a direction under Section 35(4) of the Forest Act, which can be only to prevent damage to or destruction of a forest. If the notice under Section 35(3) of the Forest Act is not served on the owner of the forest, he/she may continue to damage the forest defeating the very purpose of the Forest Act. Such an interpretation cannot be given to Section 35 of the Forest Act nor can a limited interpretation be given to the word "issued" used in the context of Section 35 of the Forest Act in Section 2(f)(iii) of the Private Forests Act. Finally, Section 35(5) of the Forest Act mandates not only service of a notice issued under that provision "in the manner provided in the Code of Civil Procedure, 1908, for

the service of summons" but also its publication "in the manner prescribed by rules". This double pronged receipt and confirmation of knowledge of the show cause notice by the owner of a forest makes it clear that Section 35(3) of the Forest Act is not intended to end the process with the mere issuance of a notice but it also requires service of a notice on the owner of the forest. The need for ensuring service is clearly to protect the interests of the owner of the forest who may have valid reasons not only to object to the issuance of regulatory or prohibitory directions, but to also enable him/her to raise a jurisdictional issue that the land in question is actually not a forest. The need for ensuring service is also to prevent damage to or destruction of a forest. Unfortunately, Chintamani missed these finer details because it was perhaps not brought to the notice of this Court that Section 35 of the Forest Act as applicable to the State of Maharashtra had sub-sections beyond sub-section (3). [paras 58, 59, 60] [251-A-G]

8. It is true that a word has to be construed in the context in which it is used in a statute. By making a reference in Section 2(f)(iii) of the Private Forests Act to 'issue' in Section 35 of the Forest Act, it is clear that the word is dressed in borrowed robes. Once that is appreciated (and it was unfortunately overlooked in Chintamani) then it is quite clear that 'issued' in Section 2(f)(iii) of the Private Forests Act must include service of the show cause notice as postulated in Section 35 of the Forest Act. Under these circumstances, to this extent, Chintamani was incorrectly decided and it is overruled to this extent. Assuming that the word 'issued' as occurring in Section 2(f)(iii) of the Private Forests Act must be literally and strictly construed, the question would arise whether it also has reference to a show cause notice issued under Section 35(3) of the Forest Act at any given time (say in 1927 or in 1957) or e

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reasonable to hold that it has reference to a show cause notice issued in somewhat closer proximity to the coming into force of the Private Forests Act, or a 'pipeline notice'. In the absence of any time period having been specified for deciding a show cause notice issued under Section 35 of the Forest Act, it must be presumed that it must be decided within a reasonable time. According to the State, a show cause notice was issued to Petitioner-G in 1957 (and assuming it was served) but no decision was taken thereon till 1975 that is for about 18 years. This is an unusually long period and undoubtedly much more than a reasonable time had elapsed for enabling the State to take a decision on the show cause notice. Therefore, the show cause notice must, for all intents and purposes be treated as having become a dead letter and the seed planted by the State yielded nothing. [paras 61, 65, 67] [252-B-G; 253-A-C; 254-A-C]

Ramlila Maidan Incident, In re **(2012) 5 SCC 1 2012 (4) SCR 971;** *Mansaram v. S.P. Pathak* **(1984) 1 SCC 125 1984 (1) SCR 139 - relied on.**

9. The entire problem may also be looked at from the perspective of the citizen rather than only from the perspective of the State. No citizen can reasonably be told after almost half a century that he/she was issued a show cause notice (which was probably not served) and based on the show cause notice his/her land was declared a private forest about three decades ago and that it vests in the State. Basic principles of good governance must be followed by every member of the Executive branch of the State at all times keeping the interests of all citizens in mind as also the larger public interest. The failure of the State to take any decision on the show cause notice for several decades (assuming it was served on Petitioner-G) is indicative of its desire to not act on it. This opinion was fortified by a series of events that took place between 1957 and 2006, beginning with the consent

decree of 8th January 1962 in Suit whereby the disputed land was recognized as not being forest land; permission to construct a large number of buildings (both residential and otherwise) as per the Development Plans of 1967 and then of 1991; exemptions granted by the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 leading to petitioner-G making unhindered but permissible constructions; and finally, the absence of any attempt by the State to take possession of the 'forest land' under Section 5 of the Private Forests Act for a couple of decades. The subsequent event of the State moving an application in Godavarman virtually denying the existence of a private forest on the disputed land also indicated that the State had come to terms with reality and was grudgingly prepared to accept that, even if the law permitted, it was now too late to remedy the situation. This view was emphatically reiterated by the Central Empowered Committee in its report dated 13th July 2009. [Paras 67, 68] [254-C-H; 255-A-C]

10. The Bombay Environment Action Group has alleged collusion between petitioner-G and other appellants and the State of Maharashtra to defeat the purpose of the Private Forests Act. It is difficult at this distant point of time to conclude, one way or the other, whether there was or was not any collusion (as alleged) or whether it was simply a case of poor governance by the State. The fact would remain that possession of the disputed land was not taken over or attempted to be taken over for decades and the issue was never raised when it should have been. To raise it now after a lapse of so many decades is unfair to Petitioner-G, the other appellants, the institutions, the State and the residents of the tenements that have been constructed in the meanwhile. [Paras 69, 70] [255-C-D, G-H; 256-A-B]

11. Section 2(f)(iii) of the Private Forests Act is not intended to apply to notices that had [illegible] and that only 'pipeline notices' issue[illegible] e

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proximity to the coming into force of the Private Forests Act were 'live' and could be acted upon. The fact that the Private Forests Act repealed some sections of the Forest Act, particularly Sections 34A and 35 thereof is also significant. Section 2(f)(iii) of the Private Forests Act is in a sense a saving clause for pipeline notices issued under Section 35(3) of the Forest Act but which could not, for want of adequate time be either withdrawn or culminate in the issuance of a regulatory or prohibitory final notification under Section 35(1) of the Forest Act, depending on the objections raised by the land owner. Looked at from any point of view, it does seem clear that Section 2(f)(iii) of the Private Forests Act was intended to apply to 'live' and not stale notices issued under Section 35(3) of the Forest Act. [Paras 71, 73] [256-C, F-G; 257-A-B]

12. The next question is whether at all the unstated decision of the State to take over the so-called forest land can be successfully implemented. What the decision implies is the demolition, amongst others, of a large number of residential buildings, industrial buildings, commercial buildings, Bhabha Atomic Energy Complex and the Employees State Insurance Scheme Hospital and compulsorily rendering homeless thousands of families, some of whom may have invested considerable savings in the disputed lands. What it also implies is demolition of the municipal and other public infrastructure works already undertaken and in use, clearing away the rubble and then planting trees and shrubs to 'restore' the 'forest' to an acceptable condition. No party should be allowed to take the benefit or advantage of their own wrong and a patent illegality cannot be cured. An unauthorized construction, unless compoundable in law, must be razed. In question are the circumstances leading to the application of the principle and the practical application of the principle. More often than not, the municipal authorities and builders conspiratorially join hands in

violating the law but the victim is an innocent purchaser or investor who pays for the maladministration. In such a case, how is the victim to be compensated or is he or she expected to be the only loser? If the victim is to be compensated, who will do so? These issues have not been discussed in the decisions cited by the Bombay Environment Action Group. The application of the principle laid down by this Court, therefore, depends on the independent facts found in a case. The remedy of demolition cannot be applied per se with a broad brush to all cases. The State also seems to have realized this and that is perhaps the reason why it moved the application that it did in Godavarman. [paras 74, 75, 80] [257-C-H; 258-A-B; 259-C-D]

Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai **(2005) 7 SCC 627;** *State of M.P. v. Vishnu Prasad Sharma* **(1966) 3 SCR 557;** *Khub Chand v. State of Rajasthan* **(1967) 1 SCR 120 - relied on.**

K. Ramadas Shenoy v. Chief Officer **(1974) 2 SCC 506;** *M.I. Builders v. Radhey Shyam Sahu* **(1996) 6 SCC 464;** *Pleasant Stay Hotel v. Palani Hills Conservation Council* **(1995) 6 SCC 127;** *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* **(1991) 3 SCC 341;** *Santoshkumar Shivgonda Patil v. Balasaheb Tukaram Shevale* **(2009) 9 SCC 352 2009 AIR 2471;** *CIT v. Bababhai Pitamberdas (HUF)* **1993 Supp (3) SCC 530 - referred to.**

13. Looking at the issue from point of view of the citizen and not only from the point of view of the State or a well meaning pressure group, it does appear that even though the basic principle is that the buyer should beware and therefore if the appellants and purchasers of tenements or commercial establishments from the appellants ought to bear the consequences of unauthorized construction, the well settled principle of

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caveat emptor would be applicable in normal circumstances and not in extraordinary circumstances as these appeals present, when a citizen is effectively led up the garden path for several decades by the State itself. The instant appeals do not relate to a stray or a few instances of unauthorized constructions and, therefore, fall in a class of their own. In a case such as the present, if a citizen cannot trust the State which has given statutory permissions and provided municipal facilities, whom should he or she trust? Assuming the disputed land was a private forest, the State remained completely inactive when construction was going on over acres and acres of land and of a very large number of buildings thereon and for a few decades. The State permitted the construction through the development plans and by granting exemption under the Urban Land (Ceiling and Regulation) Act, 1976 and providing necessary infrastructure such as roads and sanitation on the disputed land and the surrounding area. When such a large scale activity involving the State is being carried on over vast stretches of land exceeding a hundred acres, it is natural for a reasonable citizen to assume that whatever actions are being taken are in accordance with law otherwise the State would certainly step in to prevent such a massive and prolonged breach of the law. The silence of the State in all the appeals led the appellants and a large number of citizens to believe that there was no patent illegality in the constructions on the disputed land nor was there any legal risk in investing on the disputed land. Under these circumstances, for the State or the Bombay Environment Action Group to contend that only the citizen must bear the consequences of the unauthorized construction may not be appropriate. It is the complete inaction of the State, rather its active consent that has resulted in several citizens being placed in a precarious position where they are now told that their investment is actually in unauthorized constructions

which are liable to be demolished any time even after several decades. There is no reason why these citizens should be the only victims of such a fate and the State be held not responsible for this state of affairs; nor is there any reason why under such circumstances this Court should not come to the aid of victims of the culpable failure of the State to implement and enforce the law for several decades. In none of these cases is there an allegation that the State has acted arbitrarily or irrationally so as to voluntarily benefit any of the appellants. On the contrary, the facts show that the appellants followed the due legal process in making the constructions that they did and all that can be said of the State is that its Rip Van Winkleism enabled the appellants to obtain valid permissions from various authorities, from time to time, to make constructions over a long duration. The appellants and individual citizens cannot be faulted or punished for that. These appeals raised larger issues of good administration and governance and the State has, regrettably, come out in poor light in this regard. [paras 81 to 84] [259-E-H; 260-A-H; 261-A-B]

Case Law Reference:

AIR 1978 Bombay 119	Referred to	Para 24
(2000) 3 SCC 143	Partly overruled	Para 29
1976 (2) SCR 809	Referred to	Para 48
1997 (4) Suppl. SCR 133	Referred to	Para 49
(1883) 8 AC 798	Referred to	Para 50
(1964) 6 SCR 784	Relied on	Para 54
2000 (3) SCR 219	Relied on	Para 54
2002 (3) SCR 1078	Relied on	Para 54

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1993 Supp (3) SCC 530	**Referred to**	**Para 61**
(1964) 7 SCR 539	**Referred to**	**Para 61**
1976 AIR 1150	**Referred to**	**Para 61**
2012 (4) SCR 971	**Relied on**	**Para 64**
1984 (1) SCR 139	**Relied on**	**Para 65**
2009 AIR 2471	**Referred to**	**Para 65**
(2005) 7 SCC 627	**Relied on**	**Para 72**
(1966) 3 SCR 557	**Relied on**	**Para 72**
(1967) 1 SCR 120	**Relied on**	**Para 72**
(1974) 2 SCC 506	**Referred to**	**Para 74**
(1996) 6 SCC 464	**Referred to**	**Para 74**
(1995) 6 SCC 127	**Referred to**	**Para 74**
(1991) 3 SCC 341	**Referred to**	**Para 74**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1102 of 2014.

From the Judgment and order dated 24.03.2008 of the High Cout of Bombay in WP No. 2196 of 2006.

WITH

Civil Appeal No. 1103 of 2014.

Civil Appeal No. 1104 of 2014.

Civil Appeal No. 1105 of 2014.

Civil Appeal No. 1106 of 2014.

Civil Appeal No. 1107 of 2014.

Civil Appeal No. 1108 of 2014.

Civil Appeal No. 1109 of 2014.

Civil Appeal No. 1110 of 2014.

Civil Appeal No. 1111 of 2014.

Civil Appeal No. 1112 of 2014.

Civil Appeal No. 1113 of 2014.

Civil Appeal No. 1114 of 2014.

Civil Appeal No. 1115 of 2014.

Civil Appeal No. 1116 of 2014.

Civil Appeal No. 1117 of 2014.

Civil Appeal No. 1118 of 2014.

Civil Appeal No. 1119 of 2014.

Civil Appeal No. 1120 of 2014.

SLP (C) No. 34691/2011.

Paras Kuhad, ASG, F.S. Nariman, R.F. Nariman, Dr. Rajeev Dhawan, Meenakshi Arora, Dr. A.M. Singhvi, Pravin Samdani, Ashok K. Gupta, C.U. Singh, Upmanyu Hazarika, Shekhar Naphade, Atul Y. Chitale, J.P. Cama, Basava P. Patil, Madhvi Diwan. Ajay Bhargava, Vanita Bhargava, Karun Mehta, Priyambada Mishra (for Khaitan & Co.). Shailesh C. Mahimtura, Jatin Zaveri, Amit Mehta, Neel Kamal Mishra, Joseph Pookkatt, Girija Balakrishnan, Prashant Kr., Manjula Srinivasan (for AP&J Chambers), Saurabh Sinha, Joseph Pookkatt (for AP & J Chambers), P.K. Manohar, Pallavi Gupta, Amit Bhandari, Kalyanai Shukla, Satyendra Kumar, Sunil Fernandes, Shishir Deshpande, Amit Yadav, Devansh A. Mohta, Sujata Kurdukar, Gaurav Goel, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Hetu Arora Sethi, Darpan K.M.,

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Manish Kumar, Amit Kumar, Rakesh K. Sharma, Amol Nirmalkumar Suryawanshi, Arun R. Padneker, Sanjay V. Kharde, A.P. Mayee, Shubhangi Tuli (for Asha G. Nair), Mohan Prasad Gupta, S.K. Bajwa, Jitin Chaturvedi, S.N. Terdal, Sanyukta Mukherjee, Jayati Chitale, Suchitra A. Chitale, Vijay K. Verma, Tarun Verma, M.N.S. Rao, Bhardwaj S. Iyengar, Shailesh Madiyal, Shishir Deshpande, Amit Yadav (for Sujata Kurdukar), D. Bharat Kumar, Sanooja M., Abhijit Sengupta, Vinay Navare, Satyajeet Kumar, Abha R. Sharma, Shilpa Singh, A. Venayagam Balan, Vikas Mehta, Shivaji M. Jadhav, Mahesh Aggarwal (for E.C. Agrawala), Sharmila Upadhyay, D.N. Goburdhan, Prashant Kumar, Anurag Sharma (for AP & J Chambers) for the appearing parties.

The Judgment of the Court was delivered by

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

2. The principal question for consideration is whether the mere issuance of a notice under the provisions of Section 35(3) of the Indian Forest Act, 1927 is sufficient for any land being declared a "private forest" within the meaning of that expression as defined in Section 2(f)(iii) of the Maharashtra Private Forests (Acquisition) Act, 1975. In our opinion, the question must be answered in the negative. Connected therewith is the question whether the word "issued" in Section 2(f) (iii) of the Maharashtra Private Forests Acquisition Act, 1975 read with Section 35 of the Indian Forest Act, 1927 must be given a literal interpretation or a broad meaning. In our opinion the word must be given a broad meaning in the surrounding context in which it is used.

3. A tertiary question that arises is, assuming the disputed lands are forest lands, can the State be allowed to demolish the massive constructions made thereon over the last half a century. Given the facts and circumstances of these appeals, our answer to this question is also in the negative.

4. This is a batch of 20 appeals and they were argued on the basis of the facts as in the appeal of Godrej. In each appeal, the minute details would, of course, be different but the legal issues are the same and all the appeals were argued by learned counsel on the basis that the legal issues and questions of law are the same. For convenience, we have taken into consideration the facts in the appeal of Godrej.

Facts

5. Godrej acquired land in Vikhroli in Salsette taluka in Maharashtra by a registered deed of conveyance dated 30th July 1948 from Nowroji Pirojsha, successor in interest of Framjee Cawasjee Banaji who, in turn, had been given a perpetual lease/kowl for the land by the Government of Bombay on 7th July 1835.

6. The land was described in the perpetual lease/kowl as "waste land" and one of the purposes of the lease was to cultivate the waste land. We are concerned in this appeal with an area of 133 acres and 38 gunthas of land bearing Old Survey Nos. 117,118 and 120 (New Survey Nos. 36 (Part), 37 and 38). For convenience this land is hereafter referred as the "disputed land".

Consent decree in the Bombay High Court

7. On 27th August 1951 the Legislative Assembly of the State of Bombay passed the Salsette Estates (Land Revenue Exemption Abolition) Act, 1951. This statute was brought into force on 1st March 1952. Section 4 of the Salsette Estates Act provided that waste lands granted under a perpetual lease/kowl not appropriated or brought under cultivation before 14th August 1951 shall vest in and be the property of the State.[1]

1. **Section 4 - Waste lands, etc.. to vest in Government**

(a) All waste lands in any estate which under the terms of the kowl are not the property of the estate-holder,

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8. According to the State, the disputed land was not appropriated or brought under cultivation before 14th August 1951 and, therefore, it vested in or was the property of the State by virtue of Section 4 of the Salsette Estates Act.

9. This factual position was disputed by Godrej and to resolve the dispute, Suit No. 413 of 1953 was filed by Godrej in the Bombay High Court praying, inter alia, for a declaration that it was the owner of the disputed land in village Vikhroli as the successor in title of Framjee Cawasjee Banaji; that the provisions of the Salsette Estates Act had no application to the disputed land and, that the disputed land had been appropriated by Godrej before 14th August 1951 for its industrial undertaking.

10. The suit was contested by the State by filing a written statement but eventually the Bombay High Court passed a consent decree on 8th January 1962 to the effect that except for an area of 31 gunthas, all other lands were appropriated and brought under cultivation by Godrej before 14th August 1951 and are the property of Godrej. The consent decree reads, inter alia, as follows:-

> "AND THIS COURT by and with such consent DOTH FUTHER DECLARE that it is agreed by and between the parties of the following lands namely

(b) all waste lands in any estate which under the terms of the kowl are the property of the estate-holder but have not been appropriated or brought under cultivation before the 14th August 1951, and

(c) all other kinds of property referred to in Section 37 of the Code situate in an estate which is not the property of any individual or an aggregate of persons legally capable of holding property other than the estate-holder and except in so far as any rights of persons may be established in or over the same and except as may be otherwise provided by any law for the time being in force, together with all rights in or over the same or appertaining thereto,

and are hereby declared to be the property of the State and it shall be lawful to dispose of and sell the same by the authority in the manner and for the purposes prescribed in Section 37 or 38 of the Code, as the case may be.

S. No.	Area A.G.A.
15 Part	0-21-0
16 Part	0-10-0
0-31-0	

> in the village of Vikhroli vest in Government under Section 4(c) of the said Act" [Salsette Estates Act].

> "AND THIS COURT by and with such consent DOTH FURTHER DECLARE that it is agreed by and between the parties that save and except the lands mentioned above all other lands in the village of Vikhroli were appropriated or brought under cultivation before the fourteenth day of August one thousand nine hundred and fifty-one and are the property of the Plaintiff…."

11. These events establish two facts: (i) Even according to the State, the disputed land was 'waste land' and not a 'forest'. This is significant since the Indian Forest Act, 1927 did not apply to 'waste land' (due to the Indian Forest (Bombay Amendment) Act, 1948) with effect from 4th December 1948. (ii) It was acknowledged by the State that the disputed land (even if it was a forest) was appropriated or brought under cultivation by Godrej before 14th August 1951.

Development Plan for the City of Bombay

12. A development plan for the City of Bombay (and Greater Bombay including Vikhroli) was published on 7th January 1967 and the next development plan was published in 1991. In both development plans, the disputed land was designated as 'R' or 'Residential'. On publication of the first development plan, Godrej applied for and was granted permission, on various dates, by the Municipal Corporation of Greater Bombay to construct residential buildings on the disputed land. Godrej is said to have constructed four such buildings on the basis of permissions gr[illegible] e

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and these building were occupied for residential purposes by its staff.

13. On 17th February 1976 the Urban Land (Ceiling and Regulation) Act, 1976 came into force. Since the disputed land was in excess of the ceiling limit, Godrej filed statements (under Section 6 of the Act) and sought exemption from the Competent Authority for utilizing the excess/surplus vacant lands for industrial and residential purposes (under Section 20 of the Act). Pursuant to the request made by Godrej, it was granted exemption by the State Government, as prayed for and subject to certain conditions which included (both initially and subsequently by a corrigendum) the construction of tenements for the benefit of its employees to be used as staff quarters.

14. Pursuant to the grant of exemption, Godrej applied for and was granted permission by the Municipal Corporation of Greater Bombay to construct multi-storeyed buildings on the disputed land. According to Godrej, over a period of time, it has constructed more than 40 multi-storeyed residential buildings (ground+4 and ground+7), one club house and five electric sub-stations. It is said that over a couple of thousand families are occupying these buildings and that further construction has also been made, pursuant to permission granted, of a management institute and other residential buildings.

Amendments to the Indian Forest Act, 1927

15. Chapter V of the Indian Forest Act, 1927 relates to the control over forests and lands not being the property of government. It was amended (as far as we are concerned) on three occasions by the State of Bombay or Maharashtra, as the case may be.[2]

2. Changes brought about by the Government of India (Adaptation of Indian Laws) Order, 1937 and the Adaptation of Laws Order, 1950 have not been incorporated in the narration of facts.

16. The first amendment was by the Indian Forest (Bombay Amendment) Act, 1948 being Bombay Act No. 62 of 1948. By this amendment (which came into force on 4th December 1948), the three significant changes that we are concerned with were: (i) Insertion of Section 34A in the Forest Act[3] whereby an inclusive definition of "forest" was incorporated for the purposes of the chapter; (ii) Substitution of Section 35(1) of the Forest Act[4] dealing with protection of forests for special

3. 34A. Interpretation.- For the purposes of this Chapter 'forest' includes any land containing trees and shrubs, pasture, lands and any other land whatsoever which the Provincial Government may, by notification in the Official Gazette, declare to be a forest.

4. Section 35 - Protection of forests for special purposes

(1) The Provincial Government may, by notification in the Official Gazette,-

(i) regulate or prohibit in any forest -

(a) the breaking up or clearing of the land for cultivation;

(b) the pasturing of cattle;

(c) the firing or clearing of the vegetation;

(d) the girdling, tapping or burning of any tree or the stripping off the bark or leaves from any tree;

(e) the lopping and pollarding of trees;

(f) the cutting, sawing, conversion and removal of trees and timber; or

(g) the quarrying of stone or the burning of lime or charcoal or the collection or removal of any forest produce or its subjection to any manufacturing process;

(ii) regulate in any forest the regeneration of forests and their protection from fire;

when such regulation or prohibition appears necessary for any of the following purposes :-

(a) for the conservation of trees and forests;

(b) for the preservation and improvement of soil or the reclamation of saline or water-logged land, the prevention of land-slips or of the formation of ravines and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel;

(c) for the improvement of grazing;

(d) for the maintenance of a water supply in springs, rivers and tanks;

(e) for the maintenance increase and distribution of the supply of fodder, leaf manure, timber or fuel;

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purposes, including regulatory and prohibitory measures; (iii) The words 'waste lands' or 'land' occurring in sub-sections (2) and (3) of Section 35 of the Forest Act[5] were deleted. Therefore, 'waste lands' were taken out of the purview of the Forest Act (as applicable to the State of Bombay) with effect from 4th December 1948.

17. The next amendment was made by the Indian Forest (Bombay Amendment) Act, 1955 being Bombay Act No. 24 of 1955. The three significant changes that we are concerned with were: (i) Amendment to Section 35(3) of the Forest Act;[6] (ii) Insertion of sub-sections (4), (5) and (6) in Section 35 of the

(f) for the maintenance of reservoirs or irrigation works and hydro-electric works;

(g) for protection against storms, winds, rolling stones, floods and drought;

(h) for the protection of roads, bridges, railways and other lines of communication; and

(i) for the preservation of the public health.

5. **Section 35 - Protection of forests for special purposes**

(2) The State Government may, for any such purpose, construct at its own expense, in any forest, such work as it thinks fit.

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.

6. **Section 35 - Protection of forests for special purposes**

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue by an officer authorised by the State Government in that behalf of a notice to the owner of such forest calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.

Forest Act;[7] (iii) Insertion of Section 36A (manner of serving notice and order under Section 36) in the Forest Act.[8]

18. The next amendment was by the Indian Forest (Maharashtra Unification and Amendment) Act, 1960 being Maharashtra Act No. 6 of 1961. The two changes brought about were: (i) The words "six months" in sub-section (4) of Section 35 of the Forest Act were substituted by the words "one year";[9] (ii) Sub-sections (5A) and (7) were inserted in Section 35 of

7. **Section 35 - Protection of forests for special purposes**

(4) A notice to show cause why a notification under subsection (1) should not be made, may require that for any period not exceeding six months, or till the date of the making of a notification, whichever is earlier, the owner or such forest and all persons who are entitled or permitted to do therein any or all of the things specified in clause (i) of sub-section (1), whether by reasons of any right, title or interest or under any licence or contract or otherwise, shall not, after the date of the notice and for the period or until the date aforesaid, as the case may be, do any or all the things specified in clause (i) of sub-section (1), to the extent specified in the notice.

(5) A notice issued under sub-section (3) shall be served on the owner of such forest in the manner provided in the Code of Civil Procedure, 1908, for the service of summons and shall also be published in the manner prescribed by rules.

(6) Any person contravening any requisition made under sub-section (4) in a notice to show cause why a notification under sub-section (1) should not be made shall, on conviction, be punished with imprisonment for a term which may extend to six months or with fine or with both.

8. **36-A. Manner of serving notice and order under section 36.**- The notice referred to in sub-section (1) of section 36 and the order, if any, made placing a forest under the control of a Forest Officer shall be served on the owner of such forest in the manner provided in the Code of Civil Procedure, 1908, for the service of summons.

9. **Section 35 - Protection of forests for special purposes**

(4) A notice to show cause why a notification under subsection (1) should not be made, may require that for any period not exceeding one year, or till the date of the making of a notification, whichever is earlier, the owner or such forest and all persons who are entitled or permitted to do therein any or all of the things specified in clause (i) of sub-section (1), whether by reasons of any right, title or interest or under any licence or contract or otherwise, shall not, after the date of the notice and for the period or until the date aforesaid, as the case may be, do a[illegible]d in clause (i) of sub-section (1), to the extent [illegible]

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the Forest Act.[10]

Notice issued to Godrej

19. Completely unknown to Godrej and not disclosed by the State in Suit No. 413 of 1953 even till 8th January 1962 when the consent decree was passed by the Bombay High Court, a Notice bearing No. WT/53 had been issued to Godrej under Section 35(3) of the Forest Act (as amended) and published in the Bombay Government Gazette of 6th September 1956 in respect of the disputed land in village Vikhroli. Godrej subsequently learnt of the notice from a search in the records of the Department of Archives. The search revealed that the notice, as published in the Gazette, bore no date and according to Godrej, the notice was not served upon it and, it was submitted, that the notice was never acted upon. Indeed, subsequent events cast a doubt on whether the notice was at all issued to or served on Godrej. Notice No. WT/53 reads as follows:-

Notice.

No.WT/53

In pursuance of sub-section (3) of section 35 of the Indian Forest Act, 1927 (XVI of 1927), read with rule 2 of the rules published in Government Notification, Agriculture and Forests Department, No.5133/48513-J, dated the 19th day of September, 1950, I, J.V. Karamchandani, the Conservator of Forests, Western Circle, hereby given notice to -

10. **Section 35 - Protection of forests for special purposes**

(5-A) Where a notice issued under sub-section (3) has been served on the owner of a forest in accordance with subsection (5), any person acquiring thereafter the right of ownership of that forest shall be bound by the notice as if it had been served on him as an owner and he shall accordingly comply with the notice, requisition and notification, if any, issued under this section.

(7) Any person contravening any of the provisions of a notification issued under sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

The Manager, Godrej Boyce & Manufacture Factory, at and post Vikhroli, B.S.D.

calling on him to appear within two months from the date of receipt of this notice before the Divisional Forest Officer, West Thana, to show cause why the accompanying notification (hereinafter referred to as "the notification") should not be made by the Government of Bombay under sub-section (1) of the said section 35 in respect of the forest specified in the Schedule hereto appended and belonging to him.

2. If the said The Manager, Godrej Boyce and Manufacture Factory, at and post Vikhroli, B.S.D., fails to comply with this notice, it shall be assumed that the said The Manager, Godrej Boyce and Manufacture Factory, at and post Vikhroli, B.S.D., has no objection to the making of the notification.

3. I further require that for a period of six months or till the date of the making of the notification, whichever is earlier, the said The Manager, Godrej Boyce and Manufacture Factory, at and post Vikhroli, B.S.D. and all persons who are entitled or permitted to do, therein, any or all of the things specified in clause (1) of sub-section (1) of the said section 35, whether by reason of any right, title or interest or under any licence or contract, or otherwise, shall not after the date of this notice, and for the period or until the date aforesaid, as the case may be, do any of the following things specified in clause (1) of sub-section (1) of the said section 35, namely :-

(a) the cutting and removal of trees and timber

(b) the firing and clearing of the vegetation.

Schedule

District Thana, taluka Salsette, vill

S.No.118; area, 63 acres 23 gunthas, Boundaries:- North-Boundary of Pavai; East-Boundary of Haralayi; South-S.No.117; West-Boundary of Ghatkopur.

S.No.117; area, 36 acres, 35 gunthas, Boundaries:- North-S.No.118; East-S.No.120; South-S.No.112; West-Boundary of Ghatkopur.

S.No.120; area, 33 acres, 13 gunthas. Boundaries:- North-Boundary of Haralayi; East-Agra Road; South-S.No.115; West-S.Nos.116, 117."

Maharashtra Private Forests (Acquisition) Act, 1975

20. Sometime in 1975 the State Legislature passed the Maharashtra Private Forests (Acquisition) Act, 1975. The Private Forests Act came into force on 30th August 1975 when it was published in the Official Gazette. We are concerned with the definition of "forest" and "private forest" as contained in Section 2(c-i) and Section 2(f) respectively in the Private Forests Act. These definitions read as follows:

"2(c-i) "forest" means a tract of land covered with trees (whether standing, felled, found or otherwise), shrubs, bushes, or woody vegetation, whether of natural growth or planted by human agency and existing or being maintained with or without human effort, or such tract of land on which such growth is likely to have an effect on the supply of timber, fuel, forest produce, or grazing facilities, or on climate, stream flow, protection of land from erosion, or other such matters and includes,--

(i) land covered with stumps of trees of forest;

(ii) land which is part of a forest or lies within it or was part of a forest or was lying within a forest on the 30th day of August 1975;

(iii) such pasture land, water-logged or cultivable or non-

cultivable land, lying within or linked to a forest, as may be declared to be forest by the State Government;

(iv) forest land held or let for purpose of agriculture or for any purposes ancillary thereto;

(v) all the forest produce therein, whether standing, felled, found or otherwise;"

"2(f) "private forest" means any forest which is not the property of Government and includes,--

(i) any land declared before the appointed day to be a forest under section 34A of the Forest Act;

(ii) any forest in respect of which any notification issued under sub-section (1) of section 35 of the Forest Act, is in force immediately before the appointed day;

(iii) any land in respect of which a notice has been issued under sub-section (3) of section 35 of the Forest Act, but excluding an area not exceeding two hectares in extent as the Collector may specify in this behalf;

(iv) land in respect of which a notification has been issued under section 38 of the Forest Act;

(v) in a case where the State Government and any other person are jointly interested in the forest, the interest of such person in such forest;

(vi) sites of dwelling houses constructed in such forest which are considered to be necessary for the convenient enjoyment or use of the forest and lands appurtenant thereto;"

21. We are also concerned with Section 3 (vesting of private forests in State Government), Section 5 (power to take over possession of private forests) and Section 6 (settlement of disputes) of the Private Forests Act. d

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as follows:

"Section 3 - Vesting of private Forests in State Government

(1) Notwithstanding anything contained in any law for the time being in force or in any settlement, grant, agreement, usage, custom or any decree or order of any Court, Tribunal or authority or any other document, with effect on and from the appointed day, all private forests in the State shall stand acquired and vest, free from all encumbrances, in, and shall be deemed to be, with all rights in or over the same or appertaining thereto, the property of the State Government, and all rights, title and interest of the owner or any person other than Government subsisting in any such forest on the said day shall be deemed to have been extinguished.

(2) Nothing contained in sub-section (1) shall apply to so much extent of land comprised in a private forest as in held by an occupant or tenant and is lawfully under cultivation on the appointed day and is not in excess of the ceiling area provided by section 5 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Mah. XXVII of 1061), for the time being in force or any building or structure standing thereon or appurtenant thereto.

(3) All private forests vested in the State Government under sub-section (1) shall be deemed to be reserved forests within the meaning of the Forest Act."

"Section 5 - Power to take over possession of private forests

Where any private forest stands acquired and vested in the State Government under the provisions of this Act, the person authorised by the State Government or by the Collector in this behalf, shall enter into and take over

possession thereof, and if any person resists the taking over of such possession, he shall without prejudice to any other action to which he may be liable, be liable to be removed by the use or such force as may be necessary."

"Section 6 - Settlement of disputes

Where any question arises as to whether or not any forest is a private forest, or whether or not any private forest or portion thereof has vested in the State Government or whether or not any dwelling house constructed in a forest stands acquired under this Act, the Collector shall decide the question, and the decision of the Collector shall, subject to the decision of the Tribunal in appeal which may be preferred to the Tribunal within sixty days from the date of the decision of the Collector, or the order of the State Government under section 18, be final."

22. Finally, it may be mentioned that by Section 24 of the Private Forests Act, Sections 34A, 35 and 36A of the Forest Act were repealed.[11]

23. The narrative of the events discloses that Notice No. WT/53 after its publication in the Gazette was not acted upon either under the provisions of the Forest Act as amended from time to time or under the Private Forests Act. Admittedly, no attempt was made by the State to take over possession of the disputed land at any point of time. On the contrary permissions were granted to Godrej from time to time for the construction

11. **Section 24 - Repeal of sections 34A to 37 of Forest Act**

(1) On and from the appointed day, sections 34A, 35, 36, 36A, 36B, 36C and 37 of the Forest Act shall stand repealed.

(2) Notwithstanding anything contained in sub-section (1), on and from the date of commencement of the Maharashtra Private Forests (Acquisition) (Amendment) Act, 1978 (Mah. XIV of 1978), sections 34A, 35, 36, 36A, 36B, 36C and 37 of the Forest Act, shall, in respect of the lands restored under section 22A, be deemed to have been reenacted in the same form and be deemed always to have been in force and applicable in respect of such lands, as if they had not been repealed.

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of buildings on the disputed land, which permissions were availed of by Godrej for the benefit of thousands of its employees.

Judgment in the case of Waghmare

24. The constitutional validity of the Private Forests Act (including Section 3 thereof) was challenged in the Bombay High Court on the ground of legislative competence of the State Legislature to enact the statute. This issue was referred to a Bench of five Judges and the decision of the High Court is reported as *Janu Chandra Waghmare v. State of Maharashtra.*[12] During the course of hearing, the Bench also considered as to "what is it that the State legislature has intended to include in the expression 'forest produce' for the purpose of vesting the same in the State Government under Section 3 of the Act." While answering this question, the High Court felt it necessary to "consider the true effect of the artificial definitions of the two expressions 'forest' and 'private forest' given in Section 2(c-i) and Section 2(f) read with Section 3 of the impugned Act".

25. In doing so, the High Court held that a land owner who had been issued a notice under Section 35(3) of the Forest Act (but was not heard) has an opportunity to contend that his or her land is not a 'forest' within the meaning of Section 2(c-i) of the Private Forests Act and that the land does not vest automatically in the State by virtue of Section 3 of the Private Forests Act. This position was not contested, but conceded by learned counsel appearing for the State of Maharashtra in the High Court.

26. The High Court held in paragraph 30 of the Report as follows:-

"It is thus clear that Sub-clauses (i), (ii) and (iv) of Section 2(f) deal with declared, adjudicated or admitted instances

12. AIR 1978 Bombay 119.

of forests. Sub-clause (iii) of Section 2(f) no doubt seeks to cover land in respect of which merely a notice has been issued to the owner of a private forest under Section 35(3) and his objections may have remained unheard till 30-8-1975 as Section 35 has stood repealed on the coming into force of the Acquisition Act. Here also, as in the case of owners of land falling under Sub-clause (iii) of Section 2(c-i), his objections, if any, including his objection that his land cannot be styled as forest at all can be heard and disposed of under Section 6 of the Acquisition Act, and this position was conceded by Counsel appearing for the State of Maharashtra. Sub-clause (v) includes within the definition of private forest the interest of another person who along with Government is jointly interested in a forest, while Sub-clause (vi) includes sites of dwelling houses constructed in such forest which are considered to be necessary for the convenient enjoyment or use of forest and lands appurtenant thereto."

It was further held in paragraph 32 of the Report as follows:

"In the first place, the scheme [of the Private Forests Act] clearly shows that under Section 3 all private forests vest in the State Government and since both the expressions - 'forest' as well as 'private forest' - have been defined in the Act what vests in the State Government is 'private forest' as per Section 2(f) and in order to be 'private forest' under Section 2(f) it must be 'forest' under Section 2(c-i) in the first instance and read in this manner the expression 'all the private forests' occurring in Section 3 will include 'forest produce.' It is not possible to accept the argument that the word 'forest' occurring in the composite expression 'private forest' should not be given the meaning which has been assigned to it in Section 2(c-i)……………. Definitions in Interpretation Clauses may have no context (though this may not be true of all definitions) but therefore, all the more reason, why the word 'forest' in the [illegible] n

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'forest-produce' in Section 2(f) should be given the meaning assigned to it in Section 2(c-i). Moreover, as stated earlier, the scheme itself suggests that what vests in the State under Section 3 are private forests as defined by Section 2(f) but such private forests must in the first instance be 'forests' as defined by Section 2(c-i) and read in that manner the forest produce would vest in the State Government along with the private forest under Section 3 of the Act."

27. The view of the High Court has been accepted by the State of Maharashtra and has not been challenged and has now attained finality.

28. It is important to note that the High Court was not concerned with, nor did it advert to the right of a land owner to object to the notice under Section 35(3) of the Forest Act before the Private Forests Act came into force on the ground that his land was not a forest as defined in or notified under Section 34A of the Forest Act. This will be dealt with below.

Judgment in the case of Chintamani Velkar

29. The right to file objections to a notice under Section 35(3) of the Forest Act came up for consideration in *Chintamani Gajanan Velkar v. State of Maharashtra.*[13] In that case, Chintamani was issued a notice under Section 35(3) of the Forest Act on 29th August 1975. The notice was served on him on 12th September 1975. In the meanwhile, the Private Forests Act came into force on 30th August 1975. Chintamani raised a dispute under Section 6 of the Private Forests Act (as postulated in Waghmare) contending that his land was not a forest and did not vest in the State in terms of Section 3 of the Private Forests Act.

30. The only question that arose for consideration was whether or not Chintamani's land was a forest within the meaning of that word as defined in Section 2(c-i) of the Private Forests Act. That issue had already been decided, as a matter of fact, by the Maharashtra Revenue Tribunal against Chintamani and it was held that his land was a forest. The matter ought to have rested there. However, this Court went into a further question, namely, whether the mere issuance of a notice under Section 35(3) of the Forest Act per se attracted Section 2(f)(iii) of the Private Forests Act. This Court noticed (in paragraph 18 of the Report) that where a final notification is issued under Section 35(1) of the Forest Act (obviously after hearing the objections of the land owner in compliance with the requirements of Section 35(3) thereof), the entire land of the land owner would automatically vest in the State on the appointed date, that is, 30th August 1975 when the Private Forests Act came into force. In such a case, the land owner would, ex hypothesi have an opportunity of showing in the objections to the Section 35(3) notice that the land is not a 'forest' as defined under Section 34A of the Forest Act. If the land owner succeeded in so showing, then clearly a final notification under Section 35(1) of the Forest Act could not be issued. But if the land owner did not succeed in so showing, only then could a final notification under Section 35(1) of the Forest Act be issued. It must be recalled, at this stage, that the words "or land" under Section 35(3) of the Forest Act had been deleted by the Indian Forest (Bombay Amendment) Act, 1948 being Bombay Act No.62 of 1948 and, additionally therefore, such an objection could validly have been raised.

31. Consequently, the situation that presented itself in *Chintamani* was that though a notice was issued to the land owner under Section 35(3) of the Forest Act before 30th August 1975, it could not be decided before that date when the Private Forests Act came into force. (Such a notice was referred to as a 'pipeline notice' by Mr. F.S. Nariman). Clearly, the recipient of a pipeline notice would be entitled to the benefit of *Waghmare* but this seems to have been overlooked by this Court in *Chintamani*. However, to mitig[illegible] a

13. (2000) 3 SCC 143.

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pipeline noticee who is not given the benefit of *Waghmare* this Court read Section 2(f)(iii) of the Private Forests Act and observed (perhaps as a sop to the land owner) that the "Maharashtra Legislature thought that the entire property covered by the notice in the State need not vest but it excluded 2 hectares out of the forest land held by the landholder. That was the consideration for not allowing the benefit of an inquiry under Section 35(3) and for not allowing the notification to be issued under Section 35(1) of the 1927 Act".

32. It is in this background that this Court narrowly construed the words "a notice has been issued under sub-section (3) of section 35 of the Forest Act" occurring in Section 2(f)(iii) of the Private Forests Act as not requiring "service of such notice before 30-8-1975, nor for an inquiry nor for a notification under Section 35(1)."[14]

33. In a sense, therefore, not only is there a difference of views between *Waghmare* and *Chintamani* but *Chintamani* has gone much further in taking away the right of a landholder.

Proceedings in the High Court

34. On or about 24th May 2006, Godrej received six stop-work notices issued by the concerned Assistant Engineer of the Bombay Municipal Corporation stating that the Deputy Conservator of Forests, Thane Forest Division, by a letter dated 8th May 2006 had informed that the disputed land was "affected" by the reservation of a private forest and therefore no construction could be carried out therein without the permission of the Central Government under the Forest (Conservation) Act, 1980.

35. On enquiries made by Godrej subsequent to the receipt of the stop-work notices, it came to be known that the Bombay High Court had given a direction on 22nd June 2005 in PIL No. 17/2002 (*Bombay Environment Action Group v. State of Maharashtra*) on the claim of the petitioner therein that in the entire State of Maharashtra the land records were incomplete and a large number of problems were encountered because of not updating the land records which in any event is also an obligation on the State. Accordingly, the High Court gave a direction granting time to the State of Maharashtra up to 31st May 2006 to complete the entire land records in the State and further directed that quarterly reports regarding the progress of the work be filed before the Registrar General of the High Court.

14. Paragraph 19 of **Chintamani**.

36. Godrej learnt that this triggered an ex parte mutation of the revenue records by the State to show that the disputed land was 'affected' by the provisions of the Private Forest Act. Godrej also learnt that the Notice No. WT/53 (referred to above) had been published in the Bombay Government Gazette of 6th September 1956, but not served on it.

37. On these broad facts, Godrej filed Writ Petition No. 2196 of 2006 in the Bombay High Court praying, inter alia, for a declaration that the lands owned by it in village Vikhroli are not forest land; that the letter dated 8th May 2006 issued by the Deputy Conservator of Forest as well as six stop-work notices dated 24th May 2006 be declared as illegal, ab initio null and void and that the mutation in the revenue records be also declared illegal.

38. During the proceedings in the High Court it came to be known that about 170 notices similar to notice No. WT/53 had been issued to various parties in 1956-57, including to the Bhabha Atomic Energy Complex and the Employees State Insurance Scheme Hospital. However, the lands of Bhabha Atomic Energy Complex and the Employees State Insurance Scheme Hospital were not touched by the State.

39. The writ petition (along with several other similar writ petitions) was contested by the State and it was submitted inter alia that in view of the judgment of this *i*,

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the disputed land stood vested in the State in terms of Section 3 of the Private Forests Act. By the impugned order dated 24th March 2008, the High Court dismissed all the writ petitions. Among other things, it was held in paragraph 152 of the impugned judgment:

"In the light of the authoritative pronouncement in Chintamani's case we see no substance in the argument that the construction activities on the land being in accordance with the sanctioned plans and approvals so also the lands being part of the development plan and affected by Urban Land Ceiling Act, State's action impugned in these petitions is without any jurisdiction or authority in law. All arguments with regard to the user of the land today has no legal basis. User today is after development or continuing development. Once development is on private forest, then, the same could not have been permitted or carried out. Mere omission or inaction of the State Government cannot be the basis for accepting the arguments of the petitioners."

40. The High Court rejected the contention that "mere issuance of a notice under Section 35(3) without any notification being published in the official gazette within the meaning of Section 35(1) would not mean that the land is excluded from the purview of the Private Forest (Acquisition) Act enacted by the Maharashtra Government."[15]

It was also held that:

"Once the State Government issues such notice [under Section 35(3) of the Forest Act], then, the intention is apparent. The intention is to regulate and prohibit certain activities in forest. Merely because such a notice is issued by it in 1957 and 1958 but it did not take necessary steps in furtherance thereof, does not mean that the notices have been abandoned as contended by the petitioners. There

15. Paragraph 123.

is no concept of "abandonment or disuse" in such case. Apart from the fact that these concepts could not be imported in a modern statute, we are of the view that they cannot be imported and read into statute of the present nature. Statutes which are meant for protecting and preserving forests and achieve larger public interest, cannot be construed narrowly as contended. The interpretation, therefore, if at all there is any ambiguity or scope for construction has to be wider and sub-serving this public interest so also the intent and object in enacting them. The reason for the State Government not being able to pursue the measures for preserving and protecting the forest wealth is obvious."[16]

Further, it was held that:

"The Development Plan proposal and designation so also the user cannot conflict with the character of the land as a private forest. To accept the arguments of the petitioners would mean that despite vesting the private forest continues as a land covered by the development plan and being within the municipal limits it loses its character as a private forest. A private forest is a forest and upon its vesting in the State Government by virtue of the Private Forest (Acquisition) Act would remain as such. Therefore, we see no conflict because of any change in the situation. Vesting was complete on 30th August, 1975. On 30th August, 1975 the lands with regard to which the notice was issued under Section 35(3), being a private forest vested in the State, it was a private forest always and, therefore, there is no question of the development plan or any proposal therein superimposing itself on its status."[17]

41. Feeling aggrieved by the dismissal of the writ petitions in the Bombay High Court, Godrej and other aggrieved writ petitioners preferred petitions for special leave to appeal in this

16. Paragraph 126.

17. Paragraph 149

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Court.

Proceedings in this Court

42. During the pendency of these appeals, the State filed I.A. Nos. 2352-2353 of 2008 in W.P. No. 202 of 1995 [*T.N. Godavarman v. Union of India* (Forest Bench matters)] in which it was prayed, inter alia, as follows:

(1) The lands coming under the provisions of the Maharashtra Private Forests (Acquisition) Act 1975 which were put to non forestry use prior to 25th October 1980 [when the Forest (Conservation) Act,1980 came into force] by way of having been awarded Approval of Plans, Commencement Certificates, IODS or Non Agriculture Permissions by the Competent Authorities be treated deleted from the category of forests and the non forestry activity be allowed on such lands without charging CA, NPV or equivalent non forest land or any charges whatsoever.

(2) The Collectors of all the districts be directed to pass appropriate orders under section 6 or 22A of the Maharashtra Private Forests (Acquisition) Act, 1975 either on an application or suo motu as provided for it under the Act, for all the pieces of lands coming under the provisions of the Act under their jurisdiction within 30 days.

(3) For the lands restored under the Act on which residential complexes have come up/are coming up wherein Non Agriculture Permissions (N.A.) and buildings were fully constructed and completion certificate and occupation certificate were issued by the Competent Authorities after 25th October, 1980 but before 18th May 2006 when the "stop construction work" notices were issued, only

afforestation charges be collected for afforesting equivalent forest land. Neither equivalent non forest land nor the Net Present Value be charged to them, as these areas are their own private lands."

Significantly, it was stated in the applications as follows:-

"26. As stated earlier since the records did not reveal that these are acquired Private Forests the erstwhile owners went on selling these lands to several persons who also in turn went on selling them to the strangers without there being any fault on their part. Subsequently developers purchased these lands and after getting requisite permissions from the Planning Authority carried on constructions thereon. Thereafter individuals and members of the public who wanted accommodation for housing probably invested their lifetime savings and/or raising loans entered into transactions of purchasing the flats constructed on these lands without their fault. In some of these areas commercial activities have also come up with due permission from the Government authorities. In such cases, injustice is being alleged by the subsequent purchasers who claimed to be bonafide purchasers. This has necessitated the State of Maharashtra to come out with the present application. Abstract of constructions made on private forest lands in Mumbai Suburban and Thane City makes it very clear that the problem is more severe for the common man. Errors were also committed while declaring the lands as having been acquired by the Government under the Maharashtra Private Forest (Acquisition) Act, 1975. Some of the lands/properties owned by the Government like Bhabha Atomic Energy complex and Employees State Insurance Scheme hospital also came to be declared as acquired under the Maharashtra Private Forest (Acquisition) Act, 1975."

43. The Forest Bench referred the matter to the Central Empowered Committee which, in its R y

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2009 noted in paragraphs 25 and 26 as follows:-

> "25. It is thus clear that after the issue of notices under Section 35(3) or Notification under 35(1) of the Indian Forest Act, no follow-up action was taken by the State Govt. Even after the Private Forest Act came into force, neither physical possession of the land was taken nor were the areas recorded as 'forest'. A substantial part of such area falls in urban conglomerations and have been used for various non-forest purpose including construction of buildings for which permissions have been granted by the concerned State Government authorities. Sale/purchase and resale have taken place and third party interests have been generated. People are residing for last 30-40 years in hundreds of buildings constructed with the then valid approvals. It was only after the order dated 26.5.2005 of the Hon'ble Bombay High Court, that these areas are now being treated as falling in category of "forest". Many of such areas are surrounded all around by other buildings and within metropolitan areas and are no longer suitable for afforestation or to be managed as 'forest'.
>
> "26. In the above complex background, at this belated stage, it is neither feasible nor in public interest to demolish the existing buildings/structures, re-locate the existing occupants/owners and physically convert such area into forest. The CEC in these circumstances considers that the balance of convenience lies in granting permission under the Forest (Conservation) Act for de-reservation and non-forest use of such area on a graded scale of payment depending upon the category/sub-category in which such land falls."

44. The Central Empowered Committee made certain other recommendations as a result of which Godrej paid an amount of Rs.14.7 crores towards NPV and this has been recorded in the order passed by the Forest Bench in its order dated 17th February 2010. The relevant extract of the order

dated 17th February 2010 passed by the Forest Bench reads as under:-

> "Pursuant to the report filed by the C.E.C. regards the property owned and possessed by the Godrej and Boyce Mfg. Co. Ltd., a sum of Rs.14,71,98,590/- was deposited as NPV and the deposit of this amount has been confirmed by the learned counsel appearing for the State.
>
> We have passed an interim order of status quo restraining the petitioners from further construction on the lands and also not to create third party rights. That interim order is vacated. The petitioners are at liberty to go on with the construction and complete it. The direction of not to create third party rights is also vacated. This order is subject to the order, if any, to be passed by MOEF in this regard and also subject to the final outcome of this matter.
>
> Learned counsel for the petitioner states that he will not claim any refund of the amount so deposited."

45. When the present set of appeals came up for hearing before this Court on 9th February 2011, the correctness of Chintamani was doubted by learned counsel on the question whether the word "issued" as occurring in Section 2(f)(iii) of the Private Forest Act in the context of "any land in respect of which a notice has been issued under sub-section (3) of section 35 of the Forest Act" should be interpreted literally or whether it postulates service of notice on the landholder. It is under these circumstances that these appeals were listed before us.

The primary question

46. The initial question is whether the disputed land is at all a forest within the meaning of Section 2(c-i) of the Private Forests Act.

47. It is quite clear from a reading of *Waghmare* that the "means and includes" definition of forest [illegible] e

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Private Forests Act does not detract or take away from the primary meaning of the word 'forest'. We are in agreement with this view.

48. In *Jagir Singh v. State of Bihar*[18] the interpretation of the word "owner" in Section 2(d) of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 came up for consideration. While interpreting "owner" which 'means' and 'includes', this Court held:

> "The definition of the term "owner" is exhaustive and intended to extend the meaning of the term by including within its sweep bailee of a public carrier vehicle or any manager acting on behalf of the owner. The intention of the legislature to extend the meaning of the term by the definition given by it will be frustrated if what is intended to be inclusive is interpreted to exclude the actual owner."

49. The proposition was more clearly articulated in *Black Diamond Beverages v. Commercial Tax Officer*[19] wherein this Court considered the use of the words 'means' and 'includes' in the definition of "sale price" in Section 2(d) of the W.B. Sales Tax Act, 1954. It was held in paragraph 7 of the Report:

> "The first part of the definition defines the meaning of the word "sale price" and must, in our view, be given its ordinary, popular or natural meaning. The interpretation thereof is in no way controlled or affected by the second part which "includes" certain other things in the definition. This is a well-settled principle of construction."

50. In coming to this conclusion, this Court referred to a passage from Craies on *Statute Law*[20] which in turn referred

18. (1976) 2 SCC 942.

19. (1998) 1 SCC 458.

20. 7th Edition 1.214.

to the following passage from *Robinson v. Barton-Eccles Local Board*[21]:

> "An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word as used in the Act … to be applied to something to which it would not ordinarily be applicable."

51. In the case of Godrej, the admitted position, as per the consent decree dated 8th January 1962 is that the disputed land was not a waste land nor was it a forest. In so far as the other appeals are concerned, the disputed lands were built upon, from time to time, either for industrial purposes or for commercial purposes or for residential purposes. Under the circumstances, by no stretch of imagination can it be said that any of these disputed lands are 'forest' within the primary meaning of that word, or even within the extended meaning given in Section 2(c-i) of the Private Forests Act.

52. The next question is whether the notice said to have been issued to Godrej being Notice No. WT/53 can be described as a 'pipeline notice'. Again, the answer must be in the negative in as much as it cannot be reasonably said that the pipeline extends from 1956-57 up to 1975. Assuming that a notice issued in 1956-57 is a pipeline notice even in 1975, the question before us would, nevertheless, relate to the meaning and impact of "issued" of Section 2(f)(iii) of the Private Forests Act read with Section 35 of the Forest Act. This is really the meat of the matter.

53. Undoubtedly, the first rule of interpretation is that the words in a statute must be interpreted literally. But at the same time if the context in which a word is used and the provisions of a statute inexorably suggest a subtext other than literal, then the context becomes important.

21. (1883) 8 AC 798.

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54. In *R.L. Arora v. State of U.P.*[22] it was observed that "a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute."

Similarly, in *Tata Engg. & Locomotive Co. Ltd. v. State of Bihar*[23] it was held:

> "The method suggested for adoption, in cases of doubt as to the meaning of the words used is to explore the intention of the legislature through the words, the context which gives the colour, the context, the subject-matter, the effects and consequences or the spirit and reason of the law. The general words and collocation or phrases, howsoever wide or comprehensive in their literal sense are interpreted from the context and scheme underlying in the text of the Act."

Finally, in *Joginder Pal v. Naval Kishore Behal*[24] it was held:

> "It is true that ordinary rule of construction is to assign the word a meaning which it ordinarily carries. But the subject of legislation and the context in which a word or expression is employed may require a departure from the rule of literal construction."

55. Applying the law laid down by this Court on interpretation, in the context of these appeals, we may be missing the wood for the trees if a literal meaning is given to the word "issued". To avoid this, it is necessary to also

22. (1964) 6 SCR 784.

23. (2000) 5 SCC 346.

24. (2002) 5 SCC 397.

appreciate the scheme of Section 35 of the Forest Act since that scheme needs to be kept in mind while considering "issued" in Section 2(f)(iii) of the Private Forests Act.

56. A notice under Section 35(3) of the Forest Act is intended to give an opportunity to the owner of a forest to show cause why, inter alia, a regulatory or a prohibitory measure be not made in respect of that forest. It is important to note that such a notice pre-supposes the existence of a forest. The owner of the forest is expected to file objections within a reasonable time as specified in the notice and is also given an opportunity to lead evidence in support of the objections. After these basic requirements are met, the owner of the forest is entitled to a hearing on the objections. This entire procedure obviously cannot be followed by the State and the owner of the forest unless the owner is served with the notice. Therefore, service of a notice issued under Section 35(3) of the Forest Act is inherent in the very language used in the provision and the very purpose of the provision.

57. Additionally, Section 35(4) of the Forest Act provides that a notice under Section 35(3) of the Forest Act may provide that for a period not exceeding six months (extended to one year in 1961) the owner of the forest can be obliged to adhere to one or more of the regulatory or prohibitory measures mentioned in Section 35(1) of the Forest Act. On the failure of the owner of the forest to abide by the said measures, he/she is liable to imprisonment for a term upto six months and/or a fine under Section 35(7) of the Forest Act. Surely, given the penal consequence of non-adherence to a Section 35(4) direction in a Section 35(3) notice, service of such a notice must be interpreted to be mandatory. On the facts of the case in Godrej, such a direction was in fact given and Godrej was directed, for a period of six months, to refrain from the cutting and removal of trees and timber and the firing and clearing of vegetation. Strictly speaking, therefore, despite not being served with Notice No. WT/53 an[illegible] o

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knowledge of it, Godrej was liable to be punished under Section 35(7) of the Forest Act if it cut or removed any tree or timber or fired or cleared any vegetation.

58. This interplay may be looked at from another point of view, namely, the need to issue a direction under Section 35(4) of the Forest Act, which can be only to prevent damage to or destruction of a forest. If the notice under Section 35(3) of the Forest Act is not served on the owner of the forest, he/she may continue to damage the forest defeating the very purpose of the Forest Act. Such an interpretation cannot be given to Section 35 of the Forest Act nor can a limited interpretation be given to the word "issued" used in the context of Section 35 of the Forest Act in Section 2(f)(iii) of the Private Forests Act.

59. Finally, Section 35(5) of the Forest Act mandates not only service of a notice issued under that provision "in the manner provided in the Code of Civil Procedure, 1908, for the service of summons" (a manner that we are all familiar with) but also its publication "in the manner prescribed by rules". This double pronged receipt and confirmation of knowledge of the show cause notice by the owner of a forest makes it clear that Section 35(3) of the Forest Act is not intended to end the process with the mere issuance of a notice but it also requires service of a notice on the owner of the forest. The need for ensuring service is clearly to protect the interests of the owner of the forest who may have valid reasons not only to object to the issuance of regulatory or prohibitory directions, but to also enable him/her to raise a jurisdictional issue that the land in question is actually not a forest. The need for ensuring service is also to prevent damage to or destruction of a forest.

60. Unfortunately, Chintamani missed these finer details because it was perhaps not brought to the notice of this Court that Section 35 of the Forest Act as applicable to the State of Maharashtra had sub-sections beyond sub-section (3). This Court proceeded on the basis of Section 35 of the Indian Forest Act, 1927 as it existed without being aware of the amendments

made by the State of Maharashtra and the erstwhile State of Bombay. This, coupled with the factually incorrect view that two hectares of forest land[25] were excluded for the benefit of the landholder led this Court to give a restrictive meaning to "issue".

61. In Chintamani this Court relied on the decision rendered in *CIT v. Bababhai Pitamberdas (HUF)*[26] to conclude that a word has to be construed in the context in which it is used in a statute and that, therefore, the decisions rendered in *Banarsi Debi v. ITO*[27] and *CWT v. Kundan Lal Behari Lal*[28] to the effect that "the word 'issue' has been construed as amounting to 'service' are not relevant for interpreting the word 'issued' used in Section 2(f) [of the Private Forests Act]." It is true, as observed above, that a word has to be construed in the context in which it is used in a statute. By making a reference in Section 2(f)(iii) of the Private Forests Act to 'issue' in Section 35 of the Forest Act, it is clear that the word is dressed in borrowed robes. Once that is appreciated (and it was unfortunately overlooked in *Chintamani*) then it is quite clear that 'issued' in Section 2(f)(iii) of the Private Forests Act must include service of the show cause notice as postulated in Section 35 of the Forest Act.

62. We have no option, under these circumstances, but to hold that to this extent, *Chintamani* was incorrectly decided and it is overruled to this extent. We may add that in *Chintamani* the land in question was factually held to be a private forest and therefore the subsequent discussion was not at all necessary.

63. Assuming that the word 'issued' as occurring in Section 2(f)(iii) of the Private Forests Act must be literally and strictly construed, can it be seriously argued that it also has reference

25. The correct factual position is that Section 2(f)(iii) of the Private Forests Act excluded "an area not exceeding two hectares".

26. 1993 Supp (3) SCC 530.

27. (1964) 7 SCR 539.

28. (1975) 4 SCC 844.

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to a show cause notice issued under Section 35(3) of the Forest Act at any given time (say in 1927 or in 1957)? Or would it be more reasonable to hold that it has reference to a show cause notice issued in somewhat closer proximity to the coming into force of the Private Forests Act, or a 'pipeline notice' as Mr. Nariman puts it?

64. In the absence of any time period having been specified for deciding a show cause notice issued under Section 35 of the Forest Act, it must be presumed that it must be decided within a reasonable time. Quite recently, in *Ramlila Maidan Incident, In re*[29] it was held: "It is a settled rule of law that wherever provision of a statute does not provide for a specific time, the same has to be done within a reasonable time. Again reasonable time cannot have a fixed connotation. It must depend upon the facts and circumstances of a given case."

65. Similarly, in *Mansaram v. S.P. Pathak*[30] it was held: "But when the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner. Exercise of power in a reasonable manner inheres the concept of its exercise within a reasonable time."

So also, in *Santoshkumar Shivgonda Patil v. Balasaheb Tukaram Shevale*[31] it was held:

> "It seems to be fairly settled that if a statute does not prescribe the time-limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the

29. (2012) 5 SCC 1 paragraph 232.

30. (1984) 1 SCC 125.

31. (2009) 9 SCC 352.

> authority, suo motu or otherwise, it is plain that exercise of such power within reasonable time is inherent therein."

66. According to the State, a show cause notice was issued to Godrej in 1957 (and assuming it was served) but no decision was taken thereon till 1975 that is for about 18 years. This is an unusually long period and undoubtedly much more than a reasonable time had elapsed for enabling the State to take a decision on the show cause notice. Therefore, following the law laid down by this Court, the show cause notice must, for all intents and purposes be treated as having become a dead letter and the seed planted by the State yielded nothing.

67. The entire problem may also be looked at from the perspective of the citizen rather than only from the perspective of the State. No citizen can reasonably be told after almost half a century that he/she was issued a show cause notice (which was probably not served) and based on the show cause notice his/her land was declared a private forest about three decades ago and that it vests in the State. Is it not the responsibility of the State to ensure that its laws are implemented with reasonable dispatch and is it not the duty of the State to appreciate that statute books are not meant to be thrown at a citizen whenever and wherever some official decides to do so? Basic principles of good governance must be followed by every member of the Executive branch of the State at all times keeping the interests of all citizens in mind as also the larger public interest.

68. In our opinion, the failure of the State to take any decision on the show cause notice for several decades (assuming it was served on Godrej) is indicative of its desire to not act on it. This opinion is fortified by a series of events that have taken place between 1957 and 2006, beginning with the consent decree of 8th January 1962 in Suit No. 413 of 1953 whereby the disputed land was recognized as not being forest land; permission to construct a large nu[mber of buildings (both] residential and otherwise) as per the [...] of

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1967 and then of 1991; exemptions granted by the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 leading to Godrej making unhindered but permissible constructions; and finally, the absence of any attempt by the State to take possession of the 'forest land' under Section 5 of the Private Forests Act for a couple of decades. The subsequent event of the State moving an application in Godavarman virtually denying the existence of a private forest on the disputed land also indicates that the State had come to terms with reality and was grudgingly prepared to accept that, even if the law permitted, it was now too late to remedy the situation. This view was emphatically reiterated by the Central Empowered Committee in its report dated 13th July 2009.

69. In its written submissions, the Bombay Environment Action Group has alleged collusion between Godrej and other appellants and the State of Maharashtra to defeat the purpose of the Private Forests Act. It is stated that prior to the said Act coming into force, the Secretary in the Revenue and Forests Department of the State Government had written to the Collector on 27th August 1975 enclosing a copy of the said Act and informing that under Section 5 thereof, the Range Forest Officers and the Divisional Forest Officers will be authorized to take possession of the private forests from the land owners. It is stated that the letter was issued to enable the Collector to coordinate with the Divisional Forest Officers to ensure that the large private forests are taken over physically as early as possible. Subsequently, by another letter (variously described as dated 3rd February 1977, 14th February 1977 and 3rd February 1979) the Secretary in the Revenue and Forests Department advised the Conservator of Forests to go slow with the taking over of possession of private forests in Thane, Kulaba and Ratnagiri districts.

70. It is difficult at this distant point of time to conclude, one way or the other, whether there was or was not any collusion (as alleged) or whether it was simply a case of poor

governance by the State. The fact remains that possession of the disputed land was not taken over or attempted to be taken over for decades and the issue was never raised when it should have been. To raise it now after a lapse of so many decades is unfair to Godrej, the other appellants, the institutions, the State and the residents of the tenements that have been constructed in the meanwhile.

71. Given this factual scenario, we agree that Section 2(f)(iii) of the Private Forests Act is not intended to apply to notices that had passed their shelf-life and that only 'pipeline notices' issued in reasonably close proximity to the coming into force of the Private Forests Act were 'live' and could be acted upon.

72. In *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai*[32] this Court dealt with the provisions of the Land Acquisition Act and held that the legislation being an expropriatory legislation, it ought to be strictly construed since it deprives a person of his/her land. In this decision, reliance was placed on *State of M.P. v. Vishnu Prasad Sharma*[33] and *Khub Chand v. State of Rajasthan*.[34] The same rationale would apply to Section 2(f)(iii) of the Private Forests Act since it seeks to take away, after a few decades, private land on the ostensible ground that it is a private forest. Section 2(f)(iii) of the Private Forests Act must not only be reasonably construed but also strictly so as not to discomfit a citizen and expropriate his/her property.

73. The fact that the Private Forests Act repealed some sections of the Forest Act, particularly Sections 34A and 35 thereof is also significant. Section 2(f)(iii) of the Private Forests Act is in a sense a saving clause for pipeline notices issued under Section 35(3) of the Forest Act but which could not, for

32. (2005) 7 SCC 627.

33. (1966) 3 SCR 557.

34. (1967) 1 SCR 120.

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want of adequate time be either withdrawn or culminate in the issuance of a regulatory or prohibitory final notification under Section 35(1) of the Forest Act, depending on the objections raised by the land owner. Looked at from any point of view, it does seem clear that Section 2(f)(iii) of the Private Forests Act was intended to apply to 'live' and not stale notices issued under Section 35(3) of the Forest Act.

The second question:

74. The next question is whether at all the unstated decision of the State to take over the so-called forest land can be successfully implemented. What the decision implies is the demolition, amongst others, of a large number of residential buildings, industrial buildings, commercial buildings, Bhabha Atomic Energy Complex and the Employees State Insurance Scheme Hospital and compulsorily rendering homeless thousands of families, some of whom may have invested considerable savings in the disputed lands. What it also implies is demolition of the municipal and other public infrastructure works already undertaken and in use, clearing away the rubble and then planting trees and shrubs to 'restore' the 'forest' to an acceptable condition. According to learned counsel for the State, this is easily achievable. But it is easier said than done. According to the Bombay Environment Action Group a patent, incurable illegality has been committed and the natural consequences (demolition) must follow. Reliance was placed, inter alia, on *K. Ramadas Shenoy v. Chief Officer*[35], *M.I. Builders v. Radhey Shyam Sahu*[36], *Pleasant Stay Hotel v. Palani Hills Conservation Council*[37] and *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra*[38] to suggest that no party should be allowed to take the benefit or advantage of their own wrong and a patent illegality cannot be cured.

75. The broad principle laid down by this Court is not in

35. (1974) 2 SCC 506.

36. (1996) 6 SCC 464.

37. (1995) 6 SCC 127.

38. (1991) 3 SCC 341.

doubt. An unauthorized construction, unless compoundable in law, must be razed. In question are the circumstances leading to the application of the principle and the practical application of the principle. More often than not, the municipal authorities and builders conspiratorially join hands in violating the law but the victim is an innocent purchaser or investor who pays for the maladministration. In such a case, how is the victim to be compensated or is he or she expected to be the only loser? If the victim is to be compensated, who will do so? These issues have not been discussed in the decisions cited by the Bombay Environment Action Group.

76. In so far as the practical application of the principle is concerned, in *Shenoy* permission was granted to convert a Kalyana Mantap-cum-Lecture Hall into a cinema hall. A reading of the decision suggests that no construction was made and it is not clear whether any money was actually spent on the project. The question of compensation, therefore, did not arise.

77. *M.I. Builders* was an extreme case in which partial demolition was ordered since the agreement between the Lucknow Nagar Mahapalika and the builder was not only unreasonable for the Mahapalika, but atrocious. In paragraph 59 of the Report, this Court said,

> "The agreement defies logic. It is outrageous. It crosses all limits of rationality. The Mahapalika has certainly acted in a fatuous manner in entering into such an agreement."

It was further held in paragraph 71 of the Report that,

> "The agreement smacks of arbitrariness, unfairness and favouritism. The agreement was opposed to public policy. It was not in public interest. The whole process of law was subverted to benefit the builder."

78. *Pleasant Stay Hotel* was a case of deliberately flouting the law. The Hotel was granted sanction for the construction of two floors but despite the rejection of its revised plan, it went ahead and constructed seven floors. This Court noted that, therefore, five floors had been cons[...]d

unauthorisedly. Under these circumstances, and subject to certain clarifications, the demolition order passed by the High Court was upheld. Payment of compensation in a case of knowingly and deliberately flouting the law does not arise.

79. In *Pratibha* the eight unauthorized floors were constructed in clear and flagrant violation and disregard of the FSI. The demolition order had already attained finality in this Court and thereafter six of the unauthorized floors had been demolished and the seventh was partially demolished. This Court found no justification to interfere with the demolitions. Again, the issue of compensation does not arise in such a situation.

80. The application of the principle laid down by this Court, therefore, depends on the independent facts found in a case. The remedy of demolition cannot be applied per se with a broad brush to all cases. The State also seems to have realized this and that is perhaps the reason why it moved the application that it did in *Godavarman*.

81. Looking at the issue from point of view of the citizen and not only from the point of view of the State or a well meaning pressure group, it does appear that even though the basic principle is that the buyer should beware and therefore if the appellants and purchasers of tenements or commercial establishments from the appellants ought to bear the consequences of unauthorized construction, the well-settled principle of caveat emptor would be applicable in normal circumstances and not in extraordinary circumstances as these appeals present, when a citizen is effectively led up the garden path for several decades by the State itself. The present appeals do not relate to a stray or a few instances of unauthorized constructions and, therefore, fall in a class of their own. In a case such as the present, if a citizen cannot trust the State which has given statutory permissions and provided municipal facilities, whom should he or she trust?

82. Assuming the disputed land was a private forest, the State remained completely inactive when construction was going on over acres and acres of land and of a very large number of buildings thereon and for a few decades. The State permitted the construction through the development plans and by granting exemption under the Urban Land (Ceiling and Regulation) Act, 1976 and providing necessary infrastructure such as roads and sanitation on the disputed land and the surrounding area. When such a large scale activity involving the State is being carried on over vast stretches of land exceeding a hundred acres, it is natural for a reasonable citizen to assume that whatever actions are being taken are in accordance with law otherwise the State would certainly step in to prevent such a massive and prolonged breach of the law. The silence of the State in all the appeals before us led the appellants and a large number of citizens to believe that there was no patent illegality in the constructions on the disputed land nor was there any legal risk in investing on the disputed land. Under these circumstances, for the State or the Bombay Environment Action Group to contend that only the citizen must bear the consequences of the unauthorized construction may not be appropriate. It is the complete inaction of the State, rather its active consent that has resulted in several citizens being placed in a precarious position where they are now told that their investment is actually in unauthorized constructions which are liable to be demolished any time even after several decades. There is no reason why these citizens should be the only victims of such a fate and the State be held not responsible for this state of affairs; nor is there any reason why under such circumstances this Court should not come to the aid of victims of the culpable failure of the State to implement and enforce the law for several decades.

83. In none of these cases is there an allegation that the State has acted arbitrarily or irrationally so as to voluntarily benefit any of the appellants. On the contrary, the facts show that the appellants followed the due le[illegible]g

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the constructions that they did and all that can be said of the State is that its Rip Van Winkleism enabled the appellants to obtain valid permissions from various authorities, from time to time, to make constructions over a long duration. The appellants and individual citizens cannot be faulted or punished for that.

84. These appeals raise larger issues of good administration and governance and the State has, regrettably, come out in poor light in this regard. It is not necessary for us to say anything more on the subject except to conclude that even if the State were to succeed on the legal issues before us, there is no way, on the facts and circumstances of these appeals, that it can reasonably put the clock back and ensure that none of the persons concerned in these appeals is prejudiced in any manner whatsoever.

Conclusion:

85. Accordingly, for the reasons given, all these appeals are allowed and the impugned judgment and order of the Bombay High Court is set aside in all of them and the notices impugned in the writ petitions in the High Court are quashed.

Orders in Interlocutory Applications

Civil Appeals arising out of SLP (C) Nos.25747/2010 and 25748/2010

86. Delay condoned.

SLP (C) No.34691/2011

87. Permission to file the special leave petition is declined. However, the petitioner is at liberty to take such appropriate action as is now permissible under the law.

Civil Appeals arising out of S.L.P. (C) Nos. 10677 of 2008, 10760 of 2008, 11509 of 2008 and 11640 of 2008

88. Applications for impleadment/intervention stand allowed.

Civil Appeals arising out of S.L.P. (C) Nos. 10760 of 2008 and 11509 of 2008

89. Applications for modification of the order dated 5th May, 2008 in these appeals and the applications for directions in all other appeals are disposed of in terms of the judgment pronounced.

D.G. Appeals allowed.

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AVEEK SARKAR & ANR.
v.
STATE OF WEST BENGAL & ORS.
(Criminal Appeal No. 902 of 2004)

FEBRUARY 03, 2014

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

CODE OF CRIMINAL PROCEDURE, 1973: s.482 - Quashing of proceedings - German magazine published an article with a picture of world renowned Tennis player, posing nude and covering the breast of his dark-skinned fiancée with his hands which was photographed by none other than her father - The couple spoke against apartheid and proclaimed that true love has no boundaries - The article reproduced in Indian magazine and newspaper - Criminal proceedings under ss.292, IPC and u/ss. 3, 4 and 6 of Indecent Representation of Women (Prohibition) Act, 1986 against the editor and publisher of magazine and newspaper - High Court declining to quash the proceedings - On appeal, Held: While judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary values and national standards and not the standard of a group of susceptible or sensitive persons - Hicklin test is not the correct test to be applied to determine "what is obscenity" - Those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, however, obscenity has to be judged from the point of view of an average person, by applying contemporary community standards - The said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large - The message it conveyed was eradicate evil of racism and apartheid in the society and promote love and marriage between white skinned man and a black skinned woman - When viewed in

that angle, the picture or the article cannot be said to be objectionable so as to initiate proceedings u/s.292 IPC or u/s.4 of the Act, 1986 - Magistrate, without appreciation of background in which the photograph was shown, proposed to initiate prosecution proceedings against the appellants - High Court should have exercised powers u/s.482 to secure the ends of justice - Criminal proceedings initiated against the appellants set aside - Indecent Representation of Women (Prohibition) Act, 1986 - ss.3, 4, 6 - Penal Code, 1860 - s.292.

A German magazine published an article with a picture of world renowned Tennis player (Boris), posing nude and covering the breast of his dark-skinned fiancée (Barbara) with his hands which was photographed by none other than her father. The couple spoke freely against apartheid and proclaimed that true love has no boundaries. The article stated that the purpose of the photograph was also to signify that love champions over hatred. The article was reproduced in "Sports World", a widely circulated magazine published in India and then in Anandabazar Patrika, a newspaper having wide circulation in Kolkata.

A Kolkata lawyer filed a complaint under Section 292, IPC before the Magistrate against the appellants, the Editor and the Publisher and Printer of the newspaper as well as against the Editor of the Sports World. The complaint stated that the nude photograph would have effect to corrupting young minds, both children and youth of this country, and was against the cultural and moral values of our society and that unless such types of obscene photographs are censured and banned and accused persons are punished, the dignity and honour of our womanhood would be in jeopardy. The complainant also urged that the accused persons should not only be prosecuted under Section 292 IPC, but also be prosecuted under Section [illegible]**t**

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Representation of Women (Prohibition) Act, 1986, since the photograph prima facie gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences. The Magistrate held that a prima facie case was made out against the accused persons under Section 292 IPC and issued summons against all the accused persons.

The accused persons on 5.3.1993 filed an application before the Court for dropping the proceedings stating that there was no illegality in reproducing news item in the Sports World as well as in the Anandabazar Patrika and photograph appeared in a magazine 'STERN" published in Germany. Further, it was pointed out that the said magazine was never banned entry into India and was never considered as 'obscene', especially when Section 79, IPC states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

The Magistrate held the accused persons should be examined under Section 251 Cr.P.C. and ordered that they would be put to face the trial for the offence punishable under Section 292 IPC alternatively under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986. The appellants filed application before the High Court under Section 482 Cr.P.C. for quashing the proceedings. Before the High Court, it was pointed out that the Magistrate had not properly appreciated the fact that there was no ban in importing the German sports magazine 'STERN" into India. Consequently, reproduction of any picture would fall within the general exception contained in Section 79 IPC. Referring to the picture, it was pointed out that the picture only demonstrated the protest lodged by the tennis

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player as well as his fiancée against 'apartheid" and those facts were not properly appreciated by the Magistrate. Further, it was also pointed out that the offending picture could not be termed as obscene inasmuch as nudity per se was not obscene and the picture was neither suggestive nor provocative in any manner and would have no affect on the minds of the youth or the public in general. The High Court declined to quash the proceedings against which the instant appeal was preferred.

Allowing the appeal, the Court

HELD:

TEST OF OBSCENITY AND COMMUNITY STANDARDS

1.1. The Constitution Bench in the year 1965 in *Ranjit D. Udeshi indicated that the concept of obscenity would change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. Judgment referred to several examples of changing notion of obscenity. Again in the year 1969, in Chandrakant Kalyandas Kakodar, this Court reiterated the principle that the standards of contemporary society in India are also fast changing. Again in 2010, the principle of contemporary community standards and social values were reiterated in *S. Khushboo*. **[Para 12, 13, 14] [278-A-B, D, F]**

1.2. In *Ranjit D. Udeshi,* **the Court highlighted the delicate task to be discharged by the Courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292, IPC and the Court held that the Penal Code does not define the word obscene and this delicate task of how to distinguish between that which is artistic and th**

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has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the court to reach a decision on a constitutional issue of a most far reaching character and it must beware that it may not lean too far away from the guaranteed freedom. Applying this test, to the book "Lady Chatterley's Lover", this Court in Ranjit D. Udeshi held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity. [paras 15, 16] [278-F-H; 279-A-E]

1.3. The novel "Lady Chatterley's Lover" which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England, the question of obscenity is left to the Jury. This case is of the year 1994, but it is 2014 now and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary values and national standards and not the standard of a group of susceptible or sensitive persons. [para 17, 19] [279-F; 281-F]

Samaresh Bose v. Amal Mitra **(1985) 4 SCC 289: 1985 (3) Suppl. SCR 17;** *S. Khushboo V. Kanniammal* **(2010) 5 SCC 600: 2010 (5) SCR 322 ;** *Ranjit D. Udeshi v. State of Maharashtra* **AIR 1965 SC 881: 1970 (2) SCR 80;** *Chandrakant Kalyandas Kakodar v. State of Maharashtra* **1969 (2) SCC 687: 1970 (2) SCR 80 - relied on.**

R. v. Penguin Books Ltd. **(1961 Crl. Law Review 176 - referred to.**

HICKLIN TEST:

2. In the United Kingdom, way back in 1868, the Court laid down the Hicklin test in Regina v. Hicklin . Hicklin test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. United States, however, made a marked departure. Of late, it felt that the Hicklin test is not correct test to apply to judge what is obscenity. In Roth v. United States, the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of "exciting lustful thoughts" were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards. In Canada also, the majority held in Brodie v. The Queen that D.H. Lawrence's novel "Lady Chatterley's Lover" was not obscene within the meaning of the Canadian Criminal Code. The Supreme Court of Canada in Regina v. Butler held that the dominant test is the "community standards problems test". The Court held that explicit sex that is not violent and neither degrading nor dehumanizing is generally toler[illegible]n

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society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as 'obscene', the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue". Earlier in Towne Cinema Theatres Ltd. v. The Queen, the Canadian Court applied the community standard test and not Hicklin test. [paras 20-23] [281-G; 282-B-H; 283-A]

Brodie v. The Queen **1962 SCR 681;** *Regina v. Butler* **(1992) 1 SCR 452;** *Towne Cinema Theatres Ltd. v. The Queen* **(1985) 1 SCR 494 - relied on.**

Regina v. Hicklin **(1868 L.R. 2 Q.B. 360);** *Roth v. United States* **354 U.S. 76 (1957) - referred to.**

COMMUNITY STANDARD TEST:

3. Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292, IPC, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. Therefore, the "community standard test" is to be applied rather than "Hicklin test" to determine what is "obscenity". A bare reading of Sub-section (1) of Section 292 would make clear that a picture or article shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards. [para 24] [283-B-G]

MESSAGE AND CONTEXT

4. Applying the community tolerance test, the photograph is not suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Fultus was fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph had no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall. The said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, posing nude, dropping of harassment, battling racism in Germany. Boris Becker himself in the article published in the German magazine, spoke of the racial discrimination prevalent in Germany and the article highlighted his protests against racism in Germany. The message, the photograph wants to convey is that the colour of skin matters little and love champions [illegible] e

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promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman. Therefore, the photograph and the article in the light of the message it wanted to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white skinned man and a black skinned woman. When viewed in that angle, the picture or the article which was reproduced by Sports World and the Anandabazar Patrika cannot be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986. No offence was committed under Section 292 IPC and then the question whether it falls in the first part of Section 79 IPC has become academic. The Magistrate, without proper application of mind or appreciation of background in which the photograph was shown, proposed to initiate prosecution proceedings against the appellants. The Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the appellants to face the trial. The High Court should have exercised powers under Section 482 Cr.P.C. to secure the ends of justice. The criminal proceedings initiated against the appellants are set aside. [Paras 27-31] [285-D-H; 286-B-G]

Bobby Art International & Ors. v. Om Pal Singh Hoon **(1996) 4 SCC 1: 1996 (2) Suppl. SCR 136 ;** *Ajay Goswami v. Union of India* **(2007) 1 SCC 143: 2006 (10) Suppl. SCR 770 - relied on.**

Case Law Reference:

1970 (2) SCR 80	**relied on**	**Para 10**
1970 (2) SCR 80	**relied on**	**Para 10**
1985 (3) Suppl. SCR 17	**relied on**	**Para 14**
2010 (5) SCR 322	**relied on**	**Para 14**
1962 SCR 681	**relied on**	**Para 22**
(1992) 1 SCR 452	**relied on**	**Para 22**
(1985) 1 SCR 494	**relied on**	**Para 23**
196 (2) Suppl. SCR 136	**relied on**	**Para 25**
2006 (10) Suppl. SCR 770	**relied on**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 902 of 2004.

From the Judgment and Order dated 17.03.2004 of the High Court at Calcutta in Criminal Revision No. 1591 of 1994.

Pradeep Ghosh, Amar Dave, Abhishek Roy and Kartik Bhatnagar (for Manik Karanjawala) for the Appellants.

Mohit Paul, Shagun Matta, (for Anip Sachthey), V.D. Khanna for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. A German magazine by name "STERN" having worldwide circulation published an article with a picture of Boris Becker, a world renowned Tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The article states that, in an interview, both Boris Becker and Barbaba Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. Article picturises Boris Becker as a strident protester of the pernicious practice of "Apartheid". Further, it was stated that the purpose of the photograph was also to signify that love champions over hatred.

2. "Sports World", a widely circulate d

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in India reproduced the article and the photograph as cover story in its Issue 15 dated 05.05.1993 with the caption

> "Posing nude dropping out of tournaments, battling Racism in Germany. Boris Becker explains his recent approach to life" - Boris Becker

Unmasked.

3. Anandabazar Patrika, a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the above-mentioned photograph as well as the article on 06.05.1993, as appeared in the Sports World.

4. A lawyer practicing at Alipore Judge's Court, Kolkata, claimed to be a regular reader of Sports World as well as Anandabazar Patrika filed a complaint under Section 292 of the Indian Penal Code against the Appellants herein, the Editor and the Publisher and Printer of the newspaper as well as against the Editor of the Sports World, former Captain of Indian Cricket Team, late Mansoor Ali Khan of Pataudi, before the Sub-Divisional Magistrate at Alipore. Complaint stated that as an experienced Advocate and an elderly person, he could vouchsafe that the nude photograph appeared in the Anandabazar Patrika, as well as in the Sports World, would corrupt young minds, both children and youth of this country, and is against the cultural and moral values of our society. The complainant stated that unless such types of obscene photographs are censured and banned and accused persons are punished, the dignity and honour of our womanhood would be in jeopardy. The complainant also deposed before the Court on 10.5.1993, inter alia, as follows :

> "………That the Accused No.1 and the Accused No.2 both the editors of Ananda Bazar Patrika and Sports World respectively intentionally and deliberately with the help of the Accused No.3 for the purpose of their business, particularly for sale of their papers and magazines published, printed and publicly exhibited and circulated and also sold their papers and magazines namely, Anand Bazar Patrika and Sports World dated 6.5.1993 wherein the photograph of world class Lawn Tennis player namely, Boris Becker and his girl friend German Film Actress Miss Barbara have been published in a manner in an inter-twined manner wherein Boris Becker placed the hand upon the breast of Miss Barbara which have annexed in my petition with a caption 'Boris Backer Un-masked' which is absolutely obscene and lascivious in nature and which is a criminal offence. The obscene and about nude photographs show published by the accused persons in the mind of myself as well as society of different age group have a very bad impact…….."

5. The learned Magistrate on 10.5.1993 passed the following order in Criminal Case Ref. Case No.C.796 of 1993 :

> 'Complainant is present. He is examined and discharged. No other PWs are present. It appears that a prima facie case is made out against the accused persons under Section 292 IPC. Issue summons against all the accused persons fixing 17.6.1993 for S.P. and appearance. Requisite at one."

6. Complainant also urged that the accused persons should not only be prosecuted under Section 292 IPC, but also be prosecuted under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986, since the photograph prima facie gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences. The accused persons on 5.3.1993 filed an application before the Court for dropping the proceedings stating that there was no illegality in reproducing in the Sports World as well as in the Anandabazar Patrika of the news item and photograph appeared in a magazine 'STERN" published

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in Germany. Further, it was pointed out that the said magazine was never banned entry into India and was never considered as 'obscene', especially when Section 79 of Indian Penal Code states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

7. The Court after seeing the photographs and hearing the arguments on either side, held as follows :-

> "Moreover, until evidence comes in it will not be proper to give any opinion as to the responsibility of the accused persons. But I feel it pertinent to mention that though the Section 292 does not define word 'obscene', but my rids of precedents have clustered round on this point and being satisfied with the materials on record, pernicious effect of picture in depraving and debauching the mind of the persons into whose hands it may come and also for other sufficient reasons to proceed further this Court was pleased to issue process against the accused persons under Section 292 I.P.C. At present having regard to the facts of the case, I find the matter merits interference by not dropping the proceedings as prayed for. It is too early to say that the accused persons are entitled to get benefit of Section 79 I.P.C."

8. The Magistrate after holding so, held the accused persons to be examined under Section 251 Cr.P.C. and ordered that they would be put to face the trial for the offence punishable under Section 292 IPC alternatively under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

9. The Appellants herein preferred Criminal Revision No.1591 of 1994 before the High Court of Calcutta under Section 482 Cr.P.C. for quashing the proceedings in Case No.C.796 of 1993 (corresponding to T.R. No.35 of 1994)

pending before the learned Judicial Magistrate Court, Alipore. Before the High Court, it was pointed out that the Magistrate had not properly appreciated the fact that there was no ban in importing the German sports magazine 'STERN" into India. Consequently, reproduction of any picture would fall within the general exception contained in Section 79 IPC. Reference was also made to letter dated 20th July, 1993 addressed by the Assistant Editor, Sports World to the Collector, Calcutta Customs and a copy of the letter dated 4.10.1993 sent by the Deputy Collector, Calcutta Customs to the Assistant Editor, Sports World. Referring to the picture, it was pointed out that the picture only demonstrates the protest lodged by Boris Becker as well as his fiancée against 'apartheid" and those facts were not properly appreciated by the learned Magistrate. Further, it was also pointed out that the offending picture could not be termed as obscene inasmuch as nudity per se was not obscene and the picture was neither suggestive nor provocative in any manner and would have no affect on the minds of the youth or the public in general. Further, it was also pointed out that the learned Magistrate should not have issued summons without application of mind. The High Court, however, did not appreciate all those contentions and declined to quash the proceedings under Section 483 Cr.P.C., against which this appeal has been preferred.

10. Shri Pradeep Ghosh, learned senior counsel, appearing for the Appellants, submitted that the publication in question as well as the photograph taken, as a whole and in the background of facts and circumstances, cannot be said to be per se "obscene" within the meaning of Section 291(1) IPC so as to remand a trial of the Appellants in respect of the alleged offence under Section 292(1) IPC. The learned counsel pointed out that obscenity has to be judged in the context of contemporary social mores, current socio-moral attitude of the community and the prevalent norms of acceptability/ susceptibility of the community, in relation to matters in issue. In support of this contention, relianc e

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Constitution Bench judgment of this Court in *Ranjit D. Udeshi v. State of Maharashtra* AIR 1965 SC 881. Reference was also made to the judgment of this Court in *Chandrakant Kalyandas Kakodar v. State of Maharashtra* 1969 (2) SCC 687. Few other judgments were also referred to in support of his contention. Learned senior counsel also pointed out that the learned Magistrate as well as the High Court have completely overlooked the context in which the photograph was published and the message it had given to the public at large. Learned senior counsel also pointed out that the photograph is in no way vulgar or lascivious. Learned senior counsel also pointed out that the Courts below have not properly appreciated the scope of Section 79 IPC and that the Appellants are justified in law in publishing the photograph and the article which was borrowed from the German magazine. Learned senior counsel also pointed out that such a publication was never found to be obscene even by the State authorities and no FIR was ever lodged against the Appellants and a private complaint of such a nature should not have been entertained by the learned Magistrate without appreciating the facts as well as the law on the point. Learned senior counsel pointed out that the High Court ought to have exercised jurisdiction under Section 482 Cr.P.C.

11. Shri Mohit Paul, learned counsel, appearing for the Respondents, submitted that the Courts below were justified in holding that it would not be proper to give an opinion as to the culpability of the accused persons unless they are put to trial and the evidence is adduced. Learned counsel pointed out that the question whether the publication of the photograph is justified or not and was made in good faith requires to be proved by the Appellants since good faith and public good are questions of fact and matters for evidence. Learned counsel pointed out that the learned Magistrate as well as the High Court was justified in not quashing the complaint and ordering the Appellants to face the trial.

TEST OF OBSCENITY AND COMMUNITY STANDARDS

12. Constitution Bench of this Court in the year 1965 in *Ranjit D. Udeshi* (supra) indicated that the concept of obscenity would change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. Judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows :-

> "…. The world, is now able to tolerate much more than formerly, having coming indurate by literature of different sorts. The attitude is not yet settled….."

This is what this Court has said in the year 1965.

13. Again in the year 1969, in *Chandrakant Kalyandas Kakodar* (supra), this Court reiterated the principle as follows:-

> "The standards of contemporary society in India are also fast changing. "

14. Above mentioned principle has been reiterated in *Samaresh Bose v. Amal Mitra* (1985) 4 SCC 289 by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in *S. Khushboo V. Kanniammal* (2010) 5 SCC 600.

15. This Court in *Ranjit D. Udeshi* (supra) highlighted the delicate task to be discharged by the Courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292 of the Code and the Court held as follows :

> "The Penal Code does not define the word obscene and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of a genera[illegible] st

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admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the court to reach a decision on a constitutional issue of a most far reaching character and it must beware that it may not lean too far away from the guaranteed freedom."

16. Applying the above test, to the book "Lady Chatterley's Lover", this Court in *Ranjit D. Udeshi* (supra) held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity.

17. The novel "Lady Chatterley's Lover" which came to be condemned as obscene by this Court was held to be not obscene in England by Central Criminal Court. In England, the question of obscenity is left to the Jury. Byrne, J., learned Judge who presided over the Central Criminal Court in *R. v. Penguin Books Ltd.* (1961 Crl. Law Review 176) observed as follows :-

"In summing up his lordship instructed the jury that: They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: was the book obscene? Was its effect taken as a whole to tend to deprave and corrupt persons who were likely, having

regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the defendant has established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit."

18. Later, this Court in *Samaresh Bose* (supra), referring to the Bengali novel "Prajapati" written by Samaresh Bose, observed as follows :-

"35. .... We are not satisfie k

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that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity..............."

We have already indicated, this was the contemporary standard in the year 1985.

19. We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

HICKLIN TEST:

20. In the United Kingdom, way back in 1868, the Court laid down the Hicklin test in *Regina v. Hicklin* (1868 L.R. 2 Q.B.360), and held as follows :-

"The test of obscenity is whether the tendency of the matter

charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

21. Hicklin test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. United States, however, made a marked departure. Of late, it felt that the Hicklin test is not correct test to apply to judge what is obscenity. In *Roth v. United States* 354 U.S. 476 (1957), the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of "exciting lustful thoughts" were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

22. In Canada also, the majority held in *Brodie v. The Queen* (1962 SCR 681) that D.H. Lawrence's novel "Lady Chatterley's Lover" was not obscene within the meaning of the Canadian Criminal Code.

23. The Supreme Court of Canada in *Regina v. Butler* (1992) 1 SCR 452, held that the dominant test is the "community standards problems test". The Court held that explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in the Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as 'obscene', the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue". Earlier in *Towne Cinema Theatres Ltd. v. The Queen* (1985) 1 S[illegible]n

Court applied the community standard test and not Hicklin test.

COMMUNITY STANDARD TEST:

24. We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292 of the Indian Penal Code, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than "Hicklin test" to determine what is "obscenity". A bare reading of Sub-section (1) of Section 292 , makes clear that a picture or article shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

MESSAGE AND CONTEXT

25. We have to examine the question of obscenity in the context in which the photograph appears and the message it

wants to convey. In Bobby Art International & Ors. v. Om Pal Singh Hoon (1996) 4 SCC 1, this Court while dealing with the question of obscenity in the context of film called Bandit Queen pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The Court expressed the following view :-

> "First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film "Schindler's List" was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. "Bandit Queen" tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped

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indignities upon her."

[Emphasis Supplied]

26. In *Ajay Goswami v. Union of India* (2007) 1 SCC 143, while examining the scope of Section 292 IPC and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, this Court held that the commitment to freedom of expression demands that it cannot be suppressed, unless the situations created by it allowing the freedom are pressing and the community interest is endangered.

27. We have to examine whether the photograph of Boris Becker with his fiancée Barbara Fultus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 IPC. Applying the community tolerance test, we are not prepared to say such a photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Fultus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall.

28. We may also indicate that the said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, posing nude, dropping of harassment, battling racism in Germany. Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany. Boris Becker himself puts it, as quoted in the said article:

"the nude photos were supposed to shock, no doubt about it....... What I am saying with these photos is that an inter-racial relationship is okay."

29. The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. Picture promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman.

30. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white skinned man and a black skinned woman. When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by Sports World and the Anandabazar Patrika be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

31. We have found that no offence has been committed under Section 292 IPC and then the question whether it falls in the first part of Section 79 IPC has become academic. We are sorry to note that the learned Magistrate, without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the Appellants. Learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the Appellants to face the trial. The High Court, in our view, should have exercised powers under Section 482 Cr.P.C. to secure the ends of justice.

32. We are, therefore, inclined to allow this appeal and set aside the criminal proceedings initiated against the Appellants. The Appeal is allowed as above.

D.G. Appeal allowed.

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BACHU DAS
v.
STATE OF BIHAR AND OTHERS
(Criminal Appeal No. 314 of 2014)

FEBRUARY 03, 2014

[P. SATHASIVAM, CJI AND RANJAN GOGOI, J.]

Code of Criminal Procedure, 1973: s.438 - Anticipatory bail - Complaint u/s.3 of SC/ST Act and ss.147, 148, 149, 323, 448 IPC - Order of Sessions Judge that on perusal of complaint and statement of witnesses examined during enquiry, prima facie case made out against accused under the alleged offences - However, grant of anticipatory bail by High Court - On appeal by complainant, held: The scope of s.18 of the SC/ST Act r/w s.438 of the Code is such that it creates a specific bar in the grant of anticipatory bail - When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is not made out - In the light of order of sessions judge and statutory provision, the High Court has committed error in granting Anticipatory bail - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - s.3.

Vilas Pandurang Pawar and Anr. vs. State of Maharashtra and Ors. **2012 (7) SCC 795 - relied on.**

Case Law Reference:

2012 (7) SCC 795	**relied on**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 314 of 2014.

From the Judgment and Order dated 05.05.2010 of the High Court of Judicature at Patna in Cr. Misc. No. 16213 of 2010.

Anuj Prakash, Samir Ali Khan for the Appellant.

Gopal Singh, Manish Kumar, Ravi Shankar Kumar, B.K. Choudhary, Nitin Kumar Thakur for the Respondents.

The following Order of the Court was delivered by

O R D E R

1. Heard all the parties concerned.

2. Leave granted.

3. The complainant, aggrieved by the impugned order of the High Court dated 5th May, 2010, granting anticipatory bail to the respondent Nos.2 to 8 (accused Nos.1 to 7), has filed the above appeal.

4. Learned counsel for the appellant by drawing our attention to the relevant materials, namely, the complaint, the statement of the complainant and four witnesses, as well as the relevant provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, (for short 'the SC/ST Act'), submitted that the High Court is not justified in granting anticipatory bail, particularly, in the light of the factual conclusion arrived at by the Sessions Judge, Saran at Chapra, Bihar on 28th November, 2008.

5. The learned counsel appearing for the State supported the claim of the appellant.

6. Learned counsel appearing for the respondents/ accused submitted that from the day, namely, 26th February, 2010, when the High Court granted anticipatory bail to these persons, no untoward incident occurred and cooperated with Investigating Officer. He also brought to our notice the earlier order of the High Court dated 26th February, 2010, wherein it is mentioned that there is serious land dispute between the parties and use of filthy language by cast name, is unacceptable. Relying on this order, the counsel for the accused submitted that no interference is called for in the order passed by the High Court.

7. As rightly pointed out by the lear g

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for the appellant/complainant, in the order dated 28th November, 2008, the learned Sessions Judge, Saran at Chapra, after taking note of all the materials, has concluded as under:

> "Having considered the submissions urged at the bar, going through the impugned order and L.C.R. and finding that the learned Magistrate after perusal of complaint petition, statement of complainant and of four witnesses examined during enquiry has come to the conclusion that against the accused persons offence u/s 147/148/149/323/448 of the I.P.C. and u/s 3 of the S.C. and S.T. Act is made out which appears quite legal, proper and correct one. At this stage the Magistrate is required only to see as to whether on the basis of the materials available on the record prima facie case is made out or not? I have also perused the materials placed on the record and the Court is of the opinion that against the accused persons prima facie case as found by the learned Magistrate is made out and the accused persons have rightly been summoned. In the result finding no merit in this Criminal Revision the same is hereby dismissed."

8. It is clear that the learned Magistrate carefully perused the complaint petition, as well as the statement of the complainant and four witnesses examined during enquiry and arrived a prima facie conclusion against the accused persons that offence under Sections 147, 148, 149, 323, 448 I.P.C. and Section 3 of the SC/ST Act, is made out. In such circumstance and in view of the bar under Section 18 of the SC/ST Act, the learned counsel relying on the decision of this Court reported in (2012) 7 SCC 795 [Vilas *Pandurang Pawar and Another v. State of Maharashtra and Others*], submitted that the High Court is not justified in granting anticipatory bail. In similar circumstance, this Court has considered the offence under Section 3(1), as well as the bar provided under Section 18 of the SC/ST Act and concluded as under:

> "Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.
>
> The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence."

9. In the light of the factual details, as found in the order of the learned Sessions Judge, Saran at Chapra, dated 28th November, 2008, and in the light of the statutory provision as interpreted by this Court in the above cited decision, we are satisfied that the High Court has committed an error in granting anticipatory bail. Accordingly, the said order is set aside. The respondent Nos.2 to 8/accused are granted four weeks' time from today to surrender before the appropriate Court and seek for regular bail.

10. It is made clear that we have not gone into the merits of their claim and it is open to the respondents/accused to put forth their stand, including their claim that during the interregnum period, namely, 26.02.2010, the date on which the High Court has granted the anticipatory bail and till today, no untoward incident occurred at their instances.

11. With the above observation, the appeal is allowed.

D.G. d

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