M/S MAMTA SURGICAL COTTON INDUSTRIES, RAJASTHAN

v.

ASSISTANT COMMISSIONER (ANTI-EVASION), BHILWARA, RAJASTHAN

(Civil Appeal No. 7084 of 2005 etc.)

JANUARY 23, 2014

[H.L. DATTU AND S.A. BOBDE, JJ.]

RAJASTHAN SALES TAX ACT, 1994:

s. 2 (27) - 'Manufacture' - 'Surgical cotton' processed from cotton - Assessment Year 1992-93 -- Entry no. 16 - "Cotton, that is to say, all kinds of cotton (indigenous or imported), whether ginned or unginned, baled, pressed or otherwise including Cotton waste" -- Assessee purchasing raw cotton by paying tax at the rate of 4 per cent - Processing it into 'surgical cotton' - Held: "Surgical cotton" is a separately identifiable and distinct commercial commodity manufactured out of raw cotton and, therefore, ceases to be cotton under Entry 16 - In the instant case, after going through the various steps that are carried out by assessee for getting surgical cotton from raw cotton, it can be certainly said that cotton has undergone a change into a new commercially identifiable commodity which has a different name, different character and different use - The process of transformation is not merely processing to improve quality or superficial attributes of the raw cotton - Cotton looses its original form and is marketed as a commercially different and distinct product - As regards the claim of set off against tax paid on raw cotton, assessee is at liberty to raise the question before appropriate authorities in accordance with law -- Judgment and order passed by High court in so far as Assessment Year 1992-93 is concerned, confirmed.

s.2(27) - 'Manufacture' - Held: "Manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use - While mere improvement in quality does not amount to manufacture, when the change or a series of changes transform the commodity such that commercially it can no longer be regarded as the original commodity but recognised as a new and distinct article.

Entry No. 16 - Surgical cotton' -- Assessment Years 1993-94 to 1998-99 - Held: In the year 1993, by an amendment notification F.4 (56) FD/Gr.IV/82-2 (S.O. No. 8) dated 12.04.1993, legislature has consciously included "absorbent cotton wool I.P." in Entry 16 and it was retained for all subsequent years till Assessment Year 1998-99 -- The commodity "absorbent cotton wool I.P." as included in the relevant entries is the same as "surgical cotton" which the assessee manufactures - The absorbent cotton wool I.P. is a technical name of the cotton which is sold in the market and commonly known as surgical cotton - By introducing the word "including" immediately after detailing the definition of cotton, legislature has expanded the meaning of expression "cotton" for the purposes of the Act - While the natural import suggests and prescribes only unmanufactured cotton in all forms, commodities "absorbent cotton wool I.P." and "cotton waste" manufactured out of "cotton" are intentionally and purposefully included in the relevant entries alongwith cotton in its ordinary meaning - "Surgical cotton/absorbent cotton wool I.P." is also "cotton" for the purposes of relevant entries in the notifications for assessment years 1993-94 to 1998-99 and, therefore, is liable to exemption from levy of tax under the Act - Judgment and order passed by High Court for assessment years 1993-1994 to 1998-1999 is set aside.

Words and Phrases:

Word "include" - Held: Is gener[illegible]e

meaning of the words or phrases occurring in the body of statute, and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include - When word "includes" is used in definition, legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive - The term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise.

Empire Industries Limited and Ors. v. Union of India and Ors., **(1985) 2 SCC 314;** *CCE v. Osnar Chemical (P) Ltd.* **2012 (2) SCR 1035 = (2012) 2 SCC 282;** *Jai Bhagwan Oil & Flour Mills v. Union of India* **2009 (7) SCR 409 = (2009) 14 SCC 63;** *Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise,* **2007(4) SCR 109 = (2007) 4 SCC 155;** *CIT v. Tara Agencies* **2007 (8) SCR 136 = (2007) 6 SCC 429;** *Ujagar Prints (II) v. Union of India,* **1986 Supp SCC 652;** *Saraswati Sugar Mills v. Haryana State Board,* **1991 (1) Suppl. SCR 523 = (1992) 1 SCC 418;** *Gramophone Co. of India Ltd. v. Collector of Customs,* **(2000) 1 SCC 549;** *CCE v. Rajasthan State Chemical Works,* **1991 (1) Suppl. SCR 124 = (1991) 4 SCC 473;** *CCE v. Technoweld Industries,* **(2003) 11 SCC 798;** *Metlex (I) (P) Ltd. v. CCE,* **(2005) 1 SCC 271;** *Aman Marble Industries (P) Ltd. v. CCE,* **(2005) 1 SCC 279;** *Shyam Oil Cake Ltd. v. CCE* **2004 (6) Suppl. SCR 346 = (2005) 1 SCC 264;** *South Bihar Sugar Mills Ltd. v. Union of India,* **(1968) 3 SCR 21;** *Laminated Packings (P) Ltd. v. CCE* **1990 (3) SCR 630 = (1990) 4 SCC 51;** *Dy. CST v. Coco Fibres,* **1990 (3) Suppl. SCR 419 = 1992 Supp (1) SCC 290;** *CST v. Jagannath Cotton Co.* **1995 (2) Suppl. SCR 390 = (1995) 5 SCC 527;** *Ashirwad Ispat Udyog v. State Level Committee,* **1998(2) Suppl. SCR 542 = (1998) 8 SCC 85;** *State of Maharashtra v. Mahalaxmi Stores,* **2002 (4) Suppl.**

SCR 292 = (2003) 1 SCC 70; *Aspinwall & Co. Ltd. v. CIT,* **2001 (2) Suppl. SCR 559 = (2001) 7 SCC 525;** *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO,* **(1965) 1 SCR 900;** *CCE v. Kiran Spg. Mills,* **1988 (2) SCR 1006 = (1988) 2 SCC 348 and** *Park Leather Industry (P) Ltd. v. State of U.P.* **2001 (1) SCR 1035 = (2001) 3 SCC 135;** *Union of India v. Delhi Cloth & General Mills Co. Ltd.,* **1963 Supp (1) SCR 586;** *Union of India v. J.G. Glass Industries Ltd.* **1997 (6) Suppl. SCR 345 = (1998) 2 SCC 32;** *Devi Das Gopal Krishnan v. State of Punjab,* **(1967) 3 SCR 557;** *CCE v. S.R. Tissues (P) Ltd.* **2005 (2) Suppl. SCR 355 = (2005) 6 SCC 310,** *Brakes India Ltd. v. Supdt. of Central Excise,* **(1997) 10 SCC 717,** *Kores India Ltd. v. CCE,* **2004 (6) Suppl. SCR 320 = (2005) 1 SCC 385,** *Standard Fireworks Industries v. Collector of Central Excise,* **(1987) 1 SCC 600;** *South Gujarat Roofing Tiles Manufacturers Association and anr. v. State of Gujarat and Anr.,* **1977 (1) SCR 878 = (1976) 4 SCC 601;** *RBI v. Peerless General Finance & Investment Co. Ltd.* **1987 (2) SCR 1 = (1987) 1 SCC 424;** *Karnataka Power Transmission Corpn. v. Ashok Iron Works (P) Ltd.* **2009 (1) SCR 1109 = (2009) 3 SCC 240;** *Commr. of Customs v. Caryaire Equipment India (P) Ltd.,* **(2012) 4 SCC 645;** *U.P. Power Corpn. Ltd. v. NTPC Ltd.,* **(2014) 1 SCC 371;** *Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd.,* **2007 (1) SCR 174 = (2007) 3 SCC 607;** *Dadaji v. Sukhdeobabu; Mahalakshmi Oil Mills v. State of A.P.; Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union* **2007 (4) SCR 347 = (2007) 4 SCC 685- referred to.**

McNichol and Anor v. Pinch, [1906] 2 KB 352; East Texas Motor Freight Lines v. Frozen Food Express, 351 US 49; Dilworth v. Commr. of Stamps, **(1899) AC 99 - referred to.**

Collins English Dictionary; Oxford Dictionary of English;Encarta dictionary ; Principles of Statutory Interpretation (12th Edn., 2010) by Ju...

181 **- referred to.**

"Durga Cotton Industries Vs. State of Rajasthan and Ors. **1994 (1) WLC 696 - approved.**

CST v. Lal Kunwa Stone Crusher (P) Ltd., **2000 (2) SCR 276 = (2000) 3 SCC 525;** *Sterling Foods v. State of Karnataka* **1986 (3) SCR 367 = (1986) 3 SCC 469 and** *CST v. Pio Food Packers* **1980 SCR 1271 = 1980 Supp SCC 174 - cited.**

Case Law Reference:

[1906] 2 KB 352	**referred to**	**Para 16**
2000 (2) SCR 276	**cited**	**para 10**
1986 (3) SCR 367	**cited**	**para 10**
1980 SCR 1271	**cited**	**para 10**
(1985) 2 SCC 314	**referred to**	**para 17**
2012 (2) SCR 1035	**referred to**	**para 17**
2009 (7) SCR 409	**referred to**	**para 17**
2007 (4) SCR 109	**referred to**	**para 17**
2007 (8) SCR 136	**referred to**	**para 17**
1986 Supp SCC 652	**referred to**	**para 17**
1991 (1) Suppl. SCR 523	**referred to**	**para 17**
(2000) 1 SCC 549	**referred to**	**para 17**
1991 (1) Suppl. SCR 124	**referred to**	**para 17**
(2003) 11 SCC 798	**referred to**	**para 17**
2004 (6) Suppl. SCR 346	**referred to**	**para 17**
(2005) 1 SCC 271	**referred to**	**para 17**

(2005) 1 SCC 279	**referred to**	**para 17**
(1968) 3 SCR 21	**referred to**	**para 17**
1990 (3) SCR 630	**referred to**	**para 17**
1990 (3) Suppl. SCR 419	**referred to**	**para 17**
1995 (2) Suppl. SCR 390	**referred to**	**para 17**
1998 (2) Suppl. SCR 542	**referred to**	**para 17**
2002 (4) Suppl. SCR 292	**referred to**	**para 17**
2001 (2) Suppl. SCR 559	**referred to**	**para 17**
(1965) 1 SCR 900	**referred to**	**para 17**
1988 (2) SCR 1006	**referred to**	**para 17**
2001 (1) SCR 1035	**referred to**	**para 17**
1963 Supp (1) SCR 586	**referred to**	**para 18**
1997 (6) Suppl. SCR 345	**referred to**	**para 19**
(1967) 3 SCR 557	**referred to**	**para 20**
2005 (2) Suppl. SCR 355	**referred to**	**para 21**
351 US 49	**referred to**	**para 24**
(1997) 10 SCC 717	**referred to**	**para 27**
2004 (6) Suppl. SCR 320	**referred to**	**para 27**
(1987) 1 SCC 600	**referred to**	**para 27**
1994 (1) WLC 696	**approved**	**para 46**
(1899) AC 99	**referred to**	**para 48**
1977 (1) SCR 878	**referred to**	**para 49**
1987 (2) SCR 1	**referred to**	**para 51**

2009 (1) SCR 1109	**referred to**	**para 52**
(2012) 4 SCC 645	**referred to**	**para 53**
(2014) 1 SCC 371	**referred to**	**para 53**
2007 (1) SCR 174	**referred to**	**para 53**
2007 (4) SCR 347	**referred to**	**para 53**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7084 of 2005.

From the Judgment and Order dated 23.01.2003 of the High Court of Judicature at Rajasthan at Jodhpur in S.B. Civil Sales Tax Revision No. 932 of 2002.

WITH

Civil Appeal Nos. 7085-7093 and 7094-7097 of 2005.

V. Giri, Dharmendra Kumar Sinha, Abhilash, Mohd. Sadiq for the Appellant.

Milind Kumar, Shovan Mishra for the Respondent.

The following Order of the Court was delivered

O R D E R

1. These appeals are directed against the common judgment and order passed by the High Court of Rajasthan in S.B. Civil Sales Tax Revision No. 932 of 2002 and connected matters, dated 23.01.2003. By the impugned judgment and order, the High Court has opined that "surgical cotton" is a commercially different commodity from 'cotton' and accordingly confirmed the order passed by the Rajasthan Tax Board, Ajmer in Appeal Nos. 509 to 512 of 2001, dated 28.06.2002.

Facts:

2. The appellant is a partnership firm registered as a

dealer both under the Rajasthan Sales Tax Act, 1994 (for short, "the Act") and the Central Sales Tax Act, 1956 (for short, "the CST Act"). The appellant carries on the business of processing the cotton and transforming it into surgical cotton.

3. The assessment years in question are 1992-93 to 1998-99. The assessee purchases cotton after paying tax at the rate of 4% and thereafter process it into surgical cotton for sale.

4. For the relevant assessment years, the assessing authority had conducted a survey on the business premises of the assessee and opined that surgical cotton produced and sold by the assessee is a separate commercial commodity from cotton and thus liable to be taxed at 4% under the Act. Accordingly, a show cause notice was issued to the assessee. The assessee took the stand that cotton and surgical cotton are not distinct commodities for the purposes of levy of tax under the Act. The said stand of the assessee was rejected by the Assessing Authority which passed an order of assessment whereby the assessee was taxed at the rate of 4% and the penalty and interest thereon, dated 28.03.2000.

5. Being aggrieved by the aforesaid order of assessment, the assessee had carried the matter by way of an appeal before the Deputy Commissioner (Appeals) Commercial Tax, Ajmer. The said authority, accepted the stand of the assessee that the process adopted for making surgical cotton out of cotton purchased does not bring into existence a new commercial commodity and that surgical cotton is nothing but another form of cotton and accordingly, allowed the appeal and granted the relief to the assessee by order dated 10.10.2000.

6. Aggrieved by the aforesaid order passed by the First Appellate Authority, the Revenue had carried the matter before the Rajasthan Tax Board, Ajmer (for short, "the Board"). The Board after considering the meaning of the expression 'manufacture' as defined under the Act a[illegible]e on the observations made by this Court i[illegible]s

come to the conclusion that the surgical cotton manufactured by the assessee is a new commercial commodity exigible to tax separately at the rate of 4% under the Act and therefore, set aside the orders passed by the First Appellate Authority and restored the orders passed by the assessing authority for the assessment years in question by order dated 28.06.2002.

7. The assessee being aggrieved by the said order passed by the Board had approached the High Court in S.B. Civil Sales Tax Revision No. 932 of 2002. The High Court has noticed Entry 16 of the notification F.4 (7) FD/Gr.IV/92-70 (S.O. No. 993), dated 04.03.1992 for the assessment year 1992-93 and analysed the submissions of parties to the lis and thereafter reached the conclusion that surgical cotton is amenable to be taxed as an independent entity and accordingly, rejected the tax revision cases and confirmed the orders passed by the Tax Board by the impugned judgment and order dated 23.01.2003.

8. It is the correctness or otherwise of the said judgment and order is the subject matter of these appeals.

9. We have heard the learned counsel appearing for the parties to the lis. We have also perused the documents on record including the judgments and orders passed by the Courts below.

Submissions:

10. Shri V. Giri, learned senior counsel for the appellant submits that by the process of transformation of cotton into surgical cotton no new commercial commodity comes into existence as a result of such process, and therefore it cannot be considered as "manufacture" of surgical cotton from cotton and thus would not be liable to tax at the rate of 4% under the Act. He would place reliance on the decision of this Court in *CST v. Lal Kunwa Stone Crusher (P) Ltd.,* (2000) 3 SCC 525, to bring home the point, that, since the purpose of sales tax is

to levy tax on sale of goods of each variety and not the sale of the raw material of which they may have been made and therefore, where commercial goods are merely subjected to some processing, they may remain commercially the same goods which cannot be taxed again in a series of sales so long as they continue to retain their identity as goods of that particular variety. He would further explain the term "manufacture" in context of the Act and draw support from the decisions of this Court in, inter alia, *Sterling Foods v. State of Karnataka,* (1986) 3 SCC 469 and *CST v. Pio Food Packers,* 1980 Supp SCC 174 and submit that that the essential feature of "manufacturing" is the utilization of original commodity and its transformation into a different commodity wherein the original article stands distinguished from the end product as an entirely different commodity and since the aforesaid is not the case herein, the process of transformation of cotton into surgical cotton would not be a manufacture for the levy of tax under the Act and therefore, the High Court has erroneously dismissed the case of appellants confirming the levy of tax on surgical cotton under the Act. Alternatively, he would submit that even if surgical cotton is assumed to be a distinct commodity from cotton, the originally purchased raw cotton has already suffered taxation at the outset and therefore, a set off has to be provided in light of the scheme of the Act and the CST Act.

11. Per contra, learned counsel for the Revenue would support the judgment and order passed by the High Court.

Relevant Provisions

12. Before we advert to test the correctness or otherwise of the aforesaid submissions, it is necessary to notice that the Entry prescribing the rate of tax on cotton for the assessment years in question, i.e., from 1992-1993 till 1998-1999. The entry has been amended vide series of seven subsequent notifications issued by the State Government. The said Entry

for the aforesaid relevant years reads as under:

Assessment Year	Notification		Entry Number	Entry
	Date	Number		
1992-93	04.03.92	F.4 (7) FD/Gr. IV/92-70 (S.O. No. 993)	16	Cotton, that is to say all kinds of cotton (indigenous or imported), whether ginned or unginned, baled, pressed or otherwise including Cotton waste.
1993-94	12.04.93	F.4 (56) FD/Gr. IV/82-2 (S.O. No. 8) (Amend-ment notifi-cation)	Amen-ded only Entry 16 with imme-diate effect	"after the existing words "Cotton waste" ….the expression "and Absorbent Cotton wool I.P." shall be added."
1994-95	07.03.94	F.4 (8) FD/Gr. IV/94-46 (S.O. No. 176)	20	Cotton, that is to say, all kinds of cotton (indigenous or imported), kinds of Readymade garments, whether ginned or unginned, baled, pressed or otherwise including Absorbent cotton wool I.P. and Cotton waste.
1995-96	27.03.95	F.4 (11) FD/Gr. IV/95-49 (S.O. No. 399)	25	Cotton as defined in clause (iv) of Section 14 of the Central Sales Tax Act, 1956 including
1996-97	15.03.96	F.4 (69) FD/Gr. IV/95-32 (S.O. No. 267)	28	absorbent cotton wool I.P. & cotton waste.
1997-98	12.03.97	F.4 (1) FD/Gr. IV/97-101 (S.O. No. 299)	27	
1998-99	09.07.98	F.4 (14) FD/Gr. IV/98-16 (S.O. No. 114)	29	
1999-2000	26.03.99	F.4 (4) FD/Gr. IV/99-126 (S.O. No. 423)	39	

13. The question which arises for our consideration and decision in these appeals is whether the manufacturing process is involved in the production of surgical cotton from cotton in terms of definition mentioned in Section 2(27) of the Act and whether the same commodity in the same entry would be liable for taxation twice specially when the scheme of Act suggests that cotton is a commodity of special importance and must be taxed only once in terms of Section 15 of the CST Act. Since the relevant entry has been amended vide successive notifications for each Assessment Year, we would analyse it sequentially.

Assessment Year 1992-93

14. For the Assessment Year 1992-93, Entry 16 as reproduced above prescribes that cotton of all kinds whether indigenous or imported and whether ginned or unginned, baled, pressed or otherwise including cotton waste is covered by this entry. This is a comprehensive inclusion of all kinds of cotton for the purposes of taxing. A reading o at

the commodity cotton in all its forms namely, indigenous, imported, ginned, unginned, baled, pressed, non-pressed is liable to be taxed at the rate of 4% alongwith cotton waste. Since neither does "surgical cotton" find mention in the aforesaid entry as a commodity nor does it suitably fit into the description aforesaid, it becomes relevant to delve into the question whether the commodity in question has undergone any change in its characteristics so as to acquire a new commercial identity, that is to say, whether surgical cotton remain as cotton after having undergone transformation through various processes. In other words whether the process of conversion of cotton into surgical cotton be termed as "manufacture of surgical cotton".

15. It is therefore relevant to notice the definition of 'manufacture' as defined in the dictionary clause of the Act. Section 2(27) of the Act defines the expression 'manufacture' as under:

> "27. "Manufacture" includes every processing of goods which bring into existence a commercially different and distinct commodity but shall not include such processing as may be notified by the State Government."

The definition aforesaid is an inclusive definition and therefore would encompass all processing of goods which would produce new commodity which is commercially different and distinctly identifiable from the original goods. The definition however excludes all such mechanisms of processing of goods which have been notified by the State Government to the said effect. Admittedly, no such exclusion in respect of the process in analysis for surgical cotton has been notified by the State Government. Therefore, the process of transformation has to be tested on the anvil of proposition whether surgical cotton is processed such that it is commercially different and distinctly identifiable than cotton.

16. The essential test for determining whether a process

is manufacture or not has been the analysis of the end product of such process in contradistinction with the original raw material. In 1906, Darling, J. had subtly explained the quintessence of the expression "manufacture" in *McNichol and Anor v. Pinch,* [1906] 2 KB 352 as under:

> "…I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made."

17. In order to understand the finer connotation of the expression 'manufacture', it may be useful to refer to the decision of this Court in the case of Empire Industries Limited and Ors. v. Union of India and Ors.,(1985) 2 SCC 314, wherein this Court after exhaustively noticing the views of the Indian Courts, Privy Council and this Court had stated as under:

> "'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use. "

(*CCE v. Osnar Chemical (P) Ltd.,* (2012) 2 SCC 282; *Jai Bhagwan Oil & Flour Mills v. Union of India,* (2009) 14 SCC 63; *Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise,* (2007) 4 SCC 155; *CIT v. Tara Agencies,* (2007) 6 SCC 429; *Ujagar Prints (II) v. Union of India,* 1986 Supp SCC 652; *Saraswati Sugar Mills v. Haryana State Board,* (1992) 1 SCC 418; *Gramophone Co. of India Ltd. v. Collector of Customs,* (2000) 1 SCC 549; *CCE v. Rajasthan State Chemical Works,* (1991) 4 SCC 473; *CCE v. Technoweld Industries,* (2003) 11 SCC 798; *Metlex (I) (P) Ltd. v. CCE,* (2005) 1 SCC 271; *Aman Marble Industries (P) Ltd. v. CCE,* (2005) 1 SCC 279; *Shyam Oil Cake Ltd. v. CCE,* (2005) 1 SCC 264; *South Bihar Sugar Mills Ltd. v. Union of India,* (1968) 3 SCR 21; *Laminated Pac*

(1990) 4 SCC 51; *Dy. CST v. Coco Fibres,* 1992 Supp (1) SCC 290; *CST v. Jagannath Cotton Co.,* (1995) 5 SCC 527; *Ashirwad Ispat Udyog v. State Level Committee,* (1998) 8 SCC 85; *State of Maharashtra v. Mahalaxmi Stores,* (2003) 1 SCC 70; *Aspinwall & Co. Ltd. v. CIT,* (2001) 7 SCC 525; *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO,* (1965) 1 SCR 900; *CCE v. Kiran Spg. Mills,* (1988) 2 SCC 348 and *Park Leather Industry (P) Ltd. v. State of U.P.,* (2001) 3 SCC 135)

18. The following observations by the Constitution Bench of this Court in Union of India v. Delhi Cloth & General Mills Co. Ltd., 1963 Supp (1) SCR 586 where the change in the character of raw oil after being refined fell for consideration are also quite apposite:

> "14. … The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance.'"

19. For determining whether a process is "manufacture" or not, this Court in *Union of India v. J.G. Glass Industries Ltd.,* (1998) 2 SCC 32 has laid down a two-pronged test. Firstly, whether by such process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist and secondly, whether the commodity which was already in existence would serve no purpose but for the said process. In light of the said test it was held that printing on bottles does not amount to manufacture.

20. A Constitution Bench of this Court in *Devi Das Gopal Krishnan v. State of Punjab,* (1967) 3 SCR 557 observed that if by a process a different identity comes into existence then it can be said to be "manufacture" and therefore, when oil is produced out of the seeds the process certainly transforms raw material into different article for use.

21. In *CCE v. S.R. Tissues (P) Ltd.,* (2005) 6 SCC 310,

the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court inter alia, held as under:

> "12. … However, the end use of the tissue paper in the jumbo rolls and the end use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."
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> (emphasis supplied)

22. At this stage the discussion of difference between "processing" and "manufacture" holds much relevance to well appreciate the contention canvassed by Shri Giri that the transformation of cotton into surgical cotton would be mere processing and not manufacture.

23. According to Oxford English Dictionary one of the meanings of the word "process" is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". In Chambers 21st Century Dictionary, the term "process" has been defined as "1. a series of operations performed during manufacture, etc. 2. a series of stages which a product, etc. passes through, resulting in the development or transformation of it."

24. In East Texas Motor Freight Lines v. Frozen Food Express, 351 US 49 the Supreme Court of United States of America has held that the processing of chicken in order to make them marketable but without changing their substantial identity did not turn chicken from agriculture commodities into manufactured commodities.

25. A three-Judge Bench of this Court in *Pio Food Packers* case (supra) has dealt with the distinction between "manufacture" and "processing". Therein the appeals were filed against the order of the Kerala High Court holding that the turnover of pineapple fruits purchased for preparing pineapple slices for sale in sealed cans is not covered by Section 5-A(1)(a) of the Kerala General Sales Tax Act, 1963. This Court while deciding whether such conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture or not has observed as follows:

> "5. … Commonly, manufacture is the end result of one [or] more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."
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> (emphasis supplied)

This Court held that when the pineapple fruit is processed into pineapple slices for the purpose of being sold in sealed cans, there is no consumption of the original pineapple fruit for the purpose of manufacture. Pineapple retains its character as fruit and whether canned or fresh, it could be put to the same use and utilized in similar fashion.

26. In *Sterling Foods* case (supra) this Court has observed that processed and frozen shrimps, prawns and lobsters cannot be regarded as commercially distinct commodity from raw shrimps, prawns and lobsters. The aforesaid view has further been adopted and applied by this Court in *Shyam Oil Cake Ltd.* case (supra) wherein the classification of refined edible oil after refining was under consideration and on similar lines it was held that the process of refining of raw edible vegetable oil did not amount to manufacture. In *Aman Marble Industries* case (supra), this Court has held that the cutting of marble blocks into smaller pieces would not be a process of manufacture for the reason that no new and distinct commercial product came into existence as the end product still remained the same and thus its original identity continued.

27. This Court in *Crane Betel Nut Powder Works* case (supra) citing the earlier decision in *Brakes India Ltd. v. Supdt. of Central Excise,* (1997) 10 SCC 717 wherein the process of drilling, trimming and chamfering was said to amount to "manufacture", has reiterated that if by a process, a change is effected in a product and new characteristic is introduced which facilitates the utility of the new product for which it is meant, then the process is not a simple process, but a process incidental or ancillary to the completion of a manufactured product. In *Kores India Ltd. v. CCE,* (2005) 1 SCC 385 the cutting of duty-paid typewriter/telex ribbons in jumbo rolls into standard predetermined lengths was considered by this Court and it was held that such cutting brought into existence a commercial product having distinct name, character and use and amounted to "manufacture" and attracted the liabil d

Fireworks Industries v. Collector of Central Excise, (1987) 1 SCC 600 this Court held that cutting of steel wires and the treatment of paper is a process for the manufacture of goods in question.

28. In *Lal Kunwa Stone Crusher* case (supra), the decision relied upon by Shri Giri, this Court has considered that whether on crushing stone boulders into gitti, stone chips and dust different commercial goods emerge so as to amount to manufacture as per the definition of "manufacture" under Section 2(e-1) of the U.P. Sales Tax Act, 1948 and observed that even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, "stone" as under the relevant Entry is wide enough to include the various forms such as gitti, kankar, stone ballast. It is in this light, that the Court had opined that stone gitti, chips, etc. continue to be identifiable with the stone boulders.

29. Having noticed the relevant Entries, the definition of 'manufacture' and judicial precedents, we would now notice, (a) the process adopted by the assessee for the purpose of converting raw cotton into surgical cotton and (b) the utility and commercial use of surgical cotton in contrast to cotton.

Process of conversion of cotton into surgical cotton

30. The Project report on Surgical Absorbent Cotton, December 2010 (pg. 3 and 4) prepared by MSME - Development Institute, Ministry of Micro, Small & Medium Enterprises, Government of India provides for the following steps in manufacture of surgical cotton:

"a) Opening and cleaning of Raw Cotton:

Raw cotton received in bale or otherwise is opened in opener where it is loosened and simultaneously dust/ foreign particles are also removed. Loosened cotton is

then put into a keir where chemicals such as caustic soda, soda ash, detergent, etc. are added along with adequate water and steam boiled for about 3-4 hours. By this process most of the natural waxes and oils are removed while remaining foreign matter get soften and disintegrated. The treated cotton is transferred to washing tanks where it is washed thoroughly.

b) Bleaching:

Washed cotton is bleached to remove brownish colour developed due to chemical treatment. Bleaching is done by using bleaching agent such as sodium-hypochlorite or hydrogen peroxide. The bleaching process improves whiteness, wetting properties and assists in disintegration of any remaining foreign materials.

c) Removal of Chemicals:

The bleached cotton is thoroughly washed again to remove the chemicals. A little quantity of dilute hydrochloric acid or sulphuric acid is also added to neutralize excess alkali. If required, again washed with water. The water of cotton is removed with the help of hydro-extractor. It is then sent to a wet-cotton opening machine.

d) Drying:

The cotton so obtained is dried by passing through dryer or alternatively subjected to sun drying where provision for dryer is not there.

e) Lapping:

The dried cotton is sent to blower room where it is thoroughly opened and made into laps.

f) Carding:

The laps are then fed into carding machine wherein cotton is warped around rollers in thin layers.

g) Rolling:

Cotton so obtained is compressed and rolled into suitable role size along with packaging paper.

h) Weighing and cutting:

The rolls are then weighed and cut according to required weight and sizes and labeled properly before packing in polythene sheets and heat sealed."

31. The admitted facts are the assessee purchases raw cotton by paying tax at the rate of 4 per cent. After such purchase, after ginning the cotton is put into boiler and its roughage is separated from cotton. The clean cotton thereafter is treated with caustic soda and acid slurry. After such treatment with the aforesaid chemicals, the cotton is cut in small pieces. These pieces are transferred to a tank where bleaching process takes place. Such bleached cotton is then transferred into tanks for washing. As noticed by the High Court, the cotton passed from four stages from raw cotton upto surgical cotton. First, it is put into tanks for washing each step takes sufficient time. Second, the treated cotton is transferred to a process known as hydro process where it is dried. Third, the cotton is put in the blower for cleaning the same. Fourth, such blowed out cotton is thereafter transferred to kler where rolls are prepared and then cotton is cut into pieces with the desired level, width and size. The process does not end here. The rolled out calibrated pieces of cotton are then put in carding machine where thin layers are framed and such layers are packed in bundle for marketing. The rolled and compressed cotton is sent for trading.

Utility and Commercial use:

32. The aforesaid view is further fortified by the common parlance test. It can be said when a consumer requires surgical

cotton, he would not be satisfied with cotton being provided to him and the same principle would reversibly apply that a customer of cotton would not use surgical cotton as a substitute. Further the purposes for which cotton and surgical cotton are used are diametrically opposite. While surgical cotton finds utility primarily for medical purposes in households, dispensaries, hospitals, etc, raw cotton being, inter alia, non-sterlised and riddled with organic impurities cannot be used as such at all.

33. For both these commodities operational territories are different and both have a different consumer segments. For medical and pharmaceutical purposes, use of ordinary cotton is not permissible. The fixed medical standards for the quality of surgical cotton are definite and definable such that ordinary cotton would not suffice the purpose. Surgical cotton is only used in form of medicine or pharmaceutical product, thus it cannot be said that use of commodity is interchangeable and in that view of the matter, surgical cotton is a different commodity. It is a commodity which is used with a completely distinct identity in itself. As what is used for medical purpose is perfectly sterilized disinfected purified cotton. If raw cotton is used for surgical purposes, it would be counter-productive. Surgical cotton is extensively used for making napkins, sanitary pads and filters, etc. The surgical cotton is exclusively consumed into medical field while ordinary cotton has so many uses. The main chemical properties desired in a surgical dressing are inertness and lack of irritation in use, which is provided by the surgical cotton only if manufactured as per the standards specified. Raw cotton is purified by a series of processes and rendered hydrophilic in character and free from other external organic impurities for use in surgical dressings. Surgical cotton is, thus, completely different from ordinary cotton.

34. The surgical cotton is made sterile and fit for surgical use and it is not put to the sam e

unmanufactured cotton is put and vice versa. Therefore, when unmanufactured cotton undergoes a manufacturing process, a new product saleable into the market which is having a distinct identity, comes into existence which is known in the commercial market by a different name and use. Surgical cotton possesses higher utility than the cotton in its un-manufactured state.

35. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. While mere improvement in quality does not amount to manufacture, when the change or a series of changes transform the commodity such that commercially it can no longer be regarded as the original commodity but recognised as a new and distinct article. In the instant case, after going through the various steps that are carried out by the assessee for getting surgical cotton from raw cotton, we can certainly say that cotton has undergone a change into a new commercially identifiable commodity which has a different name, different character and different use. The process of transformation is not merely processing to improve quality or superficial attributes of the raw cotton. The cotton looses its original form and it marketed as a commercially different and distinct product. This aspect of the matter is rightly noticed by the High Court by relying upon the decision of this Court in Empire Industries case (supra) wherein this Court has explained the meaning of the expression 'manufacture" as when the result of the treatment, labour and manipulation a new commercial commodity has emerged which has a distinctive new character and use.

36. Having carefully observed the process of transformation of raw cotton into surgical cotton and having noticed that there is distinctive name, character and use of the new commodity, i.e., surgical cotton, we are of the considered opinion that surgical cotton is a separately identifiable and distinct commercial commodity manufactured out of raw cotton and

therefore, ceases to be cotton under Entry 16 of the said notification.

37. The second limb of Shri Giri's contention that under the scheme of the Act and the CST Act, since tax has already been paid once on the original commodity, i.e., raw cotton, the appellants would be entitled to claim set-off for the manufactured surgical cotton fails to impress us. The High Court has noticed that the said question was not raised before the original assessing authority and consequently, the authorities below have not considered the said question and such being the case, the High Court has declined to consider the same. In our considered opinion, the said question cannot be considered by us for the first time in these appeals and thus, the conclusion of the High Court in this regard stands affirmed. However, the appellant is at liberty to raise the said question before the appropriate authorities in accordance with law.

38. In view of the above, we cannot take any exception to the impugned judgment and order passed by the High court in so far as the Assessment Year 1992-93 is concerned.

Assessment Years 1993-94 to 1998-99:

39. We would now proceed to examine the claim of the assessee for the Assessment Years 1993-94 to 1999-2000. The Entry for the relevant years is reproduced in the preceding paragraph no. 12.

40. In the year 1993, by an amendment notification F.4 (56) FD/Gr.IV/82-2 (S.O. No. 8) dated 12.04.1993, the legislature has consciously included "absorbent cotton wool I.P." immediately after the words "cotton waste" in Entry 16. By the notification dated 07.03.1994, for the Assessment Year 1994-95, the entry stands as "Cotton, that is to say, all kinds of cotton (indigenous or imported), kinds of readymade garments, whether ginned or unginned, baled, pressed or otherwise including Absorbent cotton wool I.P. an[illegible]n

the Assessment Year 1995-96, the State has amended the entry such that cotton means cotton as defined in clause (iv) of Section 14 of the Central Sales Tax Act, 1956 but has specifically included absorbent cotton wool I.P. & cotton waste in such entry. The relevant entry has remained unaltered for the succeeding assessment years 1996-97, 1997-98 and 1998-99 numbered as Entries 28, 27 and 29, respectively.

41. It is an admitted fact that the appellant herein manufactures surgical cotton from the cotton purchased by him. The assessing authority and forums below including the High Court have noticed that "cotton" and "surgical cotton" are different commercial commodities and therefore, sale of "surgical cotton" attracts sales tax under the provisions of the Act. However, during the proceedings before the High Court it was not brought to the notice of the Court that an amendment to Entry 16 was made in the year 1993 whereby the meaning of the expression "cotton" has been expanded to include "absorbent cotton wool I.P." and thus, the High Court has only analysed Entry 16 as it stands for the Assessment Year 1992-1993.

42. Therefore, the question that falls for our consideration is whether in terms of the relevant entries for aforesaid Assessment Years "surgical cotton" is liable to tax or not.

43. It appears to us that the commodity "absorbent cotton wool I.P." as included in the relevant entries is the same as "surgical cotton" which the assessee manufactures. The absorbent cotton wool I.P. is a technical name of the cotton which is sold in the market and commonly known as surgical cotton.

44. The Project Report on *Surgical Absorbent Cotton* (supra) at page 1 states that "absorbent cotton" is also known as "surgical cotton or cotton wool" and mainly used for medicinal purposes in hospitals, nursing homes, dispensaries and at home (for first aid) etc. The report thereafter uses the

term "surgical absorbent cotton" uniformly to refer to the commodity in question before us.

45. The lexicographers have also expressed the same medicinal use and properties of surgical cotton in terms of definition of absorbent cotton. The Collins English Dictionary defines "cotton wool/absorbent cotton/surgical cotton" as "absorbent cotton, purified cotton, bleached and sterilized cotton form." The Oxford Dictionary of English explains the meaning of "absorbent cotton" as cotton which is used for cleaning the skin or bathing wounds. In Encarta dictionary "absorbent cotton" is defined as under:

> "Cotton that has had the natural wax removed, making it absorbent and suitable for medical and cosmetic use as dressings or swabs".

46. In fact, the Rajasthan High Court in the case of *Durga Cotton Industries Vs. State of Rajasthan and Ors.,* 1994 (1) WLC 696 had an occasion to look into the meaning of the expression "absorbent cotton wool I.P." while considering notification dated 27.6.1990 which provided the rates of tax for cotton in Item No. 16 (the same as Entry 16 for Assessment Year 1992-93). The Court on consideration of the relevant literature had come to the conclusion that "absorbent cotton wool I.P." is commercially known as surgical cotton. In our considered opinion, the view of the Rajasthan High Court appears to be correct and consonant with the common jargon by which the commodity is recognised.

46. In fact, the Rajasthan High Court in the case of *Durga Cotton Industries Vs. State of Rajasthan and Ors.,* 1994 (1) WLC 696 had an occasion to look into the meaning of the expression "absorbent cotton wool I.P." while considering notification dated 27.6.1990 which provided the rates of tax for cotton in Item No. 16 (the same as Entry 16 for Assessment Year 1992-93). The Court on consideration of the relevant literature had come to the conclusion n

wool I.P." is commercially known as surgical cotton. In our considered opinion, the view of the Rajasthan High Court appears to be correct and consonant with the common jargon by which the commodity is recognised.

47. Having noticed the commodity in question, we would now analyse the import of the expression "including" as contained in the relevant entries.

48. The expression "include" is used as a word of extension and expansion to the meaning and import of the preceding words or expressions. The following observation of Lord Watson in *Dilworth v. Commr. of St*amps, (1899) AC 99 in the context of use of 'include' as a word of extension has guided this Court in numerous cases:

> '... But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.'

49. The meaning of the said expression has been considered by a three Judge bench of this Court in the case of the *South Gujarat Roofing Tiles Manufacturers Association and Anr. v. State of Gujarat and Anr.,* (1976) 4 SCC 601, wherein this Court has observed:

> "Now it is true that 'includes" is generally used as a word extension, but the meaning of a word or phrase is extended when it is said to include things that would not properly fall within its ordinary connotation."

50. Principles of Statutory Interpretation (12th Edn., 2010)

by Justice G.P. Singh, at p. 181, has discussed in detail the connotations of the word "include" and emphasized on the exhaustive explanation of the word "inclusive" thus:

> "...The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

51. In *RBI v. Peerless General Finance & Investment Co. Ltd.,* (1987) 1 SCC 424 this Court has followed the observations in the *Dilworth* case (supra) and explained the purpose and expanse of the "inclusive definitions" as under:

> "32. We do not think it necessary to launch into a discussion of either Dilworth case or any of the other cases cited. All that is necessary for us to say is this: legislatures resort to inclusive definitions (1) to enlarge the meaning of words or phrases so as to take in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it; (2) to include meanings about which there might be some dispute; or (3) to bring under one nomenclature all transactions possessing certain similar features but going under different names. Depending on the context, in the process of enlarging, the definition may even become exhaustive."

52. In *Karnataka Power Transmission Corpn. v. Ashok Iron Works (P) Ltd.,* (2009) 3 SCC 240 this Court after analyzing the afore-cited decisions has observed as follows:

> "17. It goes without saying that interpretation of a word or expression must depend on the text and the context. The

resort to the word 'includes' by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that word 'includes' may have been designed to mean 'means'. The setting, context and object of an enactment may provide sufficient guidance for interpretation of the word 'includes' for the purposes of such enactment."

53. The word "include" is generally used to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. That is to say that when the word "includes" is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise.

Commr. of Customs v. Caryaire Equipment India (P) Ltd., (2012) 4 SCC 645; *U.P. Power Corpn. Ltd. v. NTPC Ltd.,* (2014) 1 SCC 371; *Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd.,* (2007) 3 SCC 607; *Dadaji v. Sukhdeobabu; Mahalakshmi Oil Mills v. State of A.P.; Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union,* (2007) 4 SCC 685)

54. By introducing the word "including" immediately after detailing the definition of cotton, the legislature has expanded the meaning of the expression "cotton" for the purposes of the Act. While the natural import suggests and prescribes only unmanufactured cotton in all forms, the commodities "absorbent cotton wool I.P." and "cotton waste" manufactured out of

"cotton" are intentionally and purposefully included in the relevant entries alongwith cotton in its ordinary meaning.

55. In light of the aforesaid, we are of the considered opinion that "surgical cotton/absorbent cotton wool I.P." is also "cotton" for the purposes of the relevant entries in the notifications for assessment years 1993-94 to 1998-99 and therefore is liable to exemption from levy of tax under the Act. In light of the same, we cannot sustain the judgment and order passed by the High Court for the assessment years 1993-1994 to 1998-1999.

56. In the result, the appeals are allowed in part and the judgment and order passed by the High Court is confirmed for the assessment year 1992-93 and the judgment and order of the High Court so far as it relates for the assessment years 1993-94 to 1998-99 is set aside. No order as to costs.

Ordered accordingly.

R.P. Appeals partly allowed.

R. SUBRAMANIAM

v.

MURUGAPPA GOUNDER AND ORS.

(Civil Appeal No. 1793 of 2014)

JANUARY 31, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND M.Y. EQBAL, JJ.]

CONTEMPT OF COURT:

Unconditional apology tendered, accepted by single Judge of High Court - However, direction issued to take action against contemnors -- Held: Unconditional apology made in the form of an affidavit and the same having been accepted, further direction to Department for appropriate action neither warranted nor permissible -- Accordingly, the impugned direction set aside.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1793 of 2014.

From the Judgment and Order dated 27.07.2012 of the High Court of Judicature at Madras in Contempt Appeal No. 3 of 2012.

R. Balasubramaniam, Sumit Kumar, Ajay Amitrag, Amit Sharma for the Appellant.

The following Order of the Court was delivered by

O R D E R

1. Though the respondents duly served with notice but are not represented by counsel.

2. Heard learned senior counsel for the appellant.

3. Leave granted.

4. The only grievance of the learned senior counsel appearing on behalf of the appellant is that though the learned Single Judge accepted the apology tendered by the appellant and Respondent No.2 herein, forwarded a copy of the order passed in the contempt petition to the Principal Secretary & Commissioner of Land Administration, Chepauk, Chennai, for initiating appropriate action.

5. We have gone through the order dated 29.06.2012 passed by the learned Single Judge in Contempt Petition No. 30 of 2012. In Para 20 and 21 the learned Single Judge clearly accepted the 'unconditional apology' tendered by Respondent Nos. 1 and 3 therein. In spite of acceptance directed the authority to take action against them. When the said order was challenged in the Contempt Appeal No. 3 of 2012, the Division Bench by its impugned order confirmed the same and dismissed the appeal.

6. In the light of the fact that the persons concerned including the appellant herein have made unconditional apology in the form of an affidavit and having been accepted by the learned Single Judge, we are of the view that further direction to the Department concerned for appropriate action neither permissible nor is warranted. Accordingly, the said direction as found in para 20 of the order of the learned Single Judge and the confirmation order of Division Bench are set aside.

7. The appeal is allowed on the above terms. No cost.

R.P. Appeal allowed.

STATE THROUGH CBI NEW DELHI

v.

JITENDER KUMAR SINGH

(Criminal Appeal No. 943 of 2008)

FEBRUARY 05, 2014

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

PREVENTION OF CORRUPTION ACT, 1988:

Purpose of enactment - Held: Although Indian Penal Code provided for punishment for the offence of bribery and corruption even against the public servants, Parliament, in its wisdom, noticed that the Code was not adequate to meet the exigencies of time and a need was felt to introduce a special legislation with a view to eradicate the evil of bribery and corruption from the society - Consequently, the Prevention of Corruption Act was enacted - Penal Code, 1860.

s.3(1) - Jurisdiction of Special Judge to proceed against a non-public servant - Held: A Special Judge appointed u/s.3(1) of the PC Act has got jurisdiction to proceed exclusively against a public servant and exclusively against a non-public servant as well, depending upon the nature of the offence referred to in Chapter III of the PC Act - Junction of a public servant is not a must for the Special Judge to proceed against a non-public servant for any offence alleged to have been committed by him under Chapter III of the PC Act - A conjoint reading of s.3(1) along with ss.4(1) and (2) would make it amply clear that only the Special Judge has got the jurisdiction to try the offences specified in sub-section (1) of s.3 committed by a public servant or a non-public servant, alone or jointly.

s.3(1) - Non-framing of charge against the public servant and private persons, u/s.3(1), while public servant was alive - Held: In such a situation, the Special Judge had no occasion

to "try any case" u/s.3(1) of the PC Act, either against a public servant or a private person, so as to try any offence other than an offence specified in s.3, meaning thereby, non-PC offences against private person - Special Judge appointed u/s.3(1) could exercise the powers under sub-section (3) to s.4 to try non-PC offence - Therefore, trying a case by Special Judge u/s.3(1) is a sine qua non for exercising jurisdiction by the Special Judge for trying an offence other than an offence specified in s.3 - "Trying any case" u/s.3(1) is, therefore, a jurisdictional fact for the Special Judge to exercise powers to try Non-PC offence.

s.4(3) - 'Trying any case' - Interpretation of - Held: It means trying any case relating to the offences referred to in ss.3(1)(a) and (b) of Act for which exclusive jurisdiction is conferred on the Special Judge - A Special Judge, while exercising, exclusive jurisdiction, that is, when trying any case relating to offences u/ss.3(1)(a) and (b) of the Act, may also try any offence other than the offence specified in s.3, with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial - An accused person, either a public servant or non-public servant, who has been charged for an offence u/s.3(1) of the PC Act, could also be charged for an offence under IPC, in the event of which, the Special Judge has got the jurisdiction to try such offences against the public servant as well as against a non-public servant - Code of Criminal Procedure, 1973.

ss.4(1), 4(3) - Obligation on the part of Special judge to try Non-PC cases - Held: Exclusion of the jurisdiction of ordinary Criminal Court, so far as offences under the PC Act are concerned, has been explicitly expressed u/s.4(1) of the PC Act, which does not find a place in respect of non-PC offences in sub-section (3) of s.4 of the PC Act - It is not obligatory on the part of a Special Judge to try non-PC offences - The expression "may also try" gives an element of discretion on the part of the Spe[illegible]

depend upon the facts of each case and the inter-relation between PC offences and non-PC offences - A Special Judge exercising powers under the PC Act is not expected to try non-PC offences totally unconnected with any PC offences u/s.3(1) of the PC Act and in the event of a Special Judge not trying any offence u/s.3(1) of the PC Act, the question of the Special Judge trying non-PC offences does not arise - Trying of a PC offence is a jurisdictional fact to exercise the powers under sub-section (3) of s.4 - Jurisdiction of the Special Judge, as such, has not been divested, but the exercise of jurisdiction, depends upon the jurisdictional fact of trying a PC offence.

s.4(3) - Death of public servant and charges framed against public servant and private person - Held: Once the power has been exercised by the Special Judge u/sub-section (3) of s.4 of the PC Act to proceed against non-PC offences along with PC offences, the mere fact that the sole public servant dies after the exercise of powers under sub-section (3) of s.4, will not divest the jurisdiction of the Special Judge or vitiate the proceedings pending before him - The trying of any case under the PC Act against a public servant or a private person is a sine-qua-non for exercising powers under sub-section (3) of s.4 of PC Act - In the instant case, since no PC offence has been committed by any of the non-public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant.

JURISDICTION of a Court or a Tribunal - Held: Existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court.

In Criminal appeal no.943 of 2008, a public servant in conspiracy with private persons committed offence under PC Act. Charge sheet was filed before the Special Judge. The public servant died. The Special Judge framed charges against all the accused persons under IPC and also under PC Act. The accused who was a private person filed an application for modification, amendment or alteration of charges on account of death of the public servant. When matter came up before the High Court, it held that on the death of a public servant, the offences under the PC Act cannot be proceeded with and directed to modify and alter and or amend the charges in view of death of the public servant.

In Criminal appeal no.161 of 2011, public servant died even before the framing of charges. The High Court held that upon death, the case against public servants alone abates and rest of them can be proceeded against by the Special Judge, since the Court once vested with the jurisdiction cannot be divested of it on the death of a public servant.

The question for consideration arising out of Criminal appeal no.943/2008 were whether the Special Judge, after framing charges against a Public Servant under Section 13(2) read with Section 13(1)(b) falling under Section 3(1) of the PC Act and against private persons for offences under Sections 120-B, 420, 467, 468, 471 IPC can go ahead with the trial of the case against the private persons for non-PC offences, even after the death of the sole public servant; and that even assuming that the Special Judge has jurisdiction under sub-section (3) of Section 4 of the PC Act to proceed against the private persons, is the Special Judge duty bound to try any non-PC offence, other than the offences specified under Section 3 of the PC Act against the accused persons charged at the same trial.

The question for consideration arising out of Criminal appeal No. 161 of 2011 was whether the Special Judge has jurisdiction under Section 4(3) [illegible] y

non-PC offences against private persons when no charges have been framed against public servants for trying a case for offences under Section 3(1) of the PC Act, since they died before framing of charges under the PC Act or IPC.

Allowing both the appeals, the Court

HELD: 1.1. The Indian Penal Code has provided for punishment for the offence of bribery and corruption even against the public servants. Parliament, in its wisdom, noticed that the Penal Code was not adequate to meet the exigencies of time and a need was felt to introduce a special legislation with a view to eradicate the evil of bribery and corruption from the society. Consequently, the Prevention of Corruption Act, 1947 was enacted, which was amended in the year 1964, based on the recommendations of the Santhanam Committee. Parliament still felt that the anti-corruption laws should be made more effective, by widening their coverage and enhancing penalties and to expedite the proceedings and hence the 1988 Act was enacted. [para 20] [642-A-C]

1.2. Chapter II of the PC Act deals with the appointment of Special Judges and Chapter III deals with the offences and penalties. Section 3 of the PC Act deals with the power to appoint Special Judges. Section 5 of the PC Act deals with the procedure and powers of Special Judge. Section 3(1) of the PC Act confers power on the Central Government or the State Government to appoint as many Special Judges as may be necessary, for such area or areas or for such cases or group of cases as will be specified in the notification to be issued in the Official Gazette. The Special Judge is so empowered to try any offence punishable under Section 3(1)(a) of the PC Act. The Special Judge is also empowered to try under Section 3(1)(b) any conspiracy to commit or any

attempt to commit or any abetment of any of the offences specified in clause (a). Following offences would come within the scope of Section 3(1) of the PC Act: (1) Any offence punishable under the PC Act. (2) Any conspiracy to commit any offence punishable under the PC Act. (3) Any attempt to commit any offence punishable under the PC Act. (4) Any abetment of any offence punishable under the PC Act. [paras 21, 22] [642-D; 645-B-F]

1.3. Section 7 of the PC Act refers to offences dealing with public servant taking gratification, other than the legal remuneration in respect of an official act. Section 10 deals with punishment for abetment by a public servant of offences defined in Sections 8 and 9. Section 11 of the PC Act refers to an offence of a public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant. Offences under Sections 7, 10 and 11 can be committed only by the public servant, though an offence under Section 7 can also be committed by a person expected to be a public servant. An offence under Section 7 or 11 could also be abetted by a non-public servant, for which punishment has been prescribed under Section 12 of the PC Act. Section 8 deals with the taking gratification, by corrupt or illegal means, to influence public servant. Section 9 deals with taking gratification, for exercise of personal influence with public servant. Offences under Sections 8 and 9 can be committed by a person who need not necessarily be a public servant. An offence under Sections 8, 9 or 12 can be committed by a public servant or by a private person or by combination of both. Section 13 deals with the criminal misconduct by a public servant, which is exclusively an offence against the public servant relating to criminal misconduct. An offence under Sections 13 is made punishable under Section 15 of the PC Act. These provisions indicate that a public servant as well as a non

commit offences punishable under the PC Act. [para 24] [645-G-H; 646-A-D]

1.4. A Special Judge appointed under Section 3(1) of the PC Act has got jurisdiction to proceed exclusively against a public servant and exclusively against a non-public servant as well, depending upon the nature of the offence referred to in Chapter III of the PC Act. Junction of a public servant is not a must for the Special Judge to proceed against a non-public servant for any offence alleged to have been committed by him under Chapter III of the PC Act. An offence under Section 8 or Section 9 can be committed by non-public servant and he can be proceeded against under the PC Act without joinder of any public servant. Thus, offences under Sections 7, 10, 11 and 13 of the PC Act can be committed by a public servant though an offence under Section 7 can be committed also by a "person expected to be a public servant". On the other hand: Section 8 uses the words "whoever...", simpliciter, without using any other qualifying words. Likewise, Sections 9 and 12 also use the words "whoever..." simpliciter. Thus, an offence under Sections 8, 9 or 12 can be committed by any person, who need not necessarily be a public servant. Such an offence can, therefore, be committed by a public servant or by a private person or by a combination of the two. It is thus clear that an offence under the PC Act can be committed by either a public servant or a private person or a combination of both and in view of the mandate of Section 4(1) of the PC Act, read with Section 3(1) thereof, such offences can be tried only by a Special Judge. Thus, the scheme of the PC Act makes it quite clear that even a private person who is involved in an offence mentioned in Section 3(1) of the PC Act, is required to be tried only by a Special Judge, and by no other Court. Moreover, it is not necessary that in every offence under the PC Act, a public servant must

necessarily be an accused. In other words, the existence of a public servant for facing the trial before the Special Court is not a must and even in his absence, private persons can be tried for PC as well as non-PC offences, depending upon the facts of the case. Therefore, it is not the law that only along with the junction of a public servant in array of parties, the Special Judge can proceed against private persons who have committed offences punishable under the PC Act. [para 25- 29] [646-E-G; 647-B-E; 648-B-D]

1.5. Sections 3(1)(a) and (b) deal with only the offences punishable under the PC Act and not any offence punishable under IPC or any other law and Section 4(1) of the PC Act makes it more explicit. Section 4(1) of the PC Act has used a non-abstante clause. It says, "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, the offences specified in sub-section (1) of Section 3 shall be tried by special Judges only". Consequently, the offences referred to in Section 3(1) cannot be tried by the ordinary criminal court, since jurisdiction has been specifically conferred on a Special Judge appointed under Section 3(1) of the PC Act. Sub-section (2) of Section 4 also makes it clear, which says that every offence specified in sub-section (1) of Section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government. A conjoint reading of Section 3(1) along with Sections 4(1) and (2) would make it amply clear that only the Special Judge has got the jurisdiction to try the offences specified in sub-section (1) of Section 3 committed by a public servant or a non-public servant, alone or jointly. [Paras 30, 31] [648-

1.6. Sub-section (3) of Section 4 of the PC Act, indicates that "when trying any case", which means trying any case relating to the offences referred to in Section 3(1)(a) and (b) of the PC Act for which exclusive jurisdiction is conferred on the Special Judge. A Special Judge, while exercising, exclusive jurisdiction, that is, when trying any case relating to offences under Sections 3(1)(a) and (b) of the PC Act, may also try any offence other than the offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial. An accused, in a given case, may be charged under the Code of Criminal Procedure on an offence being committed under the IPC and the offence specified in Section 3 of the PC Act. Criminal cases that can be tried by a Special Judge are under the PC Act and also for the charges under IPC or any other legislation. Conspiracy to commit any offence either under the PC Act or under the IPC is a separate offence, has to be separately charged and tried. In other words, an accused person, either a public servant or non-public servant, who has been charged for an offence under Section 3(1) of the PC Act, could also be charged for an offence under IPC, in the event of which, the Special Judge has got the jurisdiction to try such offences against the public servant as well as against a non-public servant. [Para 32, 34] [649-B-E; 650-A-B]

2.1. In Criminal Appeal No.161 of 2011, no charge was framed against the public servant, while he was alive, under Section 3(1) nor any charge was framed against a private person for any offence under Section 3(1) of the PC Act. The Special Judge, therefore, had no occasion to "try any case" under Section 3(1) of the PC Act, either against a public servant or a private person, so as to try any offence other than an offence specified in Section 3, meaning thereby, non-PC offences against private person, like the appellant. The Special Judge appointed

under Section 3(1) could exercise the powers under sub-section (3) to Section 4 to try non-PC offence. Therefore, trying a case by a Special Judge under Section 3(1) is a sine-qua-non for exercising jurisdiction by the Special Judge for trying any offence, other than an offence specified in Section 3. "Trying any case" under Section 3(1) is, therefore, a jurisdictional fact for the Special Judge to exercise powers to try any offence other than an offence specified in Section 3. [paras 35, 36] [650-E-H; 651-A]

2.2. Exclusion of the jurisdiction of ordinary Criminal Court, so far as offences under the PC Act are concerned, has been explicitly expressed under Section 4(1) of the PC Act, which does not find a place in respect of non-PC offences in sub-section (3) of Section 4 of the PC Act. Further, it is not obligatory on the part of a Special Judge to try non-PC offences. The expression "may also try" gives an element of discretion on the part of the Special Judge which will depend upon the facts of each case and the inter-relation between PC offences and non-PC offences. A Special Judge exercising powers under the PC Act is not expected to try non-PC offences totally unconnected with any PC offences under Section 3(1) of the PC Act and in the event of a Special Judge not trying any offence under Section 3(1) of the PC Act, the question of the Special Judge trying non-PC offences does not arise. Trying of a PC offence is a jurisdictional fact to exercise the powers under Sub-section (3) of Section 4. Jurisdiction of the Special Judge, as such, has not been divested, but the exercise of jurisdiction, depends upon the jurisdictional fact of trying a PC offence. [paras 37, 38] [651-B-F]

2.3. When the jurisdiction of a Court or a Tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collective to the merits of the is a

jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court. [para 39] [651-G-H]

Carona Ltd. v. Parvathy Swaminathan & Sons **(2007) 8 SCC 559: 2007 (10) SCR 656;** *Ramesh Chandra Sankla v. Vikram Cement & Ors.* **(2008) 14 SCC 58: 2008 (10) SCR 243;** *Ratilal Bhanji Mithani v. State of Maharashtra* **(1979) 2 SCC 179: 1979 (1) SCR 993 - relied on.**

Kartongen Kemi Ochforvaltning AB v. State through CBI **(2004) 1 JCC 218;** *Ajay Aggarwal v. Union of India* **(1993) 3 SCC 609: 1993 (3) SCR 543;** *Sanichar Sahni v. State of Bihar* **(2009) 7 SCC 198: 2009 (10) SCR 112;** *Mohd. Arif v. State (NCT of Delhi)* **(2011) 13 SCC 621: 2011 (10) SCR 56 - referred to.**

3.1. Where a public servant dies at the fag end of the trial, by that time, several witnesses might have been examined and to hold that the entire trial would be vitiated due to death of a sole public servant would defeat the entire object and purpose of the PC Act, which is enacted for effective combating of corruption and to expedite cases related to corruption and bribery. The purpose of the PC Act is to make anti-corruption laws more effective in order to expedite the proceedings, provisions for day-to-day trial of cases, transparency with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been provided under the PC Act. Consequently, once the power has been exercised by the Special Judge under sub-section (3) of Section 4 of the PC Act to proceed against non-PC offences along with PC offences, the mere fact that the sole public servant dies after the exercise of powers under sub-section (3) of Section 4, will not divest the jurisdiction of the Special Judge or vitiate the proceedings pending before him. Therefore in Criminal appeal no.943 of 2008, the order of the High Court is set aside and the Special Judge is

directed to complete the trial of the cases within a period of six months. [para 43, 44] [653-G-H; 654-A-D]

3.2. In Criminal Appeal No. 161 of 2011, the FIR was registered on 2.7.1996 and the charge-sheet was filed before the Special Judge on 14.9.2001 for the offences under Sections 120B, 420, IPC read with Sections 13(2) and 13(1) of the PC Act. Accused 9 and 10 died even before the charge-sheet was sent to the Special Judge. The charge against the sole public servant under the PC Act could also not be framed since he died on 18.2.2005. The Special Judge also could not frame any charge against non-public servants. Under sub-section (3) of Section 4, the special Judge could try non-PC offences only when "trying any case" relating to PC offences. In the instant case, no PC offence has been committed by any of the non-public servants so as to fall under Section 3(1) of the PC Act. Consequently, there was no occasion for the special Judge to try any case relating to offences under the PC Act against the Appellant. The trying of any case under the PC Act against a public servant or a non-public servant is a sine-qua-non for exercising powers under sub-section (3) of Section 4 of PC Act. In the instant case, since no PC offence has been committed by any of the non-public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant. The jurisdictional fact does not exist so far as this appeal is concerned, so as to exercise jurisdiction by the Special Judge to deal with non-PC offences. Consequently, there is no error in the view taken by the Special Judge in forwarding the case papers to the Court of Chief Metropolitan Magistrate for trying the case in accordance with law. [Para 45, 46] [654-E-H; 655-A-C]

Case Law Reference:

(2004) 1 JCC 218	**referred to**	**Para 9**
1993 (3) SCR 543	**referred to**	**Para 32**
2009 (10) SCR 112	**referred to**	**Para 33**
2011 (10) SCR 56	**referred to**	**Para 33**
2003 (3) Suppl. SCR 1087	**relied on**	**Para 34**
2007 (10) SCR 656	**relied on**	**Para 39**
2008 (10) SCR 243	**relied on**	**Para 39**
1979 (1) SCR 993	**relied on**	**Para 40**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 943 of 2008.

From the Judgment and Order dated 21.04.2006 of the High Court of Delhi at New Delhi in Crl. Revn. Petition No. 535 of 2005.

WITH

Crl. Appeal No. 161 of 2011.

P.P. Malhotra, ASG, V. Giri (A.C), Basanth R., K. Radhakrishnan, Uday U. Lalit, Guru Krishna Kumar, Mohammed Sadique T.A. (A.C), Shivaji M. Jadhav, Anish R. Shah, Dr. Ashok Dhamija, T.A. Khan, Yasir Rauf, Sharika Bhanot, Sonia Dhamija, Hari Shankar K., Kawal Nain, Vikas Singh Jangra, Aditya Verma, Lakshmi, Asha G. Nair for the Appearing Parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in these cases, concerned with the interpretation of various sections that appear in Chapter II read with Chapter III of the Prevention of Corruption Act, 1988 (for short "the PC Act"), especially Sections 3, 4, 5

and other related provisions dealing with offences and penalties appearing in Chapter III of the PC Act.

2. We are, in Criminal Appeal No. 943 of 2008, concerned with the question whether the Special Judge, after framing charges against a Public Servant under 13(2) read with Section 13(1)(b) falling under Section 3(1) of the PC Act and against private persons for offences under Sections 120-B, 420, 467, 468, 471 IPC can go ahead with the trial of the case against the private persons for non-PC offences, even after the death of the sole public servant. In other words, the question is whether, on the death of the sole public servant, the Special Judge will cease to have jurisdiction to continue with the trial against the private persons for non-PC offences. Further question raised is that, assuming that the Special Judge has jurisdiction under sub-section (3) of Section 4 of the PC Act to proceed against the private persons, is the Special Judge duty bound to try any non-PC offence, other than the offences specified under Section 3 of the PC Act against the accused persons charged at the same trial.

3. In Criminal Appeal No. 161 of 2011, we are concerned with the question as to whether the Special Judge has jurisdiction under Section 4(3) of the PC Act to try non-PC offences against private persons when no charges have been framed against public servants for trying a case for offences under Section 3(1) of the PC Act, since they died before framing of charges under the PC Act or IPC.

4. We have two conflicting judgments, one rendered by the Delhi High Court, which is impugned in Criminal Appeal No. 943 of 2008 filed by the State through Central Bureau of Investigation (CBI), New Delhi and the other rendered by the Bombay High Court, which is challenged by a private person in Criminal Appeal No. 161 of 2011.

5. Delhi High Court seems to have taken the view that when public servants and non-public servan

accused and some offences are under the PC Act coupled with other offences under IPC, on death of a public servant, the offences under the PC Act cannot be proceeded with and the trial Court has to modify and/or alter and/or amend the charges. Bombay High Court has taken the view that once the jurisdiction is vested on a Special Judge, the same cannot be divested on the death of a public servant and that if a private person has abetted any offences punishable under the PC Act, he can be tried even without the public servant, in view of the separate charge levelled against such private person by the Special Judge.

6. We may first deal with the facts in Criminal Appeal No. 943 of 2008. The CBI, New Delhi registered a case No. RCSIG 2000/E0001 on 16.5.2000 against one P. K. Samal (A-1), Chief Manager SBI, Jaipur Road, J. K. Singh (A-2), Director M/s Mideast Integrated Steels Ltd. (MISL), New Delhi, Rita Singh (A-3), Director M/s MISL, Deepak Singh (A-4) and Proprietor Kesoram Refractory, New Delhi, under Section 120B read with Sections 420, 467, 471 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act and substantive offences under Sections 420, 467, 468 and 471 IPC and Section 13(2) read with Section 13(1)(d) of the PC Act alleging that A-1, during 1996-97, was a party to a criminal conspiracy with A-2, A-3, A-4 and others with the object of cheating IDBI, Mumbai and in pursuance thereof, A-1 abused his official position to cause undue pecuniary advantage to the accused persons A-2 and A-3 and corresponding loss to IDBI, to the tune of Rs.3,52,63,550/- by negotiating forged /fictitious invoices purportedly of M/s. Kesoram Refractories, a B.K. Birla Group Company, Calcutta, against L.Cs opened by SBI, Jaipur Road.

7. CBI, after completing the investigation, filed charge-sheet on 1.11.2001 before the Special Judge, New Delhi and the Special Judge, on 25.3.2003, after hearing the prosecution as well as the defence counsel, framed charges against the accused persons under Section 120B read with Sections 467,

471 and 420 IPC and also under Sections 13(1)(d) and 13(2) of the PC Act and substantive offences against the accused persons under Sections 420, 467, 471 IPC and also substantive offences under Sections 13(1)(d) and 13(2) of the PC Act against A-1. All the accused persons pleaded not guilty and claimed trial.

8. The Special Judge, later, posted the case for prosecution evidence on 10.4.2003 and, on that day, two witnesses were present, but the case was adjourned. Meanwhile, on 20.6.2003, the sole public servant A-1 died. A-3 then filed Criminal Revision No. 550 of 2003 before the High Court of Delhi on 22.7.2003 challenging the order framing the charges against him. The High Court, on 1.8.2003, directed the trial Court to record only the examination-in-chief of the witnesses. Accordingly, the examination-in-chief of 8 prosecution witnesses was recorded on different days. On 28.4.2004, A-2 filed an application before the Special Judge for dropping the charges in view of the death of A-1, the sole public servant. On 12.5.2004, A-2 filed an application before the High Court as Criminal M.C. No. 1395/2004 seeking stay of further proceedings before the trial Court, till charges are amended. The High Court, on 14.5.2004, directed the trial Court to dispose of the application filed by A-2 for modification, amendment or alteration of charges on account of death of A-1 and further directed if the Court feels it necessary, it may add, alter or amend the charges and proceed in accordance with law.

9. CBI, however, filed objection to the above application before the Special Judge on 20.5.2004. A-2, on 12.7.2005, filed Criminal Revision No. 535 of 2005 before the High Court for calling of the case pending before the Special Judge, so as to consider the propriety of not passing any order on the application for dropping the charges, despite the directions issued by the High Court. He also prayed for setting aside the charges in view of the death of the so

questioned the maintainability of the revision and also pointed out that there is no statutory provision vitiating the jurisdiction of the Special Judge on death of the public servant. The High Court, however, placing reliance on its earlier judgement in *Kartongen Kemi Ochforvaltning AB v. State through CBI* (2004) 1 JCC 218 (Bofors case) held that on the death of a public servant, the offences under the PC Act cannot be proceeded with and directed to modify and alter and/or amend the charges in view of the death of A-1, the legality of which is under challenge in Criminal Appeal No. 943 of 2008.

10. We may now examine the facts in Criminal Appeal No. 161 of 2011. CBI (Banks Securities & Fraud Cell), Mumbai registered an FIR on 2.7.1996 which discloses that accused no. 1, the then Chairman and Managing Director of the Bank of Maharashtra, Pune, who was working as Deputy General Manager of Bank of Maharashtra along with accused nos. 9 and 10, the employees of the Bank of Maharashtra, entered into a criminal conspiracy with an intent to cheat the bank, with the appellant (accused no. 2) and accused Nos. 3 and 5, who were working as the Managing Director, General Manager of M/s Orson Electronics Limited respectively. It was also alleged in the FIR that, during 1986-88, A-2 and other accused persons entered into a criminal conspiracy with the officers of the Bank of Maharashtra and, in pursuance to the criminal conspiracy, obtained huge credit facilities to the tune of Rs.20 crore in favour of M/s Orson Electronics Limited and M/s Nihon Electronics Limited, of which A-2 was the Managing Director/Director, knowing very well that both the companies were having very low capital and were new. It was also alleged in the FIR that those funds were not utilized for the purpose for which the same were obtained from the bank and were siphoned off through M/s Orson Electronics Limited and other fictitious firms. Consequently, accused persons failed to repay the funds of the bank, thereby the bank was cheated to the tune of Rs.20.64 crores. It was also alleged in the FIR that A-1 had abused his position as public servant and granted favour to A-2 to A-8 and

thereby caused wrongful losses to the bank.

11. CBI completed the investigation and the charge-sheet was filed on 14.9.2001 against the accused persons for offences punishable inter alia under Section 120B read with Section 420 IPC and Section 5(2) read with Section 5(1)(b) of the Prevention of Corruption Act, 1947, corresponding to Section 13(2) read with Section 13(1)(d) of the PC Act, in the Court of Special Judge, Mumbai.

12. Accused nos. 9 and 10, though named in the charge-sheet, could not be sent for trial since they died before the charge-sheet came to be filed on 14.9.2001. On 18.2.2005, A-1, the sole public servant also expired. A-2, the appellant herein, then preferred an application before the Special Judge for sending the case to the Metropolitan Magistrate at Bombay for conducting the trial for offences under IPC, as the offence under the PC Act was not attracted due to the death of the public servant. It was pointed out that, in the charge-sheet, two public servants were joined as accused persons, but only one of them was alive when the charge-sheet was filed. Further, it was stated that when the charges were sought to be framed, no public servant was alive, hence, no charges under the PC Act could be framed. In the absence of any offence under the PC Act, the Special Judge could not have tried the offences levelled against the accused persons under the IPC. The application was, however, opposed by CBI stating that even though the sole public servant had died, the offence levelled against the accused persons could be tried by the Special Judge.

13. The Special Judge, after hearing the parties, passed the following order:

"9. On going through the above ratios, it can be said that the existence of public servant for facing trial before the Special Court is must and in his absence, private person cannot be tried by Special Court. In present case, the sole public servant died during the pend e

charge is not framed. The accused Nos. 2 to 8 are private persons facing trial for the offences punishable under Section 409 r/w 120-B of IPC. The said offences are triable by the Court of Chief Metropolitan Magistrate. Therefore, the case is required to be sent to Court of Chief Metropolitan Magistrate for trial as per the law. With this, I pass the following order:-

ORDER

Misc. Application (Exh. 18) is allowed.

Registrar (S) is directed to send case papers of Spl. Case No.88 of 2001 to Chief Metropolitan Magistrate for trial of accused according to law within period of four weeks from the date of this order.

Misc. Application (Exh.18) stands disposed of.

Sd/- 5.2.09
(S.P. Tavade)
Special Judge for CBI Cases
Greater Mumbai."

14. CBI, aggrieved by the said order, preferred Criminal Revision Application No. 389/2009 before the Bombay High Court. The High Court took the view that the jurisdiction conferred on the Special Judge is not divested on the death of an accused. The High Court held that, upon death, the case against that public servant alone abates and the rest of them can be proceeded against by the Special Judge, since the Court, once vested with the jurisdiction, cannot be divested of it on the death of a public servant. Consequently, the order passed by the Special Judge was set aside and the Special Judge, CBI, Bombay was directed to continue with the trial of the case. Aggrieved by the same, Criminal Appeal No. 161 of 2011 has been preferred by A-2.

15. Shri P.P. Malhotra, learned Additional Solicitor General

appearing for CBI in Criminal Appeal No. 943 of 2008, referred to Sections 3(1) and 4(1) of the PC Act and submitted that irrespective of whether the offence mentioned in Section 3(1) was committed by a public servant or a private person, individually or jointly, trial could be conducted only by the Special Judge who is conferred with the jurisdiction by the Central Government or the State Government, as the case may be, under the PC Act. Shri Malhotra submitted that on the death of a public servant, the jurisdiction once vested on the Special Judge cannot be divested. Further, it was also pointed out that once the public servant dies, the charge against him alone would abate, but the jurisdiction of the Court would not be divested. It was stated that the direction issued by the High Court was contrary to the statutory provisions and settled principles of law and is liable to be set aside.

16. Shri K. Radhakrishnan, learned senior counsel appearing for the CBI in Criminal Appeal no. 161 of 2011, highlighted the objects and reasons of the PC Act and submitted that once the jurisdiction to try the offence under the PC Act, as well as the offence under IPC, has been conferred on a Special Judge, it cannot be divested by the act of parties, even on the death of a public servant.

17. Shri V. Giri, learned senior counsel and amicus curiae, submitted that once jurisdiction is conferred on a Special Judge, it cannot be divested by the subsequent events and on death of the public servant only the charge against him will abate, but the jurisdiction of the Special Judge will not be divested.

18. Shri Kawal Nain, learned counsel appearing for the respondents in Criminal Appeal No. 943 of 2008, also traced the legislative history of the PC Act as well as the jurisdiction of the ordinary Criminal Court under the Code, with specific reference to Section 3 of the PC Act read with Section 13(1)(d)(i)(ii) of the PC Act and Section 120B of the IPC. Learned counsel pointed out that the

servant under Section 13(1)(d)(i)(ii) has abated on his death, consequently, it would not be possible for the Special Judge to try any offence as against the respondents, since both are intrinsically interlinked. Learned counsel pointed out that to establish an offence of conspiracy, there must be two or more persons as stated in Section 120A IPC.

19. Shri R. Basant, learned senior counsel appearing for the appellant in Criminal Appeal No. 161 of 2011, has taken the stand that the Special Judge has no jurisdiction under Section 4(3) of the PC Act to try the offences punishable under Section 409 read with Section 120B IPC against the appellant, since there is no public servant in the array of accused persons. Learned senior counsel submitted, assuming that the Special Judge has jurisdiction under Section 4(3) of the PC Act, still the Special Judge has the discretion to decide as to whether he should try any offence, other than the offence specified in Section 3 of the PC Act. It was pointed out that the jurisdiction of the Special Judge to try offences specified under Sections 3(a) and (b) is not only in respect of offences punishable under the PC Act, but also non-PC offences in view of Section 4(3) of the PC Act, which is only an enabling provision. Further, it was also pointed out that when exclusive jurisdiction is conferred on the Special Judge, while trying offences under Section 3(1)(a) and (b) against public servant as well as the private persons, the discretion is also conferred on the Special Judge under Section 4(3) to try non-PC offences as well against private persons. On the basis of the above legal premises, learned senior counsel pointed out that, in the instant case, since no charges have been framed against the public servant under Section 3(1) of the PC Act and that the public servant is no more, the discretion exercised by the Special Judge under Section 4(3) of the PC Act should not have been interfered with by the High Court.

20. We may, before examining the rival contentions raised by the parties, deal with the objects and reasons for enacting

the PC Act. The Indian Penal Code has provided for punishment for the offence of bribery and corruption even against the public servants. Parliament, in its wisdom, noticed that the Penal Code was not adequate to meet the exigencies of time and a need was felt to introduce a special legislation with a view to eradicate the evil of bribery and corruption from the society. Consequently, the Prevention of Corruption Act, 1947 was enacted, which was amended in the year 1964, based on the recommendations of the Santhanam Committee. Parliament still felt that the anti-corruption laws should be made more effective, by widening their coverage and enhancing penalties and to expedite the proceedings and hence the 1988 Act was enacted.

21. Chapter II of the PC Act deals with the appointment of Special Judges and Chapter III deals with the offences and penalties. Section 3 of the PC Act deals with the power to appoint Special Judges, which is extracted hereunder for an easy reference:

> **"3. Power to appoint special Judges.-** (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:-
>
> (a) any offence punishable under this Act; and
>
> (b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).
>
> (2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974)."

Section 4 of the PC Act deals with the cases triable by Special Judges. The same is also extracted below:

"4. Cases triable by special Judges.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub- section (1) of section 3 shall be tried by special Judges only.

(2) Every offence specified in sub- section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day- to- day basis."

Section 5 of the PC Act deals with the procedure and powers of Special Judge. The same also has some relevance and is extracted below for an easy reference:

"5. Procedure and powers of special Judge.- (1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant case by Magistrates.

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub- sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code.

(3) Save as provided in sub- section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974 .), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(4) In particular and without prejudice to the generality of the provisions contained in sub- section (3), the provisions of sections 326 and 457 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.

(6) A special Judge, while trying an offence punishable, under this Act, shall e[illegible]s

and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ord. 38 of 1944)."

22. Section 3(1) of the PC Act confers power on the Central Government or the State Government to appoint as many Special Judges as may be necessary, for such area or areas or for such cases or group of cases as will be specified in the notification to be issued in the Official Gazette. The Special Judge is so empowered to try any offence punishable under Section 3(1)(a) of the PC Act. The Special Judge is also empowered to try under Section 3(1)(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a). To make it more precise, following offences would come within the scope of Section 3(1) of the PC Act:

(1) Any offence punishable under the PC Act.

(2) Any conspiracy to commit any offence punishable under the PC Act.

(3) Any attempt to commit any offence punishable under the PC Act.

(4) Any abetment of any offence punishable under the PC Act.

23. Let us examine what are the offences specified in Clause (a) of Section 3(1) of the PC Act, for which reference has to be made to Chapter III of the PC Act.

24. Section 7 of the PC Act refers to offences dealing with public servant taking gratification, other than the legal remuneration in respect of an official act. Section 10 deals with punishment for abetment by a public servant of offences defined in Sections 8 and 9. Section 11 of the PC Act refers to an offence of a public servant obtaining valuable thing, without consideration from person concerned in proceeding or business

transacted by such public servant. Offences under Sections 7, 10 and 11 can be committed only by the public servant, though an offence under Section 7 can also be committed by a person expected to be a public servant. An offence under Section 7 or 11 could also be abetted by a non-public servant, for which punishment has been prescribed under Section 12 of the PC Act. Section 8 deals with the taking gratification, by corrupt or illegal means, to influence public servant. Section 9 deals with taking gratification, for exercise of personal influence with public servant. Offences under Sections 8 and 9 can be committed by a person who need not necessarily be a public servant. An offence under Sections 8, 9 or 12 can be committed by a public servant or by a private person or by combination of both. Section 13 deals with the criminal misconduct by a public servant, which is exclusively an offence against the public servant relating to criminal misconduct. An offence under Sections 13 is made punishable under Section 15 of the PC Act. The above discussion would indicate that a public servant as well as a non-public servant can commit offences punishable under the PC Act.

25. A Special Judge appointed under Section 3(1) of the PC Act has got jurisdiction to proceed exclusively against a public servant and exclusively against a non-public servant as well, depending upon the nature of the offence referred to in Chapter III of the PC Act. Junction of a public servant is not a must for the Special Judge to proceed against a non-public servant for any offence alleged to have been committed by him under Chapter III of the PC Act. As already indicated, an offence under Section 8 or Section 9 can be committed by non-public servant and he can be proceeded against under the PC Act without joinder of any public servant. For example:

- Section 7 of the Act uses the words "Whoever, being, or expecting to be a public servant...."

- Sections 10 and 11 of the Act use the words "Whoever, being a public s

- Section 13 uses the words "A public servant is said to commit…..".

26. Thus, offences under Sections 7, 10, 11 and 13 of the PC Act can be committed by a public servant though an offence under Section 7 can be committed also by a "person expected to be a public servant". On the other hand:

- Section 8 uses the words "whoever…", simpliciter, without using any other qualifying words.

- Likewise, Sections 9 and 12 also use the words "whoever…" simpliciter.

27. Thus, an offence under Sections 8, 9 or 12 can be committed by any person, who need not necessarily be a public servant. Such an offence can, therefore, be committed by a public servant or by a private person or by a combination of the two. It is thus clear that an offence under the PC Act can be committed by either a public servant or a private person or a combination of both and in view of the mandate of Section 4(1) of the PC Act, read with Section 3(1) thereof, such offences can be tried only by a Special Judge.

For example:

- A private person offering a bribe to a public servant commits an offence under Section 12 of Act. This offence can be tried only by the Special Judge, notwithstanding the fact that only a private person is the accused in the case and that there is no public servant named as an accused in that case.

- A private person can be the only accused person in an offence under Section 8 or Section 9 of the said Act. And it is not necessary that a public servant should also be specifically named as an accused in the same case. Notwithstanding the fact that a private person is the only accused in an offence under Section 8 or Section 9, it can be tried only by a Special Judge.

28. Thus, the scheme of the PC Act makes it quite clear that even a private person who is involved in an offence mentioned in Section 3(1) of the PC Act, is required to be tried only by a Special Judge, and by no other Court. Moreover, it is not necessary that in every offence under the PC Act, a public servant must necessarily be an accused. In other words, the existence of a public servant for facing the trial before the Special Court is not a must and even in his absence, private persons can be tried for PC as well as non-PC offences, depending upon the facts of the case.

29. We, therefore, make it clear that it is not the law that only along with the junction of a public servant in array of parties, the Special Judge can proceed against private persons who have committed offences punishable under the PC Act.

30. Sections 3(1)(a) and (b), it may be noted, deal with only the offences punishable under the PC Act and not any offence punishable under IPC or any other law and Section 4(1) of the PC Act makes it more explicit.

31. Section 4(1) of the PC Act has used a non-abstante clause. It says, "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, the offences specified in sub-section (1) of Section 3 shall be tried by special Judges only". Consequently, the offences referred to in Section 3(1) cannot be tried by the ordinary criminal court, since jurisdiction has been specifically conferred on a Special Judge appointed under Section 3(1) of the PC Act. Sub-section (2) of Section 4 also makes it clear, which says that every offence specified in sub-section (1) of Section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for s e

of them as may be specified in this behalf by the Central Government. A conjoint reading of Section 3(1) along with Sections 4(1) and (2) would make it amply clear that only the Special Judge has got the jurisdiction to try the offences specified in sub-section (1) of Section 3 committed by a public servant or a non-public servant, alone or jointly.

32. We may now examine the scope of sub-section (3) of Section 4 of the PC Act, which indicates that "when trying any case", which means trying any case relating to the offences referred to in Section 3(1)(a) and (b) of the PC Act for which exclusive jurisdiction is conferred on the Special Judge. A Special Judge, while exercising, exclusive jurisdiction, that is, when trying any case relating to offences under Sections 3(1)(a) and (b) of the PC Act, may also try any offence other than the offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial. An accused, in a given case, may be charged under the Code of Criminal Procedure on an offence being committed under the IPC and the offence specified in Section 3 of the PC Act. Criminal cases that can be tried by a Special Judge are under the PC Act and also for the charges under IPC or any other legislation. Conspiracy to commit any offence either under the PC Act or under the IPC is a separate offence, has to be separately charged and tried. For example, the conspiracy to commit offence punishable under the PC Act itself is an offence to be tried only by a Special Judge. In *Ajay Aggarwal v. Union of India* (1993) 3 SCC 609, the Court held as follows:

> "….Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy. …."

33. Reference may also be made to the judgments of this Court in *Sanichar Sahni v. State of Bihar* (2009) 7 SCC 198

and *Mohd. Arif v. State (NCT of Delhi)* (2011) 13 SCC 621.

34. In other words, an accused person, either a public servant or non-public servant, who has been charged for an offence under Section 3(1) of the PC Act, could also be charged for an offence under IPC, in the event of which, the Special Judge has got the jurisdiction to try such offences against the public servant as well as against a non-public servant. The legal position is also settled by the Judgment of this Court in *Vivek Gupta v. CBI and another* (2003) 8 SCC 628, wherein this Court held that a public servant who is charged of an offence under the provisions of the PC Act may also be charged by the Special Judge at the same trial of any offence under IPC if the same is committed in a manner contemplated under Section 220 of the Code. This Court also held, even if a non-public servant, though charged only of offences under Section 420 and Section 120B read with Section 420 IPC, he could also be tried by the Special Judge with the aid of sub-section (3) of Section 4 of the PC Act. We fully endorse that view.

35. We are, however, in Criminal Appeal No.161 of 2011, concerned with a situation where no charge has been framed against the public servant, while he was alive, under Section 3(1) nor any charge was framed against a private person for any offence under Section 3(1) of the PC Act. The Special Judge, therefore, had no occasion to "try any case" under Section 3(1) of the PC Act, either against a public servant or a private person, so as to try any offence other than an offence specified in Section 3, meaning thereby, non-PC offences against private person, like the appellant.

36. The Special Judge appointed under Section 3(1) could exercise the powers under sub-section (3) to Section 4 to try non-PC offence. Therefore, trying a case by a Special Judge under Section 3(1) is a sine-qua-non for exercising jurisdiction by the Special Judge for trying any offence other than an offence specified in Section 3. "Trying a

3(1) is, therefore, a jurisdictional fact for the Special Judge to exercise powers to try any offence other than an offence specified in Section 3.

37. Exclusion of the jurisdiction of ordinary Criminal Court, so far as offences under the PC Act are concerned, has been explicitly expressed under Section 4(1) of the PC Act, which does not find a place in respect of non-PC offences in sub-section (3) of Section 4 of the PC Act. Further, it is not obligatory on the part of a Special Judge to try non-PC offences. The expression "may also try" gives an element of discretion on the part of the Special Judge which will depend upon the facts of each case and the inter-relation between PC offences and non-PC offences.

38. A Special Judge exercising powers under the PC Act is not expected to try non-PC offences totally unconnected with any PC offences under Section 3(1) of the PC Act and in the event of a Special Judge not trying any offence under Section 3(1) of the PC Act, the question of the Special Judge trying non-PC offences does not arise. As already indicated, trying of a PC offence is a jurisdictional fact to exercise the powers under Sub-section (3) of Section 4. Jurisdiction of the Special Judge, as such, has not been divested, but the exercise of jurisdiction, depends upon the jurisdictional fact of trying a PC offence. We are, therefore, concerned with the exercise of jurisdiction and not the existence of jurisdiction of the Special Judge.

39. The meaning and content of the expression "jurisdictional fact" has been considered by this Court in *Carona Ltd. v. Parvathy Swaminathan & Sons* (2007) 8 SCC 559, and noticed that where the jurisdiction of a Court or a Tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collective to the merits of the issue. Existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court. In *Ramesh Chandra Sankla v. Vikram Cement & Ors.* (2008) 14 SCC 58, this Court held that

by erroneously assuming existence of the jurisdictional fact, a Court cannot confer upon itself jurisdiction which otherwise it does not possess.

40. We have already indicated that the jurisdictional fact so as to try non-PC offences is "trying any case" under the PC Act. As noticed by this Court in *Ratilal Bhanji Mithani v. State of Maharashtra* (1979) 2 SCC 179, the trial of a warrant case starts with the framing of charge. Prior to that the proceedings are only an inquiry. The Court held as follows:-

> "Once a charge is framed, the Magistrate has no power 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 the 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. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1898 (which correspond to Sections 325 and 360 of the Code of 1973)."

41. We may now examine whether, in both these appeals, the above test has been satisfied. First, we may deal with Criminal Appeal No. 943 of 2008. CBI, in this appeal, as already indicated, submitted the charge-sheet on 1.11.2001 for the offences against A-1, who is a public servant, as well as against non-public servants. Learned Special Judge had, on 25.3.2003, framed the charges against the accused persons under Section 120B read Sections with 467, 471 and 420 IPC and also under Sections 13(1)(d) and 13(2) of the PC Act and substantive offences under Sections 420 and

also substantive offences under Sections 13(1)(d) and 13(2) of the PC Act against the public servants. Therefore, charges have been framed against the public servants as well as non-public servants after hearing the prosecution and defence counsel, by the special Judge on 25.3.2003 in respect of PC offences as well as non-PC offences. As already indicated, under sub-section (3) of Section 4, when trying any case, a Special Judge may also try any offence other than the offence specified in Section 3 and be charged in the same trial. The Special Judge, in the instant case, has framed charges against the public servant as well as against the non-public servant for offences punishable under Section 3(1) of PC Act as well as for the offences punishable under Section 120B read with Sections 467, 471 and 420 IPC and, therefore, the existence of jurisdictional fact that is "trying a case" under the PC Act has been satisfied.

42. The Special Judge after framing the charge for PC and non-PC offences posted the case for examination of prosecution witnesses, thereafter the sole public servant died on 2.6.2003. Before that, the Special Judge, in the instant case, has also exercised his powers under sub-section (3) of Section 4 of the PC Act and hence cannot be divested with the jurisdiction to proceed against the non-public servant, even if the sole public servant dies after framing of the charges. On death, the charge against the public servant alone abates and since the special Judge has already exercised his jurisdiction under sub-section (3) of Section 4 of the PC Act, that jurisdiction cannot be divested due to the death of the sole public servant.

43. We can visualize a situation where a public servant dies at the fag end of the trial, by that time, several witnesses might have been examined and to hold that the entire trial would be vitiated due to death of a sole public servant would defeat the entire object and purpose of the PC Act, which is enacted for effective combating of corruption and to expedite cases

related to corruption and bribery. The purpose of the PC Act is to make anti-corruption laws more effective in order to expedite the proceedings, provisions for day-to-day trial of cases, transparency with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been provided under the PC Act. Consequently, once the power has been exercised by the Special Judge under sub-section (3) of Section 4 of the PC Act to proceed against non-PC offences along with PC offences, the mere fact that the sole public servant dies after the exercise of powers under sub-section (3) of Section 4, will not divest the jurisdiction of the Special Judge or vitiate the proceedings pending before him.

44. We are, therefore, inclined to allow Criminal Appeal No. 943 of 2008 and set aside the order of the High Court and direct the Special Judge to complete the trial of the cases within a period of six months.

45. We may now examine Criminal Appeal No. 161 of 2011, where the FIR was registered on 2.7.1996 and the charge-sheet was filed before the Special Judge on 14.9.2001 for the offences under Sections 120B, 420, IPC read with Sections 13(2) and 13(1) of the PC Act. Accused 9 and 10 died even before the charge-sheet was sent to the Special Judge. The charge against the sole public servant under the PC Act could also not be framed since he died on 18.2.2005. The Special Judge also could not frame any charge against non-public servants. As already indicated, under sub-section (3) of Section 4, the special Judge could try non-PC offences only when "trying any case" relating to PC offences. In the instant case, no PC offence has been committed by any of the non-public servants so as to fall under Section 3(1) of the PC Act. Consequently, there was no occasion for the special Judge to try any case relating to offences under the PC Act against the Appellant. The trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine-qua-non for exercising powers u[illegible]f

Section 4 of PC Act. In the instant case, since no PC offence has been committed by any of the non-public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant. The jurisdictional fact, as already discussed above, does not exist so far as this appeal is concerned, so as to exercise jurisdiction by the Special Judge to deal with non-PC offences.

46. Consequently, we find no error in the view taken by the Special Judge, CBI, Greater Mumbai in forwarding the case papers of Special Case No. 88 of 2001 in the Court of Chief Metropolitan Magistrate for trying the case in accordance with law. Consequently, the order passed by the High Court is set aside. The competent Court to which the Special Case No. 88 of 2001 is forwarded, is directed to dispose of the same within a period of six months. Criminal Appeal No. 161 of 2011 is allowed accordingly.

D.G. Appeals allowed.

PRATIMA CHOWDHURY

v.

KALPANA MUKHERJEE & ANR.

(Civil Appeal No. 1938 of 2014)

FEBRUARY 10, 2014

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

TRANSFER OF PROPERTY ACT, 1882:

Housing Society - Transfer of membership/flat - Validity of - Flat given on rent to the son of the respondent - Letters written by appellant to Society for transferring the said flat in favour of respondent on account of close relationship between them - Transfer was without consideration - Arbitrator held the letters of transfer invalid - Cooperative Tribunal and High Court held that approach of arbitrator was erroneous - Held: Respondent was mother-in-law of niece of appellant - Therefore factually the expression of close relationship depicted in the letters was false - As regards transfer without consideration, respondent herself gave statement to the effect that appellant had transferred the flat for consideration of Rs.4.29 lacs which was in form of shares belonging to the son of the respondent - However, on the date of execution of transfer or even when board resolution was passed, the son of the respondent did not have any shares in his name said to have been transferred to appellant as consideration of the flat - Therefore, all the ingredients of the letters were shrouded in suspicious circumstances - The stance of appellant regarding transfer of shares was that same was return of loan extended by her to son of the respondent for business venture - This factual position was overlooked by Cooperative Tribunal and High Court - Arbitrator held that the appellant was in Bombay and not in Calcutta when these letters were written - Said finding was recorded on the basis of 3 witnesses

produced on behalf of appellant before the arbitrator - Cooperative Tribunal overlooked the statement of witnesses merely because notary was an Advocate - Conclusion of Cooperative Tribunal and High Court that the documents were executed in Calcutta was therefore based on no evidence - Further, respondent continued to pay rent into the account of appellant - Accordingly, arbitrator rightly inferred that even to the knowledge of respondent, flat was not actually transferred to her name.

Housing Society - Transfer of membership/flat - Revocation of - Withdrawal letter revoking letters of transfer was sent by appellant before the transfer of membership/flat had attained finality - Still, Society did not consider the withdrawal letter - Acceptance or rejection on merits is another matter, but non-consideration clearly invalidated the resolution of transfer passed by society.

Transfer of membership/flat - Validity of - Fiduciary relation - Held: When parties are in fiduciary relationship, the manner of examining the validity of a transaction specifically when there is no reciprocal consideration has to be based on parameters which are different from those applicable to an ordinary case.

Transfer of membership/flat without consideration - Relationship of faith, trust and confidence - Letters written by appellant to Housing Society for transferring her flat to the name of the respondent - Held: There was no justification for the appellant to transfer her flat to respondent free of cost specially when she has no direct intimate relationship with respondent - Son of respondent was married to niece of appellant and so he was in domineering position - He enjoyed trust and confidence of appellant which was apparent from the fact that the joint account of appellant with the son of the respondent was operated by him exclusively and drafting of the letters of transfer of flat was done by him on behalf of appellant - In such fact situation, the onus of substantiating

the validity and genuineness of the transfer of flat by the appellant rested squarely on the shoulders of the respondent which she miserably failed to discharge.

CODE OF CIVIL PROCEDURE, 1908: Pleadings - Rejoinder - Non consideration of facts stated in the rejoinder - Effect of - Respondent-defendant in written replies adopted stand contrary to documents relied upon by rival parties - Number of documents not mentioned by appellant-plaintiff in the dispute case relied upon by respondent - Held: Arbitrator recorded his findings in the award not only on the pleadings including rejoinder but also on the basis of evidence led in support of said pleadings - Thus, arbtirator acted in accordance with law and therefore exclusion from consideration of factual position asserted by appellant in her rejoinder by the Cooperative Tribunal and High Court was wholly unjustified.

DOCTRINES/PRINCIPLES:

Principle of estoppel - Applicability of - Discussed.

Principle of justice and equity and doctrine of fairness - Applicability of.

Evidence Act, 1872: s.115 - Estoppel - Salient pre-condition for invoking rule of estoppel - Discussed - In the instant case, the first party made no representation, the second party did not accept any representation and did not act in any manner nor second party altered its position - Therefore, the question whether the restoration of the original position would be iniquitous or unfair did not arise.

NOTARY ACT, s.8 - Notarization of document - Non issuance of notarial certificate - Held: In the absence of issuance of certificate, notarization of document becomes suspicious.

The appellant owned a flat in a

One PM, the son of the responent and the son-in-law of the appellant's sister occupied flat 5D owned by the appellant. PM was employed with CP Ltd. On 9.3.1992, CP Ltd. confirmed having taken flat in question on lease and licence for 3 years for the residence of PM. The rent was paid in the joint acount of the appellant and PM.

On 29.6.1992, the appellant requested the Society to transfer the said flat to the respondent and intimated that all municipal taxes would be paid by the respondent. The appellant then addressed letter dated 11.11.1992 to the Secretary of the Society reiterating her request made in letter dated 29.6.1992 wherein she again expressed clearly that the transfer being sought by her, was without any monetary consideration. It was pointed out in the said letter that the formal request for the transfer was made in order to comply with the rules regulating such transfer, and also, to avoid future complications. Consequently, the appellant executed an agreement dated 13.11.1992, transferring her right, title and interest in the said flat to the respondent. The Secretary of the Society wrote letter dated 10.3.1993 to the Deputy Registrar, Co-operative Societies for seeking the approval for the transfer of flat to the name of the respondent. Meanwhile PM was transferred to Bombay and on 19.10.1993, CP Ltd. terminated the agreement executed by it with the appellant. On 21.10.1993, the respondent on her own account deposited rent in the bank account of the appellant. On 16.12.1994, 500 shares standing in the joint names of PM and his wife SM were transferred to the name of the appellant.

The appellant wrote a letter dated 28.2.1995 to the Secretary of the Society, that she had not received any reply to her letter dated 11.11.1992. She also informed the Secretary of the Society that she had decided to return to Calcutta permanently and, therefore, her request for

transfer of her membership to the name of the respondent be treated as withdrawn. The appellant's case was that the Society never responded to her letter dated 28.2.1995 and the said letter was never forwarded by the Society to the Department of Co-operative Societies.

Still, the Society approached the Deputy Registrar, Co-operative Societies, seeking approval for the admission of the respondent as a member of the Society which was conditionally approved on 13.3.1995. On 13.3.1995 itself the shares of the appellant were transferred to the name of the respondent. On 22.3.1995, the appellant addressed a letter to the Deputy Registrar, Co-operative Societies requesting to direct the Society to withdraw the offer of transfer of her membership to the respondent. It was also requested, that the application made by the respondent for transfer of share certificates in her name, be not approved. The appellant wrote another letter dated 28.3.1995 to the Secretary of the Society requesting that transfer of membership in favour of the respondent be treated as withdrawn. The Society convened a meeting on 2.4.1995 wherein the Board of Directors resolved, that it had no legal competence to restore the membership of the Society, as also, the retransfer of the ownership of the flat no. 5D, to the appellant. Having so resolved, the Secretary of the Society forwarded a copy of the resolution dated 2.4.1995, to the appellant. The Board of Directors of the Society approved the transfer of flat to the name of the respondent. In addition to the said flat, the ownership of the appellant also comprised of a covered garage space, on the ground floor. The same were not mentioned in the clearances dated 14.2.1993 (by the Board of Directors of the Society) and 13.3.1995 (by the Deputy Registrar, Co-operative Societies). Consequently based on the agreement dated 25.4.1995 between the respondent and the Society, the said garage space w y

transferred to the name of the respondent.

On 16.4.1995, the appellant challenged the validity of the Board of Directors' Resolution dated 2.4.1995. The Deputy Registrar, Co-operative Societies referring to the appellant's letter dated 28.2.1995 (wherein appellant had withdrawn her request for transfer of membership in favour of respondent), wrote a letter dated 31.5.1995 to the Secretary of the Society highlighting the fact that, the Society had not brought the letter dated 28.2.1995 to the notice of Deputy Registrar, Co-operative Societies, at the time of seeking approval of the Co-operative Department. The Secretary of the Society was accordingly directed, to take a decision on the matter, and to forward the same to the Deputy Registrar, Co-operative Societies.

Since, the appellant was not communicated any determination, by the concerned authorities, she addressed a notice on 9.9.1995, calling upon the Secretary of the Society, to deliver the possession of the flat along with the share certificates. The Society denied all the allegations made by the appellant against the Society (contained in the notice). On the claim of retransfer of the shares and flat made by the appellant, the Society responded by asserting, that the shares had been transferred to the name of the respondent, and on the basis thereof flat no. 5D also had been transferred in her name, thereupon, the Society did not have any legal authority to restore/retransfer the same to the name of the petitioner. On 19.12.1995, the Deputy Registrar, Co-operative Societies also informed the appellant, that the transfer of her shares and flat in favour of the respondent had been completed, and since the Society had resolved on 2.4.1995 that it had no legal competence to cancel the same, nothing could be done in the matter.

The appellant filed Dispute Case which was adjudicated upon by the Arbitrator. The Arbitrator held

that agreement dt. 13.11.92 was invalid, void and incomplete and directed the Society to ensure and conform that the appellant gets the possession of the flat with garage space with immediate effect and issue share certificate in her name immediately. On appeal, the Co-operative Tribunal held that the entire approach of the Arbitrator was erroneous, as the Arbitrator had treated the appellant as a pardanashin lady. The High Court dismissed the appeal. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The Co-operative Tribunal, as also, the High Court excluded from consideration, the factual position expressed in the rejoinder filed by the appellant (before the Arbitrator). In excluding the said factual position, the Co-operative Tribunal and the High Court did not rely on any provision of law nor was any reliance placed on any principle accepted and recognized in legal jurisprudence. It is not a matter of dispute that after the respondent and the Society were permitted to file written replies before the Arbitrator, the rejoinder filed thereto on behalf of appellant, was permitted to be taken on record. It is not in contention, that in the written replies filed before the Arbitrator, the respondent had adopted inter alia the stance that consideration was paid to appellant in lieu of the transfer of flat to her name, even though the documents relied upon by the rival parties, expressed otherwise. A number of documents not mentioned in the Dispute Case filed by appellant were also relied upon by the respondent. Pleadings between the parties could be considered as complete, only after appellant was permitted to file a rejoinder (in case she desired to do so). She actually filed a rejoinder which was taken on record by the Arbitrator. Both parties were permitted to lead evidence, not only on the factual po

the complaint filed by appellant and the written replies filed in response thereto (by respondent and the Society), but also, the factual position highlighted by appellant in her rejoinder affidavit. It is, therefore, not on the basis of the pleadings of the parties, but also on the basis of the evidence led in support of the said pleadings, that the Arbitrator had recorded his findings in his award. The Arbitrator had, therefore, acted in accordance with law, and therefore the exclusion from consideration, of the factual position asserted by appellant in her rejoinder, by the Co-operative Tribunal and the High Court was wholly unjustified. The factual narration by appellant could not be excluded from consideration, while adjudicating upon the rival claims between appellant and the respondent. [Para 26] [712-G-H; 713-A-F]

2. The Co-operative Tribunal in its order had invoked the principle of estoppel, postulated in Section 115 of the Indian Evidence Act. The High Court affirmed the conclusions drawn by the Co-operative Tribunal. In addition to the said principle, the High Court invoked the principles of equity and fairness. The rule of estoppel is a doctrine based on fairness. A perusal of the provision reveals four salient pre conditions before invoking the rule of estoppel. Firstly, one party should make a factual representation to the other party. Secondly, the other party should accept and rely upon the said factual representation. Thirdly, having relied on the said factual representation, the second party should alter his position. Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position. Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position. None of the ingredients of principle of estoppel contained in Section 115 of the

Indian Evidence Act, can be stated to have been satisfied, in the facts and circumstances of this case. Herein, the first party has made no representation. The second party has therefore not accepted any representation made to her. Furthermore, the second party has not acted in any manner, nor has the second party altered its position. Therefore, the question whether the restoration of the original position would be iniquitous or unfair does not arise at all. In the facts presented by the rival parties, especially in the background of the order passed by the Arbitrator, that no consideration had passed in lieu of the transfer of the flat, and especially in the background of the factual finding recorded by the Co-operative Tribunal and the High Court, that passing of consideration in the present controversy was inconsequential, the principle of estoppel relied upon could not have been invoked, to the detriment of the appellant. In view of this, the determination by the Co-operative Tribunal, as also the High Court, in having relied on the principle of estoppel, and thereby, excluding the pleas/defences raised by the appellant to support her claim is set aside. [para 27] [714-A, H; 715-A-G; 717-E]

Kasinka Trading vs. Union of India, **(1995) 1 SCC 274;** *Monnet Ispat & Energy Ltd. vs. Union of India & Ors.,* **(2012) 11 SCC 1;** *H.S. Basavaraj (D) by his LRs. & Anr. Vs. Canara Bank & Ors.,* **(2010) 12 SCC 458 - relied on.**

3.1. Admittedly, the reason for transferring the flat indicated in the letters dated 11.11.1992 and 13.11.1992 was on account of the close relationship between the appellant and the respondent. As a matter of fact, there was no close relationship between appellant and the respondent. The appellant was indicated to have been living in Bombay and never visiting Calcutta. The respondent was a resident of Calcutta, who was in employment at Calcutta, and had s

her son PM, after he moved to Calcutta alongwith his wife SM. There was no direct relationship between the appellant and the respondent. Appellant's niece SM was married to PM, son of the respondent. The only relationship that can be assumed, is of aunt and niece, between the appellant and SM. If on account of love and affection, for her niece, the appellant desired to transfer flat which she had purchased for a consideration of Rs.4 lakhs, she would have done so by transferring it to the name of her niece SM. Affinity to SM, and the love, affection and welfare of SM would not extend to a gesture of the nature under reference, i.e., by way of transfer of immovable property, of substantial value, without consideration, to the mother-in-law of SM. Therefore, factually the expression of close relationship between the appellant and respondent depicted in letters dated 11.11.1992 and 13.11.1992 are on the face of it, false and incorrect. It is, therefore, improper for the adjudicating authorities to have accepted the factum of close relationship of the parties, in so far as, the transfer of flat no. 5D was concerned. Further, as per letters dated 11.11.1992 and 13.11.1992, Flat no. 5D was sought to be transferred by the appellant to the respondent, without consideration. The said factual position cannot be accepted on account of the statement of the respondent herself. In the written reply filed before the Arbitrator, the respondent took the express stance, that the appellant had transferred flat no. 5D to her name, by accepting a consideration of Rs.4,29,000/-. She further asserted, that the said consideration had passed from the respondent to the appellant through PM who had transferred shares in his name valued at Rs.4,29,000/-, to the name of the appellant. Per se therefore, even respondent denied the factual position indicated in the letters. [para 28(i), (ii)] [717-H; 718-A-H; 719-A-B]

3.2. The letters dated 11.11.1992 and 13.11.1992

expressly recorded, that the factual position narrated in the letters was on account of "compliance with the rules regulating such transfer, and also, for avoiding future complications". In view of the factual position, it is apparent, that false facts were being recorded for compliance with the rules and regulations, as also, for avoiding future complications. One would have appreciated the recording of consideration in lieu of the transfer of property from the name of appellant to that of the respondent, to avoid future complications, rather than withholding the same. It is clearly not understandable, what kind of complications were being avoided. Expressing the factual position in the letters under reference, makes the whole transaction suspicious, mistrustful and possibly fraudulent too. In the absence of any relationship, the party benefiting from the letters dated 11.11.1992 and 13.11.1992, would have successfully avoided all complications merely by incorporating consideration, which was to pass from the respondent to the transferee appellant. If consideration was to pass, and had actually passed, it is difficult to understand why the parties would say, that the transaction did not involve passing of consideration. It is, therefore, clear that all the ingredients of letter dated 11.11.1992 and 13.11.1992 were shrouded in suspicious circumstances. It was not legitimately open to the parties to record in the letters under reference, that flat no. 5D was being gifted by the appellant to the respondent, on account of lack of proximity between the parties. The transfer of the said property by one to the other, by way of gift, would obviously have been subject to judicial interference, as the same would at least prima facie, give the impression of dubiety. It was, therefore, that the respondent hastened to adopt a different factual position in her written reply before the Arbitrator. In the written statement filed by the respondent (before the Arbitrator) the stand adopted by her was, tha[illegible]f

Rs.4,29,000/- had passed from her to the appellant, by way of transfer of shares (standing in the name of her son, PM) to the name of the appellant. The Board of Directors of the Society, in its meeting held on 14.2.1993, resolved to accept the resignation of the appellant and accept the membership of the respondent in her place. On the date of execution of the documents under reference, as also on the date of passing of the resolution by the Board of Directors of the Society, PM did not have any shares in his name. The shares which PM acquired, and which respondent claimed to have been transferred in lieu of consideration (to the name of the appellant), were shown to have been acquired on or after 8.9.1993. It is, therefore, apparent that PM did not even have the shares referred to by the transferee the respondent, in his name, when the transfer documents were executed on 11.11.1992 and 13.11.1992, or even on 14.2.1993 when the Board of Directors of the Society, passed the transfer resolution. These shares were shown to have been transferred to the name of the appellant on 16.12.1994. Well before 16.12.1994, even according to the stance adopted by the respondent, the appellant had executed all the transfer documents. It is therefore difficult to accept, that the parties had agreed to pass on consideration by transfer of shares, which were not even owned by the respondent (through PM) on the date of transfer of flat no. 5D from the appellant to the respondent. Therefore, the stance adopted by the respondent in the written statement filed by her before the Arbitrator, is shown to be false. [Paras 28(iii), (iv)] [719-D-H; 720-A-E; 721-D-F]

3.3. On the subject of transfer of shares from the name of PM to the name of the appellant, the appellant had adopted the stance, that the transfer of the above shares was on account of return of loans extended by the appellant to PM. The appellant had asserted, that after

the transfer of PM from Calcutta to Bombay in the year 1993, he gave up his employment with CP Ltd. and started a business of aluminium products. To help PM with his business venture, the appellant had (on the asking of PM) paid a sum of Rs. 2 lakhs by way of cheque, for supply of raw materials to PM's business venture. PM had also taken a loan for a sum of Rs. 1,50,000/- for the same purpose from the sister of appellant). It was also asserted, that SM had similarly extended loans, by making payments through cheque to PM. The Arbitrator had accepted the said assertion of the appellant. The Arbitrator had placed reliance, on documentary and oral evidence, produced by the appellant. The instant factual aspect of the matter was totally overlooked by the Co-operative Tribunal, as well as, by the High Court. The fact that appellant had addressed a letter to the Secretary of the Society, dated 28.2.1995, for withdrawal of her earlier letter dated 11.11.1992 was not disputed. It is also not a matter of dispute that at the time when the appellant addressed the above letter, neither the transfer of membership, nor the transfer of the flat, had assumed finality. The transfer of membership, as also the transfer of the flat, would assume finality only upon the approval of the same by the Deputy Registrar, Co-operative Societies. The factual position emerging from the record of the case revealed that the Society sought the approval of the Deputy Registrar, Co-operative Societies for the transfer of membership, as also, flat no. 5D to the name of Respondent on 13.3.1995. Through the letter dated 10.4.1995, the appellant was informed, that the Society had no authority to look into the matter, after the resolution of the Board of Directors dated 2.4.1995. This explanation is untenable. It was imperative for the Society to have examined the withdrawal letter dated 28.2.1995, the matter certainly had not been concluded. Well after the withdrawal letter, the Society by its notice dated 16.4.1995 had intimated its members

dated 2.4.1995. The matter was, therefore, pending authoritative conclusion. Thus viewed, it was not justified for the Society to deny consideration of the withdrawal letter dated 28.2.1995. Acceptance or rejection on merits is another matter, but non-consideration is not understandable. The instant non-consideration clearly invalidated the resolution passed by the Society. [para 28 v, vi] [721-H; 722-A-E; 723-A-F]

3.4. When the letter dated 22.3.1995 was addressed to the Deputy Registrar, Co-operative Societies, it had not yet granted approval to the recommendations made by the Society. The receipt of the letter dated 28.2.1995, by the Society (as also the receipt of the letter dated 22.3.1995, by the Deputy Registrar, Co-operative Societies) is not disputed. The decision taken by the Deputy Registrar, Co-operative Societies was, without reference to the withdrawal letter dated 28.2.1995. The determination by the Deputy Registrar, Cooperative Societies, cannot therefore be treated as a valid and legitimate consideration. The instant non-consideration clearly invalidated the approval granted by the Deputy Registrar, Co-operative Societies. The veracity of the execution of the documents dated 11.11.1992 and 13.11.1992 by the appellant, was also examined by the Arbitrator. In the said examination, the Arbitrator arrived at the conclusion, that the appellant was in Bombay and not in Calcutta when these documents were executed. The said finding was recorded on the basis of three witnesses produced on behalf of the appellant (before the Arbitrator). While rejecting the conclusion drawn by the Arbitrator, the Co-operative Tribunal overlooked the statements of the witnesses produced by the appellant, merely because the notary was an Advocate. The Co-operative Tribunal reasoned, that the statement of an Advocate, had to be given more weightage, than the witnesses produced by the appellant. The above determination at the hands of the Co-operative Tribunal,

besides being perverse was also totally unacceptable in law. In the facts and circumstances of the instant case, the statement of the notary should have been rejected and discarded, simply because the notary in his deposition had acknowledged, that he did not issue any notarial certificate in terms of Section 8 of the Notary Act. In the absence of issuance of any such certificate, notarization of the document dated 13.11.1992 was clearly subject to suspicion. The conclusion drawn by the Co-operative Tribunal as also the High Court, to the effect that the document dated 13.11.1992 was executed at Calcutta, was therefore, based on no evidence whatsoever. The fact that the document dated 13.11.1992 had not been executed in Calcutta, was also sought to be substantiated by showing, that the registration number of the Society was not depicted in the said letter, even though the said letter was shown to have been executed at the residence of the Secretary of the Society. It was reasoned, that the Secretary of the Society would have supplied the aforesaid number, if the above document had been executed at his residence. Having rejected the credibility of the statement of the notary and having not accepted the fact that the above document was executed at the residence of the Secretary of the Society, there is no reason for not accepting the statements of the three witnesses produced by the appellant, to show that she (appellant) was at Bombay on 11.11.1992, as well as, on 13.11.1992. The Cooperative Tribunal and the High Court, erred on the face of the record, by not taking into consideration material facts, available on the file of the case. [Para 28 viii, viii] [723-H; 724-A-H; 725-A-E]

3.5. The Arbitrator had placed heavy reliance on the fact, that the respondent had deposited rent on 21.10.1993 (payable to the appellant), into the account of the appellant, by herself, filling up the bank deposit voucher. Accordingly, the Arbitrat[illegible]e

property in question, even to the knowledge of the respondent, had not actually been transferred to her name by the appellant (at least upto 21.10.1993). That was the reason, why the respondent had continued to deposit rent for flat no. 5D, into the account of the appellant upto 21.10.1993. Coupled with the said factual aspect, the Arbitrator placed great reliance on the letter dated 28.10.1993 addressed by PM to CP Limited, wherein, he described the appellant as the "landlady". Undoubtedly, if the documents relied upon by the respondent were genuine, PM would not have acknowledged the ownership of the appellant over flat no. 5D (on 28.10.1993). The determination of the Arbitrator, on the subject of the transfer of the covered garage, to the name of the respondent was also overlooked by the Co-operative Tribunal, as well as, by the High Court. The appellant, had one covered garage space also. Whilst reference was made about the details of the flat sought to be transferred, in the transfer documents, no reference was made to the covered garage space. Based on the letter dated 11.11.1992, and the document dated 13.11.1992, flat no. 5D was transferred to the name of the respondent. The instant transfer however did not include the covered garage space. Thereafter, based on an agreement executed between respondent (on the one hand), and the Society (on the other), the said covered garage space was transferred to the name of the respondent, on 25.4.1995. The said transfer was not at the behest of, or with the concurrence of the appellant. Therefore, according to the view expressed by the Arbitrator, the covered garage space, must be deemed to have never been transferred to the respondent by its erstwhile owner. The Arbitrator also expressed the view, that the agreement dated 25.4.1995 could not have been executed without the participation of the appellant. The instant aspect of the matter was also totally overlooked by the Co-operative Tribunal, as well as, by the High

Court. The findings of the fact, recorded by the Co-operative Tribunal and by the High Court, are bound to be treated as perverse. [Para 28 ix, x] [725-G-H; 726-A, E-H; 727-A-B]

4. The Co-operative Tribunal as well as the High Court, had invoked the principle of justice and equity, and the doctrine of fairness, while recording their eventual findings in favour of the respondent. It is not a matter of dispute, that for a long time appellant had been residing at Bombay. She was residing at Bombay in the house of her sister. PM, son of the respondent was an engineering graduate. He also possessed the qualification of MBA. Originally PM was employed as Sales Manager/Regional Manager with CP Ltd. at Bombay. PM married SM (the daughter of appellant's sister), whilst he was posted at Bombay in 1987. Soon after his marriage, PM and SM also started to live in the house of HPR (father-in-law of PM). HPR was wealthy person. The evidence available on the record of the case revealed that the appellant treated SM as her daughter, and PM as her son. In 1992, PM was transferred from Bombay to Calcutta. Immediately on his transfer, the appellant accommodated him in flat no. 5D. Subsequently, CP Ltd. entered into a lease and licence agreement, in respect of flat no. 5D with the appellant, so as to provide residential accommodation to PM (as per the terms and conditions of his employment). Obviously, PM was instrumental in the execution of the above lease and licence agreement. In order to deposit monthly rent payable to the appellant (by CP Ltd.), PM opened a bank account in the name of the appellant, jointly with himself. He exclusively operated the above account, for deposits as well as for withdrawals. Not only that, the findings recorded by the Arbitrator indicate that the letter dated 11.11.1992 written by the appellant was drafted by PM. The said conclusion was drawn from the fact that the manuscript of the original was in the handwriting of PM. All these facts demonstrated a rela[illegible]e

trust and faith between the appellant and PM. The said relationship emerged, not only on account of the fact that PM was married to SM (the niece of the appellant), but also on account of the fact, that PM and his wife SM soon after their marriage lived in the house of HPR (husband of the sister of the appellant). They resided together with the appellant till 1992, i.e., for a period of more than a decade, before PM was transferred to Calcutta. The relationship between PM and the appellant would constitute a fiduciary relationship. Even though all these aspects of the relationship between the parties were taken into consideration, none of the adjudicating authorities dealt with the controversy, by taking into account the fiduciary relationship between the parties. When parties are in fiduciary relationship, the manner of examining the validity of a transaction, specifically when there is no reciprocal consideration, has to be based on parameters which are different from the ones applicable to an ordinary case. [Para 30] [727-E-H; 728-A-H; 729-A-B]

5. The relationship between PM and the appellant was a relationship of faith, trust and confidence. PM was in a domineering position. He was married to SM. SM was the daughter of HPR. The appellant has lived for a very long time in the house of HPR. During that period (after his marriage) PM also shared the residential accommodation in the same house with the appellant, for over a decade. In Indian society the relationship between PM and the appellant, is a very delicate and sensitive one. It is therefore, that the appellant extended all help and support to him, at all times. She gave him her flat when he was transferred to Calcutta. She also extended loans to him, when he wanted to set up an independent business at Bombay. These are illustrative instances of his authority, command and influence. Instances of his enjoying the trust and confidence of the appellant included amongst others, the joint account of the

appellant with PM, which the latter operated exclusively, and the drafting of the letters on behalf of the appellant. In such fact situation, the onus of substantiating the validity and genuineness of the transfer of flat no. 5D, by the appellant, through the letter dated 11.11.1992 and the document dated 13.11.1992, rested squarely on the shoulders of the respondent. Because it was only the relationship between PM and the appellant, which came to be extended to the respondent. The document dated 13.11.1992 clearly expressed, that the said transfer was without consideration. The respondent in her written reply before the Arbitrator asserted, that the above transfer was on a consideration of Rs.4,29,000/-. The Arbitrator in his order dated 5.2.1999 concluded, that the respondent could not establish the passing of the consideration to the appellant. The Cooperative Tribunal, as well as, the High Court, despite the factual assertion of the respondent were of the view, that passing of consideration was not essential in determination of the genuineness of the transaction. The respondent miserably failed to discharge the burden of proof, which essentially rested on her. The appellant led evidence to show, that she was at Bombay on 11.11.1992 and 13.11.1992. Letter dated 11.11.1992 and the document dated 13.11.1992, shown to have been executed at Calcutta could not be readily accepted as genuine, for the said documents fell in the zone of suspicion, more so, because the manuscript of the letter dated 11.11.1992 was in the hand-writing of PM leading to the inference, that PM was the author of the above letter. It is, therefore, not incorrect to infer, that there seems to be a ring of truth, in the assertion made by the appellant, that PM had obtained her signatures for executing the letter and document. There was no justification whatsoever for the appellant, to have transferred flat no. 5D to the respondent, free of cost, even though she had purchased the same for a consideration of Rs ar

1987. Specially so, when she had no direct intimate relationship with the respondent. By the time the flat was transferred, more than a decade had passed by, during which period, the price of above flat, must have escalated manifold. The invocation of the principle of justice and equity, and the doctrine of fairness, would in fact result in returning a finding in favour of the appellant, and not the respondent. [Para 31] [733-D-H; 734-A-H; 735-A-C]

Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib **AIR 1967 SC 878: 1967 SCR 331; ;** *Krishna Mohan Kul alias Nani Charan Kul vs. Pratima Maity* **(2004) 89 SCC 468;** *Anil Rishi vs. Gurbaksh Singh,* **(2006) 5 SCC 558 - relied on.**

Case Law Reference:

(1995) 1 SCC 274	**relied on**	**Para 27**
(2012) 11 SCC 1	**relied on**	**Para 27**
(2010) 12 SCC 458	**relied on**	**Para 27**
1967 SCR 331	**relied on**	**Para 30**
(2004) 89 SCC 468	**relied on**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1938 of 2014.

From the Judgment and Order dated 14.02.2006 of the High Court of Calcutta in CO. Nos. 3039 & 3040 of 2002.

A.T.M. Sampath, P.N. Ramalingam, T.S. Shanthi, Rahul Nagpal, Jitendra Mohan Sharma, Ajit Sharma, Nitin Singh, Sameer Singh, Sandeep Singh, Mithilesh Kumar Pandey, Pahlad Sharma for the Appearing Parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Orchestra Co-operative House Society Limited (hereinafter referred to as 'the

Society') raised flats at 48/IE, Gariahat Road, Calcutta - 700019. Indirani Bhattarcharya became a member of the Society on 12.1.1987. She was issued share certificates bearing nos. 0047 and 0048. Based on the above membership she was allotted flat no. 5D for a consideration of Rs. 4 lakhs. The above flat measuring 900 sq. ft. comprised of three bed rooms, two bath rooms, one drawing-cum-dinning room, a kitchen and verandah on the fourth floor. In addition to the above, she was allotted one covered garage space on the ground floor. The transfer of the flat no. 5D by the Society to Indirani Bhattacharya was approved by the Deputy Registrar, Co-operative Societies.

2. On 27.3.1991, Indirani Bhattacharya submitted her resignation from the Society in favour of Pratima Chowdhury (i.e., the petitioner herein). On 15.4.1991, Indirani Bhattacharya executed an agreement for transfer of flat no. 5D to Pratima Chowdhury subject to the consent of the Society and the approval of the Deputy Registrar, Co-operative Societies, for a consideration of Rs. 4 lakhs. The Society having consented to the request of Indirani Bhattacharya sought the approval of the Deputy Registrar, Co-operative Societies through a letter dated 29.4.1991. In this behalf it would also be relevant to mention that Board of Directors of the Society had resolved in its meeting held on 16.2.1992, to accept the resignation of Indirani Bhattacharya, as also, the consequential transfer of the membership of the Society and the ownership of the flat to the name of Pratima Chowdhury. In the above resolution, the name of Pratima Chowdhury as a member of the Society was approved with effect from 9.1.1992. The Secretary of the Society informed Pratima Chowdhury on 17.2.1992, that her membership to the Society, as also, the transfer of flat no. 5D to her name, had been approved by the Deputy Registrar, Co-operative Societies.

3. The facts available on the records reveal that Partha Mukherjee (son-in-law of the petitioner's

respondent) occupied the petitioner's flat. Partha Mukherjee was employed as Regional Sales Manager with Colgate Palmolive (India) Limited. On 9.3.1992, Colgate Palmolive (India) Limited, confirmed having taken flat no. 5D on lease and license, for a period of three years (with effect from 1.4.1992), for the residence of Partha Mukherjee. The pleadings also reveal, that with effect from 1.4.1992, Colgate Palmolive (India) Limited, took the aforesaid flat on a monthly rent of Rs. 5,000/-. The above said monthly rent, was deposited in the joint account of the petitioner Pratima Chowdhury and Partha Mukherjee.

4. On 29.6.1992, the petitioner Pratima Chowdhury addressed a letter to the Secretary of the Society, requesting the Society to transfer flat no. 5D to the name of her nominee Kalpana Mukherjee. The letter dated 29.6.1992 of Pratima Chowdhury, made some express factual disclosures. Firstly, that she was not in good health. Secondly, that she was not in a position to move to Calcutta from Bombay in the near future. Thirdly, that Kalpana Mukherjee was already residing in the flat in question along with Partha Mukherjee. Fourthly, that above nominee Kalpana Mukherjee was her close relative. In addition to the request of transfer of flat no. 5D in favour of her nominee Kalpana Mukherjee, Pratima Chowdhury also informed the Society through her letter dated 29.6.1992, that all municipal taxes and service charges in connection with the above flat should be collected from Kalpana Mukherjee.

5. Pratima Chowdhury then addressed another letter dated 11.11.1992, to the Secretary of the Society, reiterating her request made in the previous letter dated 29.6.1992 wherein she again expressed clearly that the transfer being sought by her, was without any monetary consideration.

6. It was pointed out in letter dated 11.11.1992, that the formal request for the transfer was only being made, in order to comply with the rules regulating such transfer, and also, to avoid future complications. Consequent upon the aforesaid

deliberations, Pratima Chowdhury executed an agreement dated 13.11.1992, transferring her right, title and interest in the flat no. 5D. On the same day as the aforesaid agreement was executed, Kalpana Mukherjee moved an application (on 13.11.1992).

7. The Board of Directors of the Society in their meeting held on 14.2.1993, resolved to accept the resignation of Pratima Chowdhury, and to accept the membership of Kalpana Mukherjee (in place of Pratima Chowdhury), and to seek the approval of the Deputy Registrar, Co-operative Societies for the transfer of flat no. 5D to the name of Kalpana Mukherjee, on the basis of letters of Pratima Chowdhury dated 11.11.1992 and 13.11.1992. Accordingly, the Secretary of the Society addressed a letter dated 10.3.1993 to the Deputy Registrar, Co-operative Societies, for the approval of the decision of the Board of Directors (of the Society, dated 14.2.1993).

8. On 23.4.1993, Pratima Chowdhury wrote a letter to the Senior Commercial Executive, of the Calcutta Electric Supply Corporation (South Region Office) requesting him to transfer the electricity-supply meter of flat no. 5D to the name of Kalpana Mukherjee. The instant letter dated 23.4.1993, is also disputed by Pratima Chowdhury. She has even disputed her signature on the said letter. She also filed a first information report at the Gariahat Police Station, Kolkata, complaining that her signature on the above letter was forged.

9. The Assistant Registrar, Co-operative Societies raised certain objections on the request of the Society for transfer of flat no. 5D from the name of Pratima Chowdhury to the name of Kalpana Mukherjee. In this behalf the Assistant Registrar, Co-operative Societies informed the Secretary of the Society, that the application of Kalpana Mukherjee for membership had not been submitted in the proper format. It was also pointed out, that the original affidavit had not been appended to the application. Lastly, it was brought out, that the Salary Certificate, Income Tax Clearance Certi[illegible]al

Tax Certificates had not been appended to the application of Kalpana Mukherjee, for the transfer of the flat in her name. On 22.9.1993, the Secretary of the Society provided all the required documents sought by the Department of the Co-operative Societies.

10. Partha Mukherjee was transferred by his employer Colgate Palmolive (India) Limited, from Calcutta to Bombay. Consequently, Colgate Palmolive (India) Limited terminated the agreement executed by it with Pratima Chowdhury on 19.10.1993, with immediate effect. In the letter dated 19.10.1993, Colgate Palmolive (India) Limited required Partha Mukherjee to hand over vacant possession of flat no. 5D to Pratima Chowdhury, after refund of security. On 21.10.1993, Kalpana Mukherjee, from her own account, deposited rent in the Bank account of Pratima Chowdhury. On 28.10.1993, Partha Mukherjee addressed a letter to P.R. Keswani, Company Secretary of Colgate Palmolive (India) Limited, along with a receipt bearing no. 9893, depicting refund of the security deposit (of Rs. 60,000/-). The aforesaid refund was shown to have been made by Pratima Chowdhury.

11. On 16.12.1994, 500 shares of Tata Chemicals Limited, 50 shares of Siemens, 500 shares of Indian Aluminium and 100 shares of I.T.C. Hotels, standing in the joint names of Partha Mukherjee and Sova Mukherjee (wife of Partha Mukherjee) were transferred to the name of Pratima Chowdhury. According to the petitioner Pratima Chowdhury, the above transfer of shares was in lieu of loans extended by her to Partha Mukherjee. However, according to Kalpana Mukherjee, the transfer of the above shares, constituted consideration paid on her behalf (by her son Partha Mukherjee) to Pratima Chowdhury in lieu of the transfer of flat no. 5D.

12. Pratima Chowdhury wrote a letter dated 28.2.1995 to the Secretary of the Society, that she had not received any reply to her letter dated 11.11.1992. She also informed the Secretary of the Society, that she had decided to return to Calcutta

permanently. Accordingly, she informed the Secretary of the Society, that her request for transfer of her membership to the name of Kalpana Mukherjee, be treated as withdrawn. It is the case of Pratima Chowdhury, that the Society never responded to her letter dated 28.2.1995. It is also her case, that her letter dated 28.2.1995 was never forwarded by the Society, to the Department of Co-operative Societies.

13. On 8.3.1995, the Society approached the Deputy Registrar, Co-operative Societies, seeking approval for the admission of Kalpana Mukherjee as a member of the Society (in place of Pratima Chowdhury). On 13.3.1995, the Deputy Registrar, Co-operative Societies conditionally approved the membership of Kalpana Mukherjee. Accordingly, on 13.3.1995 itself the shares of Pratima Chowdhury were transferred to the name of Kalpana Mukherjee. On 22.3.1995, Pratima Chowdhury addressed a letter to the Deputy Registrar, Co-operative Societies, with a copy to the Chairman of the Society. In the above letter, the Deputy Registrar, Co-operative Societies was requested to direct the Society to withdraw the offer of transfer of her membership to Kalpana Mukherjee. It was also requested, that the application made by Kalpana Mukherjee for transfer of share certificates in her name, be not approved. The instant letter dated 22.3.1995, depicts the fact that Pratima Chowdhury was unaware of the deliberations of the Society, as also, the approval (of the deliberations of the Society), by the Deputy Registrar, Co-operative Societies, on 13.3.1995. In pursuit of the same objective, Pratima Chowdhury wrote another letter dated 28.3.1995, to the Secretary of the Society. She enclosed therewith, the letter which she had addressed to the Deputy Registrar, Co-operative Societies dated 22.3.1995. Therein, she again reiterated, that her request for transfer of membership in favour of Kalpana Mukherjee be treated as withdrawn. In order to consider the request made by Pratima Chowdhury in her letter dated 22.3.1995 (to the Deputy Registrar, Co-operative Societies) and the letter dated 28.3.1995 (to the Se

the Society convened a meeting of the Board of Directors on 2.4.1995. Rather than considering the issue on merits, the Board of Directors resolved, that it had no legal competence to restore the membership of the Society, as also, the retransfer of the ownership of the flat no. 5D, to Pratima Chowdhury. Having so resolved, the Secretary of the Society forwarded a copy of the resolution dated 2.4.1995, to the petitioner on 10.4.1995.

14. At this juncture, it would be relevant to mention, that the Board of Directors of the Society approved the transfer of flat no. 5D (comprising of three bed rooms, two bath rooms, one drawing-cum-dinning room, one verandah and one kitchen on the fourth floor, located at no. 48/IE, Gariahat Road, Calcutta - 700019 to the name of Kalpana Mukherjee. In addition to the aforesaid flat, the ownership of Pratima Chowdhury also comprised of a covered garage space, on the ground floor. The same were not mentioned in the clearances dated 14.2.1993 (by the Board of Directors of the Society) and 13.3.1995 (by the Deputy Registrar, Co-operative Societies). Consequently based on the agreement dated 25.4.1995 between Kalpana Mukherjee and the Society, the said garage space was also subsequently transferred to the name of Kalpana Mukherjee.

15. On 16.4.1995 within two weeks, from the date decision taken by the Board of Directors (on 2.4.1995) and within one week from the date of communication thereof to the petitioner (through letter dated 10.4.1995), Pratima Chowdhury addressed a notice dated 16.4.1995, contesting the validity of the Board of Directors' Resolution dated 2.4.1995. The petitioner also assailed the approval of the said transfer dated 13.3.1995. The Deputy Registrar, Co-operative Societies referring to the petitioner's letter dated 28.2.1995 (wherein Pratima Chowdhury had withdrawn her request for transfer of membership in favour of Kalpana Mukherjee), wrote a letter dated 31.5.1995 to the Secretary of the Society. In the letter dated 31.5.1995, the Deputy Registrar, Co-operative Societies

also highlighted the fact that, the Society had not brought the letter dated 28.2.1995 to the notice of Deputy Registrar, Co-operative Societies, at the time of seeking approval of the Co-operative Department. The Secretary of the Society was accordingly directed, to take a decision on the matter, and to forward the same to the Deputy Registrar, Co-operative Societies. Being alive of the letter dated 31.5.1995, which was addressed by the Deputy Registrar, Co-operative Societies to the Secretary of the Society, the petitioner through her letter dated 13.6.1995 informed the Secretary of the Society, that the withdrawal letter dated 28.2.1995 addressed by her was received by the Secretary of the Society, and further that the same had been duly acknowledged on 6.3.1995. The petitioner highlighted the fact, that the approval of the Deputy Registrar, Co-operative Societies should not have been sought (by the Secretary of the Society), after the receipt of the petitioner's communication dated 28.2.1995.

16. Since, the petitioner was not communicated any determination, by the concerned authorities. She addressed a notice on 9.9.1995, calling upon the Secretary of the Society, to deliver the possession of the flat no. 5D, along with the share certificates, to her within seven days of the receipt of the said notice. On 21.11.1995, the Society denied all the allegations made by the petitioner against the Society (contained in the notice). On the claim of retransfer of the shares and flat made by the petitioner, the Society responded by asserting, that the shares had been transferred to the name of Kalpana Mukherjee, and on the basis thereof flat no. 5D also had been transferred in her name, thereupon, the Society did not have any legal authority to restore/retransfer the same to the name of the petitioner. On 19.12.1995, the Deputy Registrar, Co-operative Societies also informed Pratima Chowdhury, that the transfer of her shares and flat in favour of Kalpana Mukherjee had been completed, and since the Society had resolved on 2.4.1995 that it had no legal competence to cancel the same, nothing could be done in the matter.

17. Dissatisfied with the determination of the Co-operative Societies, as also, the denial of the consideration at the hands of the Deputy Registrar, Co-operative Societies, the petitioner filed Dispute Case No. 29/RCS of 1995-96. The aforesaid dispute case was adjudicated upon by D.K. Ghosh in his capacity as Arbitrator.

17(i) During the course of the above determination, Kalpana Mukherjee (who was impleaded as respondent no. 1) filed a reply on 22.2.1996 which deserves a special mention. Firstly, according to the reply filed by Kalpana Mukherjee flat no. 5D was purchased by Partha Mukherjee in the name of Kalpana Mukherjee (mother of Partha Mukherjee). The above flat was purchased for a total consideration of Rs. 4,29,000/-. The said consideration was paid by way of transfer of shares, in the name of Partha Mukherjee to the name of Pratima Chowdhury. Highlighting the above factual position is important because the entire paper work pertaining to the transfer of flat no. 5D, from the name of Pratima Chowdhury to the name of Kalpana Mukherjee indicates, that the above transfer was without any monetary consideration, whereas stands adopted by Kalpana Mukherjee was that as a matter of fact the said transfer was on a consideration of Rs. 4,29,000/-. Secondly, according to Kalpana Mukherjee (respondent no. 1), Pratima Chowdhury's letter dated 28.2.1995 was afterthought. It is therefore, that Kalpana Mukherjee in her reply emphasized that the letter dated 28.2.1995, was only a scheme devised by Pratima Chowdhury to wriggle out of the transaction.

17(ii) The Secretary of the Society filed separate written reply to the case filed by Pratima Chowdhury. In its reply the Society supported the transfer of shares, as also, the transfer of flat no. 5D to the name of Kalpana Mukherjee. The Society clearly brought out in their reply, that Pratima Chowdhury through her letter dated 29.6.1992 had informed the Society, that Kalpana Mukherjee was in occupation of the flat, and as such, maintenance charges for the flat should be recovered from her.

Furthermore, according to the Society, the transfer of the shares, as also, of flat no. 5D to the name of Kalpana Mukherjee was approved at the request of Pratima Chowdhury, made through her letter dated 11.11.1992. It was submitted, that the aforesaid request was considered by the Department of Co-operative Societies, which approved the resignation of Pratima Chowdhury and the consequential transfer of membership vide Resolution of the Board of Directors of the Society dated 14.2.1993. The above resolution had been forwarded by the Secretary of the Society, to the Deputy Registrar, Co-operative Societies (by letter dated 10.3.1993), for approval. It was pointed out that the Deputy Registrar, Co-operative Societies had approved the Resolution of Board of Directors of the Co-operative Societies on 13.3.1995. Additionally, it was pointed out, that after the approval of the change of membership to the name of Kalpana Mukherjee, the petitioner Pratima Chowdhury had required the Senior Commercial Executive of Calcutta Electric Supply Corporation, to transfer the electricity-supply meter of flat no. 5D to the name of Kalpana Mukherjee. According to the Society, the above facts clearly evidenced the unequivocal intention of Pratima Chowdhury to transfer her shares and flat no. 5D to the name of Kalpana Mukherjee, which was given due effect to by the Society after seeking the approval of the Deputy Registrar, Co-operative Societies. In view of the aforestated factual position, the Society denied the claim raised by Pratima Chowdhury in Dispute Case No. 29/RCS of 1995-96.

17(iii) It is also imperative to record herein, that Pratima Chowdhury had filed rejoinder, to the written statements filed on behalf of Kalpana Mukherjee and the Society before the Arbitrator. It was pointed out in the rejoinder, that Partha Mukherjee was married to Sova Mukherjee. Sova Mukherjee was the daughter of H.P. Roy and Bani Roy (sister of the petitioner, Pratima Chowdhury). On account of the above relationship she had treated Sova Mukherjee as her daughter and Partha Mukherjee as her son. Conse[illegible]er

of Partha Mukherjee to Calcutta (from Bombay), she allowed him to reside in flat no. 5D. At the behest of Partha Mukherjee, his employer Colgate Palmolive (India) Limited entered into a lease agreement with Pratima Chowdhury on 9.3.1992. Under the lease agreement Pratima Chowdhury was entitled to rent at the rate of Rs. 5,000/- per month. The lease agreement was executed for a period of three years, with overriding condition, that the tenure of lease would coincide with the tenure of Partha Mukherjee at Calcutta, while in the employment of Colgate Palmolive (India) Limited. It was also pointed out, that Partha Mukherjee had opened a joint account along with petitioner Pratima Chowdhury, for the deposit of rent payable by Colgate Palmolive (India) Limited. It was also pointed out, that Partha Mukherjee singularly operated the aforesaid joint account. In his above capacity he encashed the rent deposited by Colgate Palmolive (India) Limited, without the knowledge and notice of the petitioner Pratima Chowdhury. She also asserted in the rejoinder, that she could obtain the details of the agreement executed with Colgate Palmolive (India) Limited, as also, the deposits of rent in her joint account with Partha Mukherjee, only after she had issued a letter to Colgate Palmolive (India) Limited, that she would not make any claim from the employer of Partha Mukherjee, on the basis of information supplied. In her rejoinder Pratima Chowdhury also asserted, that Partha Mukherjee had forced her to sign the letter dated 11.11.1992, without disclosing the contents thereof. The categoric stance adopted by Pratima Chowdhury in her rejoinder was, that she was not aware of the contents of letter dated 11.11.1992, and furthermore, Partha Mukherjee had obtain her signature on other blank papers as well, by falsely informing her that the papers would be used to explain his stay in flat no. 5D. She also denied having executed the document dated 13.11.1992, which was allegedly notarized at Calcutta. In fact she denied her presence at Calcutta on 13.11.1992. She further stated, that Partha Mukherjee did not remain in employment of Colgate Palmolive (India) Limited after his transfer to Bombay. It was also pointed out by her, that on his return to Bombay, Partha

Mukherjee started his independent business in aluminium products. For the said business Pratima Chowdhury claims to have advanced a loan of Rs.2 lakhs to Partha Mukherjee. The loan stated to have been extended to Partha Mukherjee was by way of a cheque drawn in favour of Bharat Aluminium Company, for the supply of raw material for the business of Partha Mukherjee. She further contended, that Partha Mukherjee also took loan of Rs. 1,50,000/- from Bani Roy (sister of the petitioner, Pratima Chowdhury). It was pointed out, that the share certificates held by Partha Mukherjee jointly with his wife Sova Mukherjee, were transferred to the petitioner Pratima Chowdhury and her sister Bani Roy during the year 1994, toward repayment of loans taken from them by Partha Mukherjee. The position accordingly adopted was, that the transfer of share certificates did not constitute consideration in lieu of the transfer of flat no. 5D to Kalpana Mukherjee. A categoric assertion was made by the petitioner Pratima Chowdhury in her rejoinder, that on 30.11.1992 Partha Mukherjee had no company shares either in his own name or in the name of his wife Sova Mukherjee (nor in the joint names of the husband and wife). Accordingly, the plea raised by Kalpana Mukherjee in her reply (to the dispute case filed by the petitioner Pratima Chowdhury) was that the transfer transaction was for consideration, and that, the payment of consideration made by transfer of shares from the name of Partha Mukherjee to the name of Pratima Chowdhury, was false. Pratima Chowdhury also denied, that she had addressed a letter dated 23.4.1993 to the Senior Commercial Executive of the Calcutta Electric Supply Corporation (South Region Office). She disputed even her signatures on the above letter, and further asserted, that she had filed a first information report at the Gariahat Police Station, Kolkata. On the basis of the factual position noticed hereinabove, the petitioner Pratima Chowdhury reiterated, that she had neither surrendered, nor resigned from the membership of the Society, nor had she sought the transfer of flat no. 5D from her name to the name of Kalpana Mukherjee.

18. Before the Arbitrator, the petitioner examined three witnesses. She examined herself as PW1, she examined Vani Ganapati as PW2 and H.P. Roy as PW3. H.P. Roy PW3 (is married to Bani Roy, the sister of the petitioner Pratima Chowdhury) is the father-in-law of Partha Mukherjee. Kalpana Mukherjee examined four witnesses in her defence. She examined herself as DW1, Partha Mukherjee her son was examined as DW2, the Secretary of the Society was examined as DW3 and S.N. Chatterjee, Advocate, who had notarized the documents referred to above, was examined as DW4.

19. In the process of adjudicating upon the matter, the Arbitrator framed six issues of fact, and seven issues of law. The same are being extracted hereunder:

"QUESTIONS OF FACT INVOLVED

i) Whether the Plaintiff tendered resignation on 11.11.92 from the membership of the Society or not.

ii) Was the document executed on 13.11.92 a deed of transfer of flat or an agreement for transfer of flat.

iii) Whether consideration money was paid by the Defendant no. 1 to the plaintiff or not.

iv) Whether the payment of consideration money by way of transfer of shares of companies can be treated as valid payment of consideration money or not.

v) Whether the Defendant no. 2 accepted the admission of the membership of the Defendant no. 1 on 14.2.93 or

vi) Whether the flat in question was encumbered due to existence of lease and license agreement at the material point of time i.e. on 11.11.92 or on 13.11.92.

"QUESTIONS OF LAW INVOLVED

i) Whether the instant dispute is barred by law of limitation.

ii) Whether sub-section 9 of section 85 of West Bengal Co-Operative Societies Act, 1983 was followed in case of transfer of flat in question of the plaintiff.

iii) Whether section 69 and 70 of the West Bengal Co-Operative Societies Act 1983 were followed in respect of admission of membership of the Defendant no. 1.

iv) Whether Rules 135(3) (a) and 142(1) of West Bengal Co-Operative Societies Rules 1987 were obeyed or not.

v) Whether Rule 127(1) of West Bengal Co-Operative Societies Rules 1987 was obeyed in case of nomination or not.

vi) Whether the disputed transfer of flat contradicted the relevant provisions of the Bye-laws of the Defendant Society or not.

vii) The Doctrine of estoppel as per sections 115 & 116 of the Evidence Act 1872 whether attracted or not."

20. It is necessary for us to briefly record the factual as also the legal conclusions drawn by the Arbitrator in his order dated 5.2.1999, while disposing of the disputes raised by Pratima Chowdhury. Accordingly we are summarizing the same hereunder:-

(i) In respect of the letter dated 11.11.1992, the Arbitrator observed that the same was drafted by Partha Mukherjee. This inference came to be drawn from the manuscript of the original. The Arbitrator pointed out that the letter dated 11.11.1992, disclosed that the transaction was not based on passing of monetary consideration, whereas, Kalpana Mukherjee had expressly asserted in her defence, that the transaction was executed on an agreed consideration of Rs. 4,29,000/-. Kalpana Mukherjee had also affirmed, that the aforesaid consideration had passed from the transferee to the transferor by transfer of shares of Partha Mukh[illegible]f

Pratima Chowdhury. The Arbitrator relying on the contents of the letter dated 11.11.1992, recorded that the letter itself mentioned that the details disclosed therein, were meant purely to comply with the rules and to avoid future complications. The Arbitrator felt, that if Pratima Chowdhury had the intention to sell the flat, she would have mentioned the same in her letter dated 11.11.1992. It was also observed by the Arbitrator, that there was no justification for not mentioning the monetary consideration in the said letter. On the instant aspect of the matter the Arbitrator was of the view, that the disclosure of the above consideration would have clearly avoided future complications (which seem to be the intention for writing the letter dated 11.11.1992). The Arbitrator also pointed out, that the letter dated 11.11.1992 could not be treated as a letter of resignation of the petitioner Pratima Chowdhury from the Society. In this behalf it was noticed, that the word "resignation" was completely absent from the text of the letter dated 11.11.1992.

(ii) In respect of letter dated 13.11.1992 the Arbitrator pointed out, that the same was notarized by S.N. Chatterjee, Advocate, who was the son-in-law of the sister of Kalpana Mukherjee (defendant No. 1, before the Arbitrator). Although, the above notary stated that the letter dated 13.11.1992 was signed by all the parties concerned before him at Calcutta, he acknowledged, that he did not issue any notarian certificate in terms of Section 8 of the Notary Act. According to the Arbitrator, Pratima Chowdhury and all the witnesses appearing for her, had unequivocally and categorically affirmed, that she (Pratima Chowdhury) was in Bombay on 11.11.1992, as also, on 13.11.1992. Therefore, according to the Arbitrator, the question of her appearing before the notary at Calcutta on 13.11.1992, did not arise at all. According to the Arbitrator, the registration number of the Society had not been mentioned in the document dated 13.11.1992, this according to the Arbitrator, made the document suspicious because Anil Kumar Sil, the Secretary of the Society, had mentioned that the above document dated

13.11.1992 was executed at his residence. If the above factual position was correct, according to the Arbitrator, the registration number would have been supplied by the Secretary of the Society, and would have been mentioned in the document itself. Furthermore, according to the Arbitrator, the document dated 13.11.1992 was in the nature of deed of transfer, but such transfer would materialize after (and not before) the consent of the Board of Directors of the Society, and the approval of the Deputy Registrar, Co-operative Societies. As per the Arbitrator, even the first step towards transfer of flat no. 5D had not commenced on 13.11.1992, and therefore, the question of allotment and handing over the possession of the flat to the nominee Kalpana Mukherjee, in accordance with the terms and conditions of the allotment and bye-laws of the Society did not arise either in law or in fact, as has been wrongly stated in the said document dated 13.11.1992. As per the Arbitrator even the document dated 13.11.1992 was silent on the consideration for such transfer, despite Kalpana Mukherjee expressing that the above transfer was for a sale consideration of Rs. 4,29,000/-. According to the Arbitrator, the possession of Kalpana Mukherjee, was through Partha Mukherjee, because of the lease and license agreement between Pratima Chowdhury and Colgate Palmolive (India) Limited (which commenced on 1.4.1992 and was terminated on 19.10.1993), and not on the basis of the document dated 13.11.1992. The Arbitrator also pointed out, that Kalpana Mukherjee had deposited rent in the account of Pratima Chowdhury on 21.10.1993, describing it as rent payable to Pratima Chowdhury. The Arbitrator further observed that Pratha Mukherjee in his letter dated 28.10.1993 mentioned Pratima Chowdhury as the landlady of flat no. 5D. Based on the above two instances of 21.10.1993 and 28.10.1993, the Arbitrator was of the view, that the assertion of transfer of flat no. 5D by Pratima Chowdhury to Kalpana Mukherjee stood clearly annihilated.

(iii) On the issue of the consideration money, the Arbitrator noted, that Kalpana Mukherjee had stat[illegible]t

the parties had orally settled the passing of consideration in lieu of flat no. 5D, at Rs.4,29,000/-. It was also her contention, that the parties had settled that the above agreed consideration would be paid by Partha Mukherjee to Pratima Chowdhury by transferring his shares in different companies to the name of Pratima Chowdhury. But Pratima Chowdhury categorically denied the passing of any consideration, as she had no intention to sell the property. She also asserted, that the shares shown to have been transferred from the name of Partha Mukherjee to the name of Pratima Chowdhury, were acquired by Partha Mukherjee long after November, 1992 (when the letters dated 11.11.1992 and 13.11.1992 were issued) i.e. from August, 1993 to April, 1994. The details of the transfer of shares was disclosed in the award passed by the Arbitrator as under:-

"COMPANY'S NAME	NO. OF SHARES	ACQUIRED
Tata Chemicals Ltd.	50 nos.	8.9.93
Tata Chemicals Ltd.	450 nos.	27.10.93
Siemens	50 nos.	2.8.93
Indian Aluminium	500 nos.	4.3.94
I.T.C. Hotels	100 nos.	acquired with Mr. H.P. Roy 4.4.94"

The above shares were acquired by Partha Mukherjee jointly, either with his wife or with his father-in-law, long after the material point of time. Pratima Chowdhury's assertion before the Arbitrator, questioning truthfulness of the assertion of Kalpana Mukherjee, was also based on the fact that, Kalpana Mukherjee (or Partha Mukherjee) could not have agreed to transfer to Pratima Chowdhury, what they did not themselves hold when the transaction was allegedly executed. In order to falsify the contention of Kalpana Mukherjee (and Partha

Mukherjee) that consideration was paid to Pratima Chowdhury by transfer of shares as noticed above, it was stated that after Partha Mukherjee was transferred from Calcutta to Bombay in the year 1993, he did not continue with his employment with Colgate Palmolive (India) Limited, as he wanted to start a business of aluminium products with one R.K. Sen in Bombay. Keeping in view the above objective, Partha Mukherjee took a loan of Rs. 2 lakhs from Pratima Chowdhury. The above loan was extended by Pratima Chowdhury by way of cheques drawn in favour of Bharat Aluminium Company Limited for supply of raw materials for Partha Mukherjee's business. It was further contended that Partha Mukherjee similarly took a loan of Rs. 2 lakhs from his own wife Sova Mukherjee which was repaid by Partha Mukherjee through cheques (bearing nos. 021865, 021866 and 021867) drawn on the Bank of Baroda. It was further pointed that Partha Mukherjee had similarly taken a loan for a sum of Rs.1.5 lakhs for the same purpose from Bani Roy (his mother-in-law) which he had still not repaid. It was pointed out, that at the asking of H.P. Roy (his own father-in-law, father of Sova Mukherjee) Partha Mukherjee had transferred share certificates standing in his name, and in the name of his wife Sova Mukherjee, to the name of Pratima Chowdhury, towards repayment of the abovementioned loans. Accordingly, the case of Pratima Chowdhury was, that transfer of shares by Partha Mukherjee to the name of Pratima Chowdhury, was for a completely different transaction, and had nothing to do with the allowing of the usage and occupation of the flat, by Kalpana Mukherjee and Partha Mukherjee.

(iv) On the lease and license agreement the Arbitrator noticed, that Partha Mukherjee (son of Kalpana Mukherjee), and son-in-law of Pratima Chowdhury's sister Bani Roy, was allowed to reside in flat no. 5D, consequent upon his transfer from Bombay to Calcutta (while in the employment of Colgate Palmolive (India) Limited). It was also noticed, that the lease and license agreement, was executed by Colgate Palmolive (India) Limited, at the instance of Pa a

monetary consideration of Rs. 5,000/- per month, as rent payable to Pratima Chowdhury. To deposit the above consideration Partha Mukherjee opened a joint account in the names of Pratima Chowdhury and himself. The Arbitrator noted, that when Partha Mukherjee drafted the letter dated 11.11.1992, he utterly neglected to mention the subsisting lease and license agreement between Colgate Palmolive (India) Limited and Pratima Chowdhury. The Arbitrator also noticed, that Kalpana Mukherjee did not inform Colgate Palmolive (India) Limited that flat no. 5D had been transferred from the name of Pratima Chowdhury to her name. On the contrary the Arbitrator pointed out, that Kalpana Mukherjee on 21.10.1993, deposited rent in the account of Pratima Chowdhury, by filing the bank deposit slips. Furthermore, the Arbitrator noticed, that Partha Mukherjee in his letter dated 28.10.1993 mentioned, that Pratima Chowdhury as the landlady of flat no. 5D. According to the Arbitrator, the above factual position clearly indicates, that Kalpana Mukherjee along with her son Partha Mukherjee were aware, that flat no. 5D belonged to the petitioner, even on 21/28.10.1993. Whereas, they wrongly depicted the transfer thereof from the name of Pratima Chowdhury to the name of Kalpana Mukherjee through letter dated 11.11.1992 and 13.11.1992. Since the lease and license agreement between Colgate Palmolive (India) Limited and Pratima Chowdhury continued from 1.4.1992 to 19.10.1993, there was no question of handing over of possession thereof by Pratima Chowdhury to Kalpana Mukherjee.

(v) On the submissions advanced on behalf of Pratima Chowdhury in respect of one covered garage space on the premises of the Society is concerned, the Arbitrator concluded from the documents submitted by Kalpana Mukherjee, that Pratima Chowdhury had one covered garage space also. The said covered garage space was not mentioned in the document dated 13.11.1992. Thereafter, based on an agreement executed between Kalpana Mukherjee on the one hand and the Society on the other, the said garage space was also

transferred to the name of Kalpana Mukherjee on 25.4.1995. According to the Arbitrator, the instant agreement dated 25.4.1995, had no validity as the same was neither mentioned in the letter dated 11.11.1992, nor in the document dated 13.11.1992. And therefore cannot be considered as having the approval of Pratima Chowdhury. Accordingly, the Arbitrator expressed the view that the covered garage space must be deemed to have never been transferred by Pratima Chowdhury to Kalpana Mukherjee. The Arbitrator also concluded, that the agreement dated 25.4.1995 could not have been executed in the absence of Pratima Chowdhury. Based on the above factual position Pratima Chowdhury had also alleged connivance between Kalpana Mukherjee and the Society, so as to deprive Pratima Chowdhury of her property.

(vi) Besides the above factual conclusions drawn by the Arbitrator, the Arbitrator had also concluded that the Society violated various provisions of the West Bengal Co-operative Societies Act, 1983, and the rules framed thereunder, as also the bye-laws of the Society. The Arbitrator summarized the conclusions drawn on the legal issues as under:-

> "Keeping in view of the all above, I am of the opinion that the transfer of the flat no. 5D of the Defendant No. 2 Society was not done in accordance with laws including West Bengal Co-Operative Socities Act, Rules, Indian Contract Act, Transfer of Property Act due to reason at a glance.
>
> 1) Section 85(9), Section 70, Section 69 of West Bengal Co-Operative Socities Act 1983 have been flouted.
>
> 2) Rule 127(1), Rule 135(3)(a), Rule 142(1) have been flouted.
>
> 3) Bye-laws have been contradicted.
>
> 4) No consideration mone[illegible] Defendant no. 1 to the Plain[illegible]

5) Societies accepted the resignation of the Plaintiff on 14.2.93 which she had not tendered, if that be so, the society did not act as per Rule 143 also.

6) The flat in dispute was under the lease and license agreement at the material time since bank account in this respect was operated by the son of the Defendant no. 1 who also deposited cheque on Plaintiff's behalf.

7) The instant dispute case is not barred by limitation.

8) The transaction of 13.11.92 does not attract the doctrine of estoppel."

21. Based on the abovementioned conclusions drawn by the Arbitrator on the factual and legal issues canvassed by the rival parties. The Arbitrator passed the following award:

"AWARD

Keeping in view of the above, based on documents, assessing all the pros and cons, on the basis of equity, justice and good conscience, I pass the following 'AWARD':

a) The agreement dt. 13.11.92 between the Plaintiff and Defendant no. 1 is invalid, void and incomplete and

b) The relevant resolution dt. 14.2.93 (Agenda no. 1) of the Managing Committee of the Defendant no. 2 is quashed and;

c) The Defendant no. 2 is directed to ensure and conform that the plaintiff gets the possession of flat no. 5D with garage space with immediate effect and issue share certificate in her name immediately and

d) Any other action if any taken by any authority on and after 13.11.92 affecting the membership of the Plaintiff in any manner whatever is also quashed.

The above Judgment and Award have been given on Pronouncement before the parties present."

22. Dissatisfied with the award rendered by the Tribunal on 5.2.1999, Kalpana Mukherjee preferred an appeal bearing no. 14 of 1999 before the West Bengal Co-operative Tribunal (hereinafter referred to as the Co-operative Tribunal). The Society (defendant no. 2, before the Arbitrator) preferred a separate appeal bearing no. 29 of 1999, to assail the award of the Arbitrator dated 5.2.1999. While dwelling upon the controversy between the parties, the Co-operative Tribunal considered it appropriate to highlight the social relationship and affinity between the parties. According to the Cooperative Tribunal, the relationship between the parties had an essential bearing, to an effective determination of the controversy. Insofar as the instant aspect of the matter is concerned, rather than re-narrating the position taken into consideration, we consider it more appropriate to extract hereunder the narration recorded by the Co-operative Tribunal itself. The same is accordingly reproduced hereunder:-

"For proper appreciate of evidence it is proper to introduce the parties. P.W. Chowdhury, the respondent no. 1 in both the appeals is a spinster and now aged 50+. She is a graduate. She studies in Calcutta and other places. She is an exponent to Bharat Natyam and performs dance at many places of India. For a pretty long time she has been residing at Bombay. Smt. Bani Roy is her sister. B. Roy's husband Mr. H.P. Roy is a wealthy person in Bombay. P. Chowdhury has been living in the family of Mr. H.P. Roy since the put up herself in Bombay. Partha Mukherjee is the son-in-law of H.P. Roy. K. Mukherjee who is the appellant in appeal no. 14/1999 is the mother of Partha Mukherjee. K. Mukherjee retired from service in the National Library, Calcutta in 1994. [illegible]e

would stay in the Govt. accommodation at Balvediare Road, Alipur. Partha Mukherjee, Son of K. Mukherjee is an Engineer from I.I.T., Kharagpur and obtained M.B.A. from Ahmedabad and at the material time worked as Sales Manager/Regional Manager of Colgate Palmolive Ltd. in Bombay, Calcutta and other places. Partha Mukheree married Sova Mukherjee, who was the daughter of H.P. Roy of Bombay. P. Chowdhury, her sister Bani, H.P. Roy, Partha and Sova, all lived together for a prolonged period of time in the house of H.P. Roy at Bombay. Partha married Sova sometimes in 1987 and little after marriage, he and Sova started living in the house of H.P. Roy. Evidence has it to say that the relationship of Pratima with Sova Rinki is, as Pratima herself says, "like my daughter". Similarly, the evidence of Pratima runs that after marriage, her relationship with Partha was "like my son". In 1992, Partha worked for Palmolive Co. Ltd. in Bombay and while working there he, as we have earlier observed, would stay in the house of H.P. Roy. In January, 1992, Pratima was allotted a flat being no. 5B at 48E, Gariahat Road, Calcutta-19 belonging to the society. The said flat was originally allotted to Smt. Indrani Bhattacharya and the said Smt. Indrani Bhattacharya having transferred the flat to Smt. P. Chowdhury, the latter came to be an allottee of that flat, but P. Chowdhury did not reside there at all. In March/April, 1992, Partha was transferred from Bombay to Calcutta and needed an accommodation. Colgate Palmolive Co. Ltd., was required to arrange accommodation for its officers. As Pratima and Partha became very closer and Pratima treated Partha like her son, Partha put up himself in the flat of Pratima in April, 1992 and it was the Colgate Palmolive Co. Ltd., which by virtue of an agreement for license with Pratima used to pay Rs.5000/- per month as rent to Pratima. These are all facts admitted. We see that the relationship amongst Pratima, Partha and Kalpana grew very closer because of Partha marrying the daughter of the sister of Pratima. This background has to be borne

in mind while appreciating the evidence on record."

Having traced the relationship between the parties, as has been recorded hereinabove, the Co-operative Tribunal was of the view, that the entire approach of the Arbitrator was erroneous, as the Arbitrator had treated Pratima Chowdhury as a pardanashin lady. The above inference, drawn by the Co-operative Tribunal, is also being extracted hereunder:-

> "The entire approach of the Ld. Arbitrator seemed to have gone into the fashion as if the respondent no. 1 P. Chowdhury was a pardanasin lady, that she was unaware of the documents she was executing that it was Partha who managed to get all the documents executed by Pratima so as to obtain transfer of the flat in the name of his mother Kalpana Mukherjee. Let it be recorded here at the outset that P. Chowdhury, having regard to her status, education and wealth cannot be allowed to take the benefit of what a pardanasin woman is entitled to on two-fold grounds; firstly, she is highly education (illegible) and a literate woman and secondly, the pleading of Pratima Chowdhury as we get from plaint does not make out such a case. "

Just in the manner in which we have recorded the conclusions drawn by the Co-operative Arbitrator, highlighting each individual aspect taken into consideration, we will also endeavour to similarly summarize the conclusions drawn by the Co-operative Tribunal on different aspects of the matter. The above conclusions are being recorded hereunder:-

(i) The Co-operative Tribunal was of the view, that the determination rendered by the Arbitrator was erroneous on account of the fact that the Arbitrator did not take into consideration a letter of vital importance to the controversy. In this behalf, the Co-operative Tribunal examined the letter dated 29.6.1992, which Pratima Chowdhury had written to the Society, wherein she had indicated that due to her indifferent health, she was not in a position to visit Calcutta in

She accordingly requested the Society to transfer her flat to "my nominee Kalpana Mukherjee, a close relative of mine". In the above letter Pratima Chowdhury had also stated, that Kalpana Mukherjee was already occupying the flat, and was staying in it with her son (Partha Mukheree), and her daughter-in-law (Sova Mukherjee). She accordingly requested the Society, that for the maintenance of the flat, charges payable should be recovered from the residents of the flat. It would be relevant to mention, that Pratima Chowdhury had accepted having written the above letter (in the rejoinder filed by her before the Arbitrator). Despite the above Pratima Chowdhury had explained, that the letter dated 29.6.1992 had been signed by her at the instance of Partha Mukherjee. According to the Co-operative Tribunal, the above letter dated 29.6.1992 written by Pratima Chowdhury on her letterhead from Bombay, demolished the entire case set up by her. Primarily on the basis of the said letter dated 29.6.1992 the Co-operative Tribunal concluded, that the factual inferences recorded by the Arbitrator without reference to the above letter, were not justified. It came to be expressly concluded by the Co-operative Tribunal, that motives attributed to Partha Mukherjee were clearly unjustified.

(ii) According to the Co-operative Tribunal, after having written the above letter dated 29.6.1992, Pratima Chowdhury wrote two other letters dated 11.11.1992 and 13.11.1992. On the basis of the above letters, flat no. 5D was transferred by the Society, to the name of Kalpana Mukherjee, consequent upon the approval of the Deputy Registrar, Co-operative Societies. In the opinion of the Co-operative Tribunal, Pratima Chowdhury did not assail the action of the Society in transferring flat no. 5D to Kalpana Mukherjee till February, 1995. According to the Co-operative Tribunal, the challenge to the transfer of the above flat in the name of Kalpana Mukherjee, was raised only after a marital discord had developed between Partha Mukherjee and his wife Sova Mukherjee. On account of the above discord, Partha Mukhrjee left the company of the family of his father-in-law (H.P. Roy). It was only thereupon, that

Pratima Chowdhury assailed the transfer of the flat (from her name, to the name of Kalpana Mukherjee). According to the Co-operative Tribunal, the Arbitrator overlooked the above extremely relevant factual position and accordingly erred in drawing his conclusions.

(iii) Insofar as the document dated 13.11.1992 is concerned, the Co-operative Tribunal having examined it, recorded that the same was executed by Pratima Chowdhury and Kalpana Mukherjee (both as executants), which was attested by H.P. Roy (father-in-law of Partha Mukherjee) and which was also sworn before a notary. The Co-operative Tribunal also observed, that the aforesaid document had been executed on a non-judicial stamp paper of Rs.40/-. The above document in its text recorded, that Pratima Chowdhury had transferred the possession, right, title and interest of flat no. 5D in favour of Kalpana Mukherjee (the nominee/transferee). The reason for the aforesaid transfer was indicated in document dated 29.6.1992. It was mentioned, that on account of her (Pratima Chowdhury's) indifferent health and on account of having decided to permanently settle in Bombay, she had agreed to transfer the flat no. 5D in favour of Kalpana Mukherjee. It was also duly recorded in the above document, that possession of flat no. 5D had already been handed over to Kalpana Mukhrjee. It was also pointed out, that Kalpana Mukherjee had already applied for membership of the Society, whereafter, she would be entitled to all rights and privileges over flat no. 5D in terms of the bye-laws of the Society. According to the Co-operative Tribunal, Pratima Chowdhury did not deny execution of document dated 13.11.1992. As per the Co-operative Tribunal, the submission of Pratima Chowdhury about having signed a blank paper, on which Partha Mukherjee had executed the document dated 13.11.1992, was not acceptable. The Co-operative Tribunal was of the view, that Pratima Chowdhury having admitted her signatures on the document dated 13.11.1992, it was not open to her to deny the execution thereof. Fo e

Co-operative Tribunal rejected the contention advanced on behalf of Pratima Chowdhury, that she had never appeared before the notary at Calcutta because she had never gone to Calcutta during the period when the documents dated 11.11.1992 and 13.11.1992 were executed. The Co-operative Tribunal felt compelled to record the aforesaid conclusion in the following words: "Regardless of whether the document called agreement dated 13.11.1992 is legal or not, the fact remains that the document was executed by the transferor and the transferee, and it could not be denied that long before the agreement was executed, possession of the flat was delivered way back in March, 1992.". Therefore, all the findings recorded by the Arbitrator in respect of the document dated 13.11.1992 were not accepted for the above reasons.

(iv) While dealing with the documents dated 29.6.1992, 11.11.1992 and 13.11.1992, the Co-operative Tribunal expressed disbelief at the determination of the Arbitrator to the effect, that Pratima Chowdhury had no intention to transfer her membership and her flat bearing no. 5D to Kalpana Mukherjee. According to the Co-operative Tribunal, the question whether monetary consideration passed from Kalpana Mukherjee to Pratima Chowdhury or not, was a different issue, however, the letters dated 29.6.1992, 11.11.1992 and 13.11.1992 clearly expressed the intention of Pratima Chowdhury to transfer flat no. 5D in favour of her nominee Kalpana Mukherjee. The Co-operative Tribunal was also of the view, that the Arbitrator was unjustified in observing, that the above letters were drafted by Partha Mukherjee, or that, Partha Mukheree prevailed over Kalpana Mukherjee to execute the above letters. According to the Co-operative Tribunal, neither the evidence available on the records of the case, nor the circumstances of the case justified any such inference.

(v) While dealing with the issue of consideration, which had passed from Kalpana Mukherjee to Pratima Chowdhury on account of transfer of flat no. 5D, the Co-operative Tribunal

expressed, that the Arbitrator appeared to have been of the view that since in the letter dated 11.11.1992 it was stated, that no monetary transaction was involved, there could be no sale, and consequently, when there was no sale, there could be no transfer. The Co-operative Tribunal expressed the view, that sale was not the only mode of transfer. Relying on the letter dated 11.11.1992 the Co-operative Tribunal felt, that it could not be conclusively held, that Pratima Chowdhury had no intention to transfer flat no. 5D in the name of Kalpana Mukherjee. In fact, according to the Co-operative Tribunal, the issue of passing of consideration and the issue of transfer of the property were two independent issues. The said issues, according to the Tribunal, had to be determined as per the totality of the circumstances of the case. On the instant aspect of the matter the Co-operative Tribunal expressed the view, that the rival parties were tied up by a matrimonial relationship, inasmuch as, the niece (Sova Mukherjee) of Pratima Chowdhury was the cementing factor, of their relationship. Accordingly, whether or not consideration had passed between the parties, could not be considered as a decisive factor. In fact, the Co-operative Tribunal was pleased to further conclude, "Even assuming for the sake of argument that no monetary transaction was involved, the factum of transfer is not abrogated thereby". According to the Co-operative Tribunal, the provisions of the West Bengal Co-operative Societies Act, and the Rules framed thereunder, do not mandate, that transfer could only be made by way of sale. Keeping in view the closeness of the relationship, which is existed between the parties, according to the Co-operative Tribunal, the issue of paramount importance was not the receipt of monetary consideration, the issue of paramount importance was only "… to accommodate the plaintiff's niece Sova and her husband Partha, that was uppermost in the mind of the plaintiff…" Referring to the facts of the present case, the Co-operative Tribunal held, that consistent with the case of Pratima Chowdhury based on an oral agreement, Partha Mukherjee transferred shares of different companies "… worth Rs.4,29 e

plaintiff on 6.12.1994 by way of consideration of the apartment…". It is necessary to notice the observations made by the Co-operative Tribunal on the instant aspect of the matter. The same are accordingly reproduced in the words of the Co-operative Tribunal: "One may not believe the reality of oral agreement so as to determine the price and of payment thereto by transfer of shares of different companies in favour of the respondent no. 1. But if it appears from the documents which show that in the latter part of the year 1994, shares worth Rs.4,29,000/- were transferred in favour of P. Chowdhury and if no convincing evidence is forthcoming as to payment of that money for different purpose or for different reason then one is to believe the passing of consideration price, and the passing of consideration price when proved would virtually prove the alleged oral agreement to that effect."

(vi) The Co-operative Tribunal also examined the rival contentions of the parties in respect of the place where the documents in question were executed. It was pointed out, that the evidence produced by Pratima Chowdhury to the effect, that she had signed the documents in Bombay, could not be accepted. Likewise, according to the Co-operative Tribunal, the witnesses produced by Pratima Chowdhury on the above issue, were not reliable. According to the Co-operative Tribunal, when the notary who was an Advocate stated on oath, that the documents were executed in Calcutta before him, it was not possible to give credence to the statement of Pratima Chowdhury or the witnesses produced by her. According to the Co-operative Tribunal, it needed to be kept in mind even, insofar as the instant aspect of the matter was concerned, that Pratima Chowdhary had raised a dispute in respect of the transfer of flat no. 5D only after a marital discord had developed between Partha Mukherjee and Sova Mukherjee.

(vii) According to the Co-operative Tribunal "the question as to why Kalpana Mukherjee was not made a nominee in January, 1992 when she was put in possession of the flat, lies

in the fact that since 1987, Kalpana Mukherjee's son Partha Mukherjee had been residing in Bombay with his father in law H.P. Roy and Pratima Chowdhury. According to the Co-operative Tribunal, the Arbitrator recorded a useless reasoning, that the nomination in favour of Kalpana Mukherjee was not acceptable. Referring to Sections 79 and 80 of the West Bengal Co-Operative Societies Act, the Co-operative Tribunal expressed the view, that it was not compulsory that transfer of nomination could only be in favour of a member of the family of the person making the nomination. According to the Co-operative Tribunal, the letters/documents dated 29.6.1992, 11.11.1992 and 13.11.1992 were sufficient proof of the nomination by Pratima Chowdhury in favour of Kalpana Mukherjee. It was also pointed out, that the Society had accepted the above nomination, which was approved by the Deputy Registrar, Co-Operative Societies. It was accordingly concluded by the Co-operative Tribunal, that in such a situation, no separate letter giving consent to the transfer was required.

(viii) Another interesting aspect of the matter dealt with by the Co-operative Tribunal was based on the principle of estoppel. Rather than expressing the observations and conclusions drawn by the Co-operative Tribunal in our words, we consider it just and appropriate to narrate the findings recorded by the Co-operative Tribunal by extracting its observations. The same are accordingly reproduced hereunder:-

> "Section 115 of the Evidence Act provides that "when one person has by his declaration act or commission, intentionally causes or permits another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in the suit or proceeding between herself and such person or his representative shall be allowed in the suit or proceeding between herself and such person or his representation, to deny the truth of that thing". The f[illegible]y

much present to invoke the doctrine.

(a) Fraud, undue influence (illegible) and misrepresentation has not been proved;

(b) (illegible)

(c) (Illegible)

(d) Partha was in need of accommodation in Calcutta;

(e) Long before transfer Kalpana was already made a nominee in respect of the flat in question;

(f) Unquestionably two letters dated 19.6.1992 and 13.11.1992 are there addressed by Pratima to the society clearly asking for transfer of the flat in favour of Kalpana;

(g) Possession was delivered pursuant to those letters and agreement dated 13.11.1992;

(h) Lease and license agreement with Colgate Palmolive Ltd., legally cannot destroy the factum of transfer;

(i) Partha and Kalpana are led to believe about the completion of transfer;

(j) Under the law it (illegible) required to be executed and registered under the T.P. Act and the I.R. Act;

(k) Pratima writes to CESC to henceforth collect all charges from Kalpana;

(l) Pratima slept a slumber after the signing of the agreement dated 13.11.1992 till April, 1993.

These facts are to our mind sufficient to invoke the doctrine of estoppel. When society acted upon letters of the plaintiff/respondent no. 1 and transfer was effected, the respondent no. 1 is estopped from challenging her stand."

(ix) It was argued before the Co-operative Tribunal, that when the lease and license agreement came to an end, Partha Mukherjee wrote a letter to Colgate Palmolive India Limited informing it of the termination of the lease and license agreement by asserting, that "Landlady refunded back the security deposit of Rs.60,000/-". Factually, Partha Mukherjee had deposited the above amount of Rs.60,000/-, in the Calcutta office of Colgate Palmolive (India) Limited. It was argued before the Co-operative Tribunal, that the use of the expression "landlady" by Partha Mukherjee, was indicative of the fact that the transfer of flat no. 5D had actually not taken place. According to the Co-operative Tribunal, the aforesaid argument was not acceptable because in the eyes of Colgate Palmolive (India) Limited, Pratima Chowdhury was a landlady and accordingly it was not required that Partha Mukherjee should inform Colgate Palmolive (India) Limited, that Pratima Chowdhury had transferred flat no. 5D to the name of his mother Kalpana Mukherjee.

Based on the aforesaid findings recorded by the Co-operative Tribunal, both the appeals were allowed. The impugned award passed by the Tribunal dated 5.2.1999 in Dispute Case No. 29/RCS of 1995-96 was set aside. Accordingly, the dispute raised by Pratima Chowdhury was dismissed.

23. Dissatisfied with the common order passed by the Co-operative Tribunal dated 16.5.2002, vide which Appeal nos. 14 of 1999 and 29 of 1999 were disposed of, the petitioner invoked the civil revisional jurisdiction of the High Court at Calcutta (hereinafter referred to as, the High Court). During the course of deliberations before the High Court, Pratima Chowdhury assailed the findings recorded by the Co-operative Tribunal on various aspects of the matter. The High Court in its deliberations traced the sequence of facts in the background of the facts as were examined by the

Co-operative Tribunal. No new facts were taken into consideration. The High Court adjudicated upon the matter vide an order dated 14.2.2006, whereby Civil Order nos. 3039 and 3040 of 2002 were jointly disposed of. The different perspectives and angles within the framework of which the High Court examined the controversy, are being briefly narrated hereunder:-

(i) The High Court excluded various facts taken into consideration by the Arbitrator. For excluding certain facts from consideration, the view of the High Court was, that the factual position introduced by Pratima Chowdhury by filing a rejoinder before the Arbitrator, could not be taken into consideration. The consideration of the High Court was recorded in the impugned order dated 14.2.2006, as under:-

> "After service of copy of the written statement, the plaintiff before the learned Arbitrator filed a rejoinder thereby attempting to introduce certain facts. But the learned Tribunal observed that there could be no scope for filing of such rejoinder either under the Code of Civil Procedure or under the West Bengal Co-Operative Societies Rules."

In fact, on the instant aspect of the matter the High Court, adopted as correct the following observations recorded in the order passed by the Co-operative Tribunal:-

> "It has to be clearly stated that under no provision of law the plaintiff can be allowed to submit a rejoinder to the written statement of the defendant and the facts introduced in the rejoinder were illegally taken note of by the Ld. Arbitrator and whatever evidence she introduced to translate that rejoinder cannot be legally accepted."

(ii) The High Court was of the view, that the stance adopted by Pratima Chowdhury was impermissible under the principle of justice and equity, the doctrine of fairness, as also, the doctrine of estoppel. This aspect of the matter came to be

examined in the following manner:-

> "After due consideration of all relevant facts and materials it appears that there could be very little scope for the society to recall its stand just because after about three years, Pratima Chwodhury decided otherwise. In fact resolution of the dated 14.2.1993 was forwarded to the Deputy Registrar, Co-operative Societies with recommendation for transfer of flat and shares in favour of Kalpana Mukherjee as far back as on 10.3.1993. It appears that the Deputy Registrar, Co-operative Societies, asked for certain document on 26.7.1993, which were submitted by the society on 22.9.1993. Thereafter, membership of Kalpana Mukherjee in place of Pratima Chowdhury was approved. Thus, backing out by Pratima Chowdhury after about three years of her own consistent request for transfer in favour of Kalpana Mukherjee and her request to C.E.S.C. to transfer electric meter, cannot have any support in the eyes of law. Pratima Chowdhury also did not bother to intimate Kalpana Mukherjee while requesting the society for necessary action in view of her change of mind. This is against the doctrine of fairness. Lord Dening in his book, The Discipline of Law, 7th Reprint, page 223, observed:
>
> > "It is a principle of justice and of equality. It comes to this, when a man by his words or conduct has led another to believe that he may safely act on the faith of them - and the other does act on when it would be unjust or inequitable for him to do so."
>
> In the words of Dixon, J.:-
>
> "The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."

The said principle was further stretched to the following extent:-

> "At any rate, it applies to an assumption of ownership or absence of ownership. This gives rise to what may be called proprietary estoppel. There are many cases where he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases, it has been held repeatedly that the owner is not to be allowed to go back on what he has led the other to believe. So much so that his own title to the property, be it land or goods, has been held to limited or extinguished, and new rights and interest have been created therein. And this operates by reason of his conduct what he was led the other to believe even though he never intended it."
>
> It may be said that even in absence of actual promise, if a person by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights, knowing or intending that the other will act on that belief and he does so act, that again will raise an equity in favour of the other, and it is for a court to equity to say in what way the equity may be satisfied. An equity does not necessarily depend on agreement but on words or conduct. The Privy Council in V. Wellington Corporation observed that the Court must look at the circumstances in each case to decide in what way the equity can be satisfied."

(iii) The High Court expressly approved the manner in which the controversy had been examined by the Co-operative Tribunal, by taking into consideration the past relationship between the parties, and the souring of the relationship between the two spouses, i.e., Partha Mukherjee and Sova Mukherjee. Having examined the dispute in the aforesaid prospective, the High Court observed as under:-

> "On behalf of the petitioner it was also submitted that the learned Tribunal failed to appreciate the findings of the learned Arbitrator arrived at after proper appreciation of the evidence in the said proceeding. The learned Tribunal seem to be in agreement with the view that the document dated 13.11.1992 cannot be called as a proper and complete document of transfer. The learned Tribunal, thereafter explored as to whether such a document is at all necessary for effecting transfer of an apartment by a member to another person. Relying upon the letters dated 29.6.1992 and 11.11.1992 and quite rightly, without attempting to read more than what meets the eyes, the learned Tribunal held that Pratima Chowdhury by such letters, expressed her desire to transfer the flat in favour of her nominee Kalpana Mukherjee. This was quite relevant in the context of relationship between two families arising out of the marital tie. It cannot be said that the learned Tribunal was not at all justified in observing that in the backdrop of the present case, payment of consideration could not be the decisive factor."

(iv) On the subject of passing of consideration, the High Court principally accepted the view propounded by the Co-operative Tribunal. The High Court made the following observations on the issue of consideration:-

> "The learned Tribunal appears to have considered the aspect relating to transfer of flat in proper perspective. Nothing could be placed before this Court so as to justify brushing aside of the observation of the learned Tribunal that "neither the Act nor the rule rules out transfer by gift or will. But the Rule does not provide the manner of transfer, nor does it mandate that transfer has to be effected by any of the modes necessary as provided for in the Transfer of Property Act. The transferee has to be an allottee or a re-allottee."

On perusal of the impugned ju at

the learned Tribunal referring to Rule 201(3) of the West Bengal Co-operative Societies Rule, 1974 and relevant Rule of 1987 observed that the question of payment of consideration money is primarily and purely a matter between the transferor and the transferee. It was held that "deletion of the Rule 201 (3) from the present Rule of 1987 clearly fortifies the position of the society which effected transfer on the repeated request of the respondent no. 1 in full compliance with the provisions of the Act and the Rules. This being so, for a transferee to hold possession is required the certificate of allotment, not a deed of conveyance from the transferor"."

Significantly enough the learned Tribunal mentioned about the manner in which Pratima Chowdhury got the flat from the original member, Smt. Indrani Bhattacharya and wondered as to how then there could be any grievance in regard to the transfer by the said Pratima Chowdhury in favour of Kalpalan Mukherjee. The story of giving money to Partha Mukherjee by way of loan could not be established to the satisfaction of the judicial conscience of the learned Tribunal and for reasons as mentioned in the impugned judgment, the learned Tribunal did not choose to brush aside the assertions made on behalf of Kalpana Mukherjee that shares amounting to Rs.4,29,000/- were transferred in favour of Pratima Chowdhury. Controversy relating to alleged non-payment of consideration money, in the facts and circumstances of the present case, were not seen to have nay legs, to stand upon."

Having recorded the aforesaid findings, the High Court in its conclusion recorded the following observations:-

"But, as observed earlier, the judgment and order under challenge does not seem to be suffering from any such infirmity or jurisdictional error, which calls for or justifies any interference by this Court."

Based on the analysis of the controversy in the manner summarized hereinabove, the High Court dismissed the challenge raised by Pratima Chowdhury by a common order dated 14.2.2006. The common order passed by the Co-operative Tribunal dated 16.5.2002, and the common order passed by the High Court dated 14.2.2006 were assailed by Pratima Chowdhury by filing Special Leave to Appeal (Civil) no. 15252 of 2006.

24. Leave granted.

25. The factual narration recorded by us, the circumstances taken into consideration by the Arbitrator, and the Co-operative Tribunal, as also, the analysis of the High Court have all been detailed hereinabove. Suffice it to state, that there were no further facts besides those already referred to hereinabove, which were brought to our notice during the course of hearing. It is also not necessary for us to record the submissions advanced at the hands of the learned counsel for the rival parties. All that needs to be mentioned is, that the same submissions as were put forward by the respective parties hitherto before, came to be addressed before this Court as well. We shall, therefore, venture to examine the veracity of the propositions advanced on behalf of the rival parties by compartmentalizing the submissions advanced before us under different principles of law. We would thereupon record our final conclusions.

26. First and foremost, it surprises us that Co-operative Tribunal, as also, the High Court excluded from consideration, the factual position expressed in the rejoinder filed by the appellant (before the Arbitrator). In excluding the aforesaid factual position, the Co-operative Tribunal and the High Court did not rely on any provision of law nor was any reliance placed on any principle accepted and recognized in legal jurisprudence. It is not a matter of dispute, that after Kalpana Mukherjee and the Society were permitted to file written replies before the Arbitrator, the rejoinder file[illegible]f

Pratima Chowdhury, was permitted to be taken on record. It is not in contention, that in the written replies filed before the Arbitrator, Kalpana Mukherjee had adopted inter alia the stance, that consideration was paid to Pratima Chowdhury in lieu of the transfer of flat no. 5D to her name, even though the documents relied upon by the rival parties, expressed otherwise. A number of documents not mentioned in the Dispute Case filed by Pratima Chowdhury were also relied upon by Kalpana Mukherjee. Pleadings between the parties could be considered as complete, only after Pratima Chowdhury was permitted to file a rejoinder (in case she desired to do so). She actually filed a rejoinder which was taken on record by the Arbitrator. Both parties were permitted to lead evidence, not only on the factual position emerging from the complaint filed by Pratima Chowdhury and the written replies filed in response thereto (by Kalpana Mukherjee, and the Society), but also, the factual position highlighted by Pratima Chowdhury in her rejoinder affidavit. It is, therefore, not on the basis of the pleadings of the parties, but also on the basis of the evidence led in support of the aforesaid pleadings, that the Arbitrator had recorded his findings in his award dated 5.2.1999. We are therefore of the view, that the Arbitrator had acted in accordance with law, and therefore the exclusion from consideration, of the factual position asserted by Pratima Chowdhury in her rejoinder, by the Co-operative Tribunal and the High Court was wholly unjustified. The factual narration by Pratima Chowdhury, could not be excluded from consideration, while adjudicating upon the rival claims between Pratima Chowdhury and Kalpana Mukherjee. The instant aspect of the decision of the High Court, is therefore liable to be set aside, and is accordingly set aside. Just the instant determination, would result in a whole lot of facts which were not taken into consideration by the adjudicating authorities, becoming relevant. Despite that, we feel, that remanding the matter for a denovo consideration, would place a further burden on the parties. Having heard learned counsel at great length, we shall settle the issues finally, here and now.

27. The Co-operative Tribunal in its order dated 16.5.2002 had invoked the principle of estoppel, postulated in Section 115 of the Indian Evidence Act. The High Court affirmed the conclusions drawn by the Co-operative Tribunal. In addition to the above principle, the High Court invoked the principles of equity and fairness. Insofar as the latter principles are concerned, we shall delve upon them after examining the contentions of the rival parties, as equity and fairness would depend upon the entirety and totality of the facts. The above aspect can therefore only be determined after dealing with the intricacies of the factual circumstances involved. We shall, however, endeavour to deal with the principle of estoppel, so as to figure whether, the rule contained in Section 115 of the Indian Evidence Act could have been invoked, in the facts and circumstances of the present case. Section 115 of the Indian Evidence Act is being extracted hereinabove:-

> "115. Estoppel.- When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.
>
> Illustration
>
> A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

It needs to be understood, that the rule of estoppel is a doctrine based on fairness. It postulates, the exclusion of, the truth of the matter. All, for the sake of fairness. A perusal of the above provision reveals four salient pre conditi e

rule of estoppel. Firstly, one party should make a factual representation to the other party. Secondly, the other party should accept and rely upon the aforesaid factual representation. Thirdly, having relied on the aforesaid factual representation, the second party should alter his position. Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position. Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position. In our considered view, none of the ingredients of principle of estoppel contained in Section 115 of the Indian Evidence Act, can be stated to have been satisfied, in the facts and circumstances of this case. Herein, the first party has made no representation. The second party has therefore not accepted any representation made to her. Furthermore, the second party has not acted in any manner, nor has the second party altered its position. Therefore, the question whether the restoration of the original position would be iniquitous or unfair does not arise at all. Even if consideration had passed from Kalpana Mukherjee to Pratima Chowdhury, on the basis of the representation made by Pratima Chowdhury, we could have accepted that Kalpana Mukherjee had altered her position. In the facts as they have been presented by the rival parties, especially in the background of the order passed by the Arbitrator, that no consideration had passed in lieu of the transfer of the flat, and especially in the background of the factual finding recorded by the Co-operative Tribunal and the High Court, that passing of consideration in the present controversy was inconsequential, we have no hesitation whatsoever in concluding, that the principle of estoppel relied upon by the Co-operative Tribunal and the High Court, could not have been invoked, to the detriment of Pratima Chowdhury, in the facts and circumstances of the present case. Insofar as the instant aspect of the matter is concerned, the legal position declared by this Court fully supports the conclusion drawn by us hereinabove. In this behalf, reference

may be made, firstly, to the judgment rendered by this Court in *Kasinka Trading vs. Union of India,* (1995) 1 SCC 274, wherein this Court noticed as under:-

> "11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties."
>
> (emphasis is ours)

The above sentiment recorded in respect of the principle of estoppel was noticed again by this Court in *Monnet Ispat & Energy Ltd. vs. Union of India & Ors.,* (2012) 11 SCC 1, wherein this Court expressed its views in respect of the principle of estoppel as under:-

> "289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party concerned must have acted to its prejudice."

The ingredients of the doctrine of estoppel in the manner expressed above were also projected in *H.S. Basavaraj (D) by his LRs. & Anr. Vs. Canara Bank & Ors.,* (2010) 12 SCC 458, as under:-

> "30. In general words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is, however, only applicable in cases where the other party has changed his position relying upon the representation thereby made."
>
> (emphasis is ours)

As already noticed hereinabove, none of the ingredients of estoppel can be culled out from the facts and circumstances of the present case. In view of above, we hereby set aside the determination by the Co-operative Tribunal, as also the High Court, in having relied on the principle of estoppel, and thereby, excluding the pleas/defences raised by Pratima Chowdhury to support her claim.

28. The admitted factual position in the present controversy, in our considered view, is absolutely clear and unambiguous. Had the different adjudicating authorities taken into consideration the undisputed factual position, there ought not to have been much difficulty in resolving the difficulty. We shall highlight a few relevant admitted facts which crossed our mind while hearing the matter and whilst recording the order:-

(i) The reason for transferring flat no. 5D indicated in the letters dated 11.11.1992 and 13.11.1992 was on account of the close relationship between Pratima Chowdhury and

Kalpana Mukherjee, which was expressed by observing "…my nominee Kalpana, a close relative of mine…". As a matter of fact, there was no close relationship between Pratima Chowdhury and Kalpana Mukherjee. Pratima Chowdhury, is indicated to have been living in Bombay and never visiting Calcutta. Kalpana Mukherjee is a resident of Calcutta, who was in employment at Calcutta, and had started to reside with her son Partha Mukherjee, after he moved to Calcutta alongwith his wife Sova Mukherjee. There was no direct relationship between Pratima Chowdhury and Kalpana Mukherjee. Pratima Chowdhury's niece Sova Mukhrjee was married to Partha Mukherjee, son of Kalpana Mukherjee. The only relationship that can be assumed, is of aunty and niece, between Pratima Chodhury and Sova Mukherjee. If on account of love and affection, for her niece, Pratima Chowdhury desired to transfer flat no. 5D which she had purchased for a consideration of Rs.4 lakhs, she would have done so by transferring it to the name of her niece Sova Mukherjee. Affinity to Sova Mukherjee, and the love, affection and welfare of Sova Mukherjee, would not extend to a gesture of the nature under reference, i.e., by way of transfer of immovable property, of substantial value, without consideration, to the mother in law of Sova Mukherjee. Therefore, factually the expression of close relationship between Pratima Chwodhury and Kalpana Mukherjee depicted in letters dated 11.11.1992 and 13.11.1992 are on the face of it, false and incorrect. It is, therefore, improper for the adjudicating authorities to have accepted the factum of close relationship of the parties, in so far as, the transfer of flat no. 5D, is concerned.

(ii) There is hardly any justification for having accepted another important factual position depicted in the letters dated 11.11.1992 and 13.11.1992. In this behalf, our reference is to the fact that flat no. 5D was sought to be transferred by Pratima Chowdhury to Kalpana Mukherjee, without consideration. First and foremost, the aforesaid factual position is not acceptable on account of the statement of Kalpana Mukherjee herself. In

the written reply filed before the Arbitrator, Kalpana Mukherjee took the express stance, that Pratima Chwodhury had transferred flat no. 5D to her name, by accepting a consideration of Rs.4,29,000/-. She further asserted, that the aforesaid consideration had passed from Kalpana Mukherjee to Pratima Chowdhury through Partha Mukherjee. According to Kalpana Mukherjee, Partha Mukherjee transferred shares in his name valued at Rs.4,29,000/-, to the name of Pratima Chowdhury. Per se therefore, even Kalpana Mukherjee denied the factual position indicated in the above letters, whereby flat no. 5D was transferred from the name of Pratima Chowdhury, to that of Kalpana Mukherjee.

(iii) The letters dated 11.11.1992 and 13.11.1992 expressly recorded, that the factual position narrated in the above letters was on account of "compliance with the rules regulating such transfer, and also, for avoiding future complications". In view of the factual position noticed in the foregoing paragraphs, it is apparent, that false facts were being recorded for compliance with the rules and regulations, as also, for avoiding future complications. One would have appreciated the recording of consideration in lieu of the transfer of property from the name of Pratima Chowdhury to that of Kalpana Mukherjee, to avoid future complications, rather than withholding the same. It is clearly not understandable, what kind of complications were being avoided. Expressing the above factual position in the letters under reference, makes the whole transaction suspicious, mistrustful and possibly fraudulent too. In the absence of any relationship, the party benefiting from the letters dated 11.11.1992 and 13.11.1992, would have successfully avoided all complications merely by incorporating consideration, which was to pass from Kalpana Mukherjee to the transferee Pratima Chowdhury. If consideration was to pass, and had actually passed, it is difficult to understand why the parties would say, that the transaction did not involve passing of consideration. It is therefore clear, that all the ingredients of

letter dated 11.11.1992 and 13.11.1992 are shrouded in suspicious circumstances. One is prompted to record herein, that it was not legitimately open to the parties to record in the letters under reference, that flat no. 5D was being gifted by Pratima Chowdhury to Kalpana Mukherjee, on account of lack of proximity between the parties. The transfer of the said property by one to the other, by way of gift, would obviously have been subject to judicial interference, as the same would at least prima facie, give the impression of dubiety. It was therefore, that Kalpana Mukherjee hastened to adopt a different factual position in her written reply before the Arbitrator.

(iv) It is relevant to mention, that in the written statement filed by Kalpana Mukherjee (before the Arbitrator) the stand adopted by her was, that a consideration of Rs.4,29,000/- had passed from her to Pratima Chowdhury, by way of transfer of shares (standing in the name of her son, Partha Mukherjee) to the name of Pratima Chowdhury. In this behalf it would be relevant to notice, that the documents of transfer executed between Pratima Chowdhury and Kalpana Mukherjee were dated 11.11.1992 and 13.11.1992. Based thereon, the Board of Directors of the Society, in its meeting held on 14.2.1993, resolved to accept the resignation of Pratima Chowdhury. It was further resolved, to accept the membership of Kalpana Mukherjee in her place. On the date of execution of the documents under reference, as also on the date of passing of the resolution by the Board of Directors of the Society, Partha Mukherjee did not have any shares in his name. The shares which Partha Mukherjee acquired, and which Kalpana Mukherjee claims to have been transferred in lieu of consideration (to the name of Pratima Chowdhury), were shown to have been acquired on or after 8.9.1993. The dates of acquisition of the said shares, as were recorded in the order passed by the Arbitrator, which position has not been disputed before us, are as follows:-

"COMPANY'S NAME	NO. OF SHARES ACQUIRED	
Tata Chemicals Ltd.	50 nos.	8.9.93
Tata Chemicals Ltd.	450 nos.	27.10.93
Siemens	50 nos.	2.8.93
Indian Aluminium	500 nos.	4.3.94
I.T.C. Hotels	100 nos.	acquired with Mr. H.P. Roy 4.4.94"

It is therefore apparent, that Partha Mukherjee did not even have the shares referred to by the transferee Kalpana Mukherjee, in his name, when the transfer documents were executed on 11.11.1992 and 13.11.1992, or even on 14.2.1993 when the Board of Directors of the Society, passed the transfer resolution. The above shares are shown to have been transferred to the name of Pratima Chowdhury on 16.12.1994. Well before 16.12.1994, even according to the stance adopted by Kalpana Mukherjee, Pratima Chowdhury had executed all the transfer documents. It is therefore difficult to accept, that the parties had agreed to pass on consideration by transfer of shares, which were not even owned by Kalpana Mukherjee (through Partha Mukherjee) on the date of transfer of flat no. 5D from Pratima Chowdhury to Kalpana Mukherjee. In sum and substance therefore, on undisputed facts, the stance adopted by Kalpana Mukherjee in the written statement filed by her before the Arbitrator, is shown to be false. This aspect of the matter would bring out a legitimate query, namely, why should Kalpana Mukherjee have adopted a false stance, contrary to the expressed position in the letters dated 11.11.1992 and 13.11.1992. This further exposes, the suspicious nature of the transfer transaction.

(v) On the subject of transfer of shares from the name of Partha Mukherjee to the name of Pratima Chowdhury, which,

according to Kalpana Mukherjee constituted passing of consideration to Pratima Chowdhury (in lieu of the transfer of flat no. 5D). Pratima Chowdhury had adopted the stance, that the transfer of the above shares was on account of return of loans extended by Pratima Chowdhury to Partha Mukherjee. Insofar as the instant aspect of the matter is concerned Pratima Chowdhury had asserted, that after the transfer of Partha Mukherjee from Calcutta to Bombay in the year 1993, he gave up his employment with Colgate Palmolive (India) Limited, and started a business of aluminium products with one R.K. Sen, at Bombay. To help Partha Mukherjee with his above business venture, Pratima Chowdhury had (on the asking of Partha Mukherjee) paid a sum of Rs. 2 lakhs by way of cheque, to Bharat Aluminium Company Limited, for supply of raw materials to Partha Mukherjee's business venture. It was also pointed out, that Partha Mukherjee had also taken a loan for a sum of Rs. 1,50,000/- for the same purpose from Bani Roy (sister of Pratima Chowdhury). It was also asserted, that Sova Mukherjee had similarly extended loans, by making payments through cheque to Partha Mukherjee. The Arbitrator had accepted the above assertion of Pratima Chowdhury. For the above determination, the Arbitrator had placed reliance, on documentary and oral evidence, produced by Pratima Chowdhury. The instant factual aspect of the matter was totally overlooked by the Co-operative Tribunal, as well as, by the High Court. Keeping in view the factual position depicting in paragraph (iv) above, we have no doubt in our mind, that there was substance in the determination of the Arbitrator, specially on account of the fact that transfer of shares from the name of Partha Mukherjee to the name of Pratima Chowdhury came to be effected, well after the transfer of flat no. 5D to the name of Kalpana Mukherjee. For the above reason as well, the findings of fact recorded by the Co-operative Tribunal as well as by the High Court, are bound to be considered as having been recorded without taking into consideration all the material and relevant facts.

(vi) The fact that Pratima Chowdhury had addressed a letter to the Secretary of the Society, dated 28.2.1995, for withdrawal of her earlier letter dated 11.11.1992, is not in dispute. It is also not a matter of dispute, that at the time when Pratima Chowdhury addressed the above letter, neither the transfer of membership, nor the transfer of the flat, had assumed finality. The transfer of membership, as also the transfer of the flat, would assume finality only upon the approval of the same by the Deputy Registrar, Co-operative Societies. The factual position emerging from the record of the case reveals, that the Society sought the approval of the Deputy Registrar, Co-operative Societies for the transfer of membership, as also, flat no. 5D to the name of Kalpana Mukherjee on 13.3.1995. Undoubtedly, Pratima Chowdhury had sought revocation, before the transfers under reference had assumed finality. It is in the above background, that one needs to evaluate the reply of the Society dated 10.4.1995. Through the letter dated 10.4.1995, Pratima Chowdhury was informed, that the Society had no authority to look into the matter, after the resolution of the Board of Directors dated 2.4.1995. We find the above explanation, untenable. It was imperative for the Society to have examined the withdrawal letter dated 28.2.1995, the matter certainly had not been concluded. Well after the withdrawal letter, the Society by its notice dated 16.4.1995 had intimated its members, about the resolution dated 2.4.1995. The matter was, therefore, pending authoritative conclusion. Thus viewed, it was not justified for the Society to deny consideration of the withdrawal letter dated 28.2.1995. Acceptance or rejection on merits is another matter, but non-consideration is not understandable. The instant non-consideration clearly invalidates the resolution passed by the Society.

(vii) On 22.3.1995, Pratima Chowdhury addressed a letter to the Deputy Registrar, Co-operative Societies, imploring him to take appropriate action, by considering the withdrawal letter dated 28.2.1995. We are surprised, that the Deputy Registrar, Co-operative Societies adopted the same stance, as was

adopted by the Society. When the letter dated 22.3.1995 was addressed to the Deputy Registrar, Co-operative Societies, it had not yet granted approval to the recommendations made by the Society. The receipt of the letter dated 28.2.1995, by the Society (as also the receipt of the letter dated 22.3.1995, by the Deputy Registrar, Co-operative Societies) is not in dispute. It is imperative for us therefore to conclude, that the decision taken by the Deputy Registrar, Co-operative Societies was, without reference to the withdrawal letter dated 28.2.1995 (which was enclosed with the letter dated 22.3.1995 addressed to the Deputy Registrar, Co-operative Societies). The determination by the Deputy Registrar, Cooperative Societies, cannot therefore be treated as a valid and legitimate consideration. Acceptance or rejection on merits is another matter, but non-consideration is just not understandable. The instant non-consideration clearly invalidates the approval granted by the Deputy Registrar, Co-operative Societies.

(viii) The veracity of the execution of the documents dated 11.11.1992 and 13.11.1992 by Pratima Chowdhury, was also examined by the Arbitrator. In the above examination, the Arbitrator arrived at the conclusion, that Pratima Chowdhury was in Bombay and not in Calcutta when the above documents were executed. The above finding was recorded on the basis of three witnesses produced on behalf of the complainant (before the Arbitrator). While rejecting the conclusion drawn by the Arbitrator, the Co-operative Tribunal overlooked the statements of the witnesses produced by Pratima Chowdhury, merely because the notary was an Advocate. The Co-operative Tribunal reasoned, that the statement of S.N. Chatterjee, an Advocate, had to be given more weightage, than the witnesses produced by Pratima Chowdhury. The above determination at the hands of the Co-operative Tribunal, besides being perverse, is also totally unacceptable in law. In the facts and circumstances of the present case, the statement of the notary should have been rejected and discarded, simply because the notary in his deposition had acknowledge

any notarial certificate in terms of Section 8 of the Notary Act. In the absence of issuance of any such certificate, notarization of the document dated 13.11.1992 was clearly subject to suspicion. The conclusion drawn by the Co-operative Tribunal as also the High Court, to the effect that the document dated 13.11.1992 was executed at Calcutta, is therefore, based on no evidence whatsoever. The fact that the document dated 13.11.1992 had not been executed in Calcutta, was also sought to be substantiated by showing, that the registration number of the Society was not depicted in the said letter, even though the said letter was shown to have been executed at the residence of the Secretary of the Society. It was reasoned, that the Secretary of the Society would have supplied the aforesaid number, if the above document had been executed at his residence. Having rejected the credibility of the statement of S.N. Chatterjee (the notary), and having not accepted the fact that the above document was executed at the residence of Anil Kumar Sil, the Secretary of the Society, we find no reason for not accepting the statements of the three witnesses produced by Pratima Chowdhury, to show that she (Pratima Chowdhury) was at Bombay on 11.11.1992, as well as, on 13.11.1992. Herein again, the Cooperative Tribunal and the High Court, erred on the face of the record, by not taking into consideration material facts, available on the file of the case.

(ix) In the background of the factual position emerging from the deliberations recorded hereinabove, it is also necessary to notice, that the Arbitrator had placed heavy reliance on the fact, that Kalpana Mukherjee had deposited rent on 21.10.1993 (payable to Pratima Chowdhury), into the account of Pratima Chowdhury, by herself, filling up the bank deposit voucher. Accordingly, the Arbitrator inferred, that the property in question, even to the knowledge of Kalpana Mukherjee, had not actually been transferred to her name by Pratima Chowdhury (at least upto 21.10.1993). That was the reason, why Kalpana Mukherjee had continued to deposit rent for flat no. 5D, into the account of Pratima Chowdhury upto 21.10.1993. Coupled with

the aforesaid factual aspect, the Arbitrator placed great reliance on the letter dated 28.10.1993 addressed by Partha Mukherjee to Colgate Palmolive (India) Limited, wherein, he described Pratima Chowdhury as the "landlady". Undoubtedly, if the documents relied upon by Kalpana Mukherjee were genuine, Partha Mukherjee would not have acknowledged the ownership of Pratima Chowdhury over flat no. 5D (on 28.10.1993). These aspects of the matter were totally overlooked by the Co-operative Tribunal, as well as, by the High Court. These were vital facts, and needed to be examined, if the order passed by the Arbitrator was to be interfered with. In the absence of such consideration, the findings of fact recorded by the Co-operative Tribunal and by the High Court, are bound to be considered as perverse. Since the factual position attributed to the actions of 21.10.1993 and 28.10.1993, which emanated and emerged from Kalpana Mukherjee and Partha Mukherjee respectively, we are of the view that entire sequence of transfer, is rendered doubtful and suspicious.

(x) The determination of the Arbitrator, on the subject of the transfer of the covered garage, to the name of Kalpana Mukherjee was also overlooked by the Co-operative Tribunal, as well as, by the High Court. From the facts already narrated above, it is clear that Pratima Chowdhury, had one covered garage space also. Whilst reference was made about the details of the flat sought to be transferred, in the transfer documents, no reference was made to the covered garage space. Based on the letter dated 11.11.1992, and the document dated 13.11.1992, flat no. 5D was transferred to the name of Kalpana Mukherjee. The instant transfer however did not include the covered garage space. Thereafter, based on an agreement executed between Kalpana Mukherjee (on the one hand), and the Society (on the other), the said covered garage space was transferred to the name of Kalpana Mukherjee, on 25.4.1995. The said transfer was not at the behest of, or with the concurrence of Pratima Chowdhury. Therefore, according to the view expre r,

the covered garage space, must be deemed to have never been transferred to Kalpana Mukherje by its erstwhile owner. The Arbitrator also expressed the view, that the agreement dated 25.4.1995 could not have been executed without the participation of Pratima Chowdhury. The above factual position has not been disputed at the hands of Kalpana Mukherjee, before this Court. The above reasoning, in our considered view, was fully justified. The instant aspect of the matter was also totally overlooked by the Co-operative Tribunal, as well as, by the High Court. For the above reason also, the findings of the fact, recorded by the Co-operative Tribunal and by the High Court, are bound to be treated as perverse.

29. For all the reasons recorded by us in foregoing sub-paragraphs, we are of the view that the Co-operative Tribunal as well as the High Court, seriously erred in recording their conclusions. We are satisfied in further recording, that the Arbitrator was wholly justified in allowing the Dispute Case filed by Pratima Chowdhury, by correctly appreciating the factual and legal position.

30. The Co-operative Tribunal as well as the High Court, had invoked the principle of justice and equity, and the doctrine of fairness, while recording their eventual findings in favour of Kalpana Mukherjee. It is, therefore, necessary for us, to delve upon the above aspect of the matter. Before we venture to examine the instant controversy in the above perspective, it is necessary to record a few facts. It is not a matter of dispute, that for a long time Pratima Chowdhury had been residing at Bombay. She was residing at Bombay in the house of H.P. Roy and Bani Roy. Bani Roy, as stated above, is the sister of Pratima Chowdhury. H.P. Roy is a wealthy person. Partha Mukherjee son of Kalpana Mukherje, is an engineering graduate from IIT, Kharagpur. He also possesses the qualification of MBA, which he acquired from Ahmedabad. Originally Partha Mukherjee was employed as Sales Manager/ Regional Manager with Colgate Palmolive (India) Limited, at

Bombay. Partha Mukherjee married Sova Mukherjee (the daughter of H.P. Roy), whilst he was posted at Bombay in 1987. Soon after his marriage, Partha Mukherjee and Sova Mukherjee also started to live in the house of H.P. Roy (father-in-law of Partha Mukherjee). The evidence available on the record of the case reveals, that Pratima Chowdhury treated Sova Mukherjee as her daughter, and Partha Mukherjee as her son. In 1992, Partha Mukherjee was transferred from Bombay to Calcutta. Immediately on his transfer, Pratima Chowdhury accommodated him in flat no. 5D. Subsequently, Colgate Palmolive (India) Limited entered into a lease and licence agreement, in respect of flat no. 5D with Pratima Chowdhury, so as to provide residential accommodation to Partha Mukherjee (as per the terms and conditions of his employment). Obviously, Partha Mukherjee was instrumental in the execution of the above lease and licence agreement. In order to deposit monthly rent payable to Pratima Chowdhury (by Colgate Palmolive (India) Limited), Partha Mukherjee opened a bank account in the name of Pratima Chowdhury, jointly with himself. He exclusively operated the above account, for deposits as well as for withdrawals. Not only that, the findings recorded by the Arbitrator indicate that the letter dated 11.11.1992 written by Pratima Chowdhury was drafted by Partha Mukherjee. The aforesaid conclusion was drawn from the fact that the manuscript of the original was in the handwriting of Partha Mukherjee. All the above facts demonstrate, a relationship of absolute trust and faith between Pratima Chowdhury and Partha Mukherjee. The aforesaid relationship emerged, not only on account of the fact that Partha Mukherjee was married to Sova Mukherjee (the niece of Pratima Chowdhury), but also on account of the fact, that Partha Mukherjee and his wife Sova Mukherjee soon after their marriage lived in the house of H.P. Roy (husband of the sister of Pratima Chowdhury). They resided together with Pratima Chowdhury till 1992, i.e., for a period of more than a decade, before Partha Mukherjee was transferred to Calcutta. In our considered view the relationship between Partha Mukherjee and Prati[illegible]d

constitute a fiduciary relationship. Even though all the above aspects of the relationship between the parties were taken into consideration, none of the adjudicating authorities dealt with the controversy, by taking into account the fiduciary relationship between the parties. When parties are in fiduciary relationship, the manner of examining the validity of a transaction, specifically when there is no reciprocal consideration, has to be based on parameters which are different from the ones applicable to an ordinary case. Reference in this behalf, may be made to the decision rendered by this Court in *Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib,* AIR 1967 SC 878, wherein this Court examined the twin concepts of "fiduciary relationship" and "undue influence" and observed as under:

> "We may now proceed to consider what are the essential in- gredients of undue influence and how a plaintiff who seeks relief on this ground should proceed to prove his case and when the defendant is called upon to show that the contract or gift was not induced by undue influence. The instant case is one of gift but it is well settled that the law as to undue influence is the same in the case of a gift inter-vivos as in the case of a contract.
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> Under s. 16 (1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that the court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor'?
>
> Sub-section (2) of the section is illustrative as to when a person is to considered to be in a position to dominate the will of another. These are inter alia (a) where the donee

> holds a real or apparent authority over the donor or where he stands in a fiduciary relation to the donor or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> Sub-section (3) of the section throws the burden of proving that a contract was not induced by undue influence on the person benefiting by it when two factors are found against him, namely that he is in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced to be unconscionable.
>
> The three stages for consideration of a case of undue influence were expounded in the case of *Ragunath Prasad v. Sarju Prasad and others* (AIR 1924 PC 60) in the following words :- "In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached-namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other."
>
> (emphasis is ours)

The subject of fiduciary relationship was also examined by this Court in, *Krishna Mohan Kul alias Nani Charan Kul vs. Pratima Maity,* (2004) 89 SCC 468, wherein it was held as under:

> ".....When fraud, mis-representation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influenc[illegible]n.

But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position and he has to prove that there was fair play in the transaction and that the apparent is the real, in other words that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation the law presumes everything against the transaction and the onus is cast against the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been engrained in Section 111 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section

requires that the party on whom the burden of proof is laid should have been in a position of active confidence where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however, improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest.

13. In judging of the validity of transactions between persons standing in a confidential relation to each other, it is very material to see whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of very great importance in such cases. It is always obligatory for the donor/beneficiary under a document to prove due execution of the document in accordance with law, even de hors the reasonableness or otherwise of the transaction, to avail of the benefit or claim rights under the document irrespective of the fact whether such party is the defendant or plaintiff before Court.

14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly started in Ashburner's Principles of Equity, 2nd Ed., p.229, thus:

> "When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.""

(emphasis is ours)

The above conclusions recorded by this Court, came to be reiterated recently in *Anil Rishi Vs. Gurbaksh Singh,* (2006) 5 SCC 558.

31. While deciding the proposition in hand, we must keep in mind the law declared by this Court on the subject of fiduciary relationship. We will also proceed by keeping in mind, what we have already concluded in the preceding paragraph, i.e., that relationship between Partha Mukherjee and Pratima Chowdhury was a relationship of faith, trust and confidence. Partha Mukherjee was in a domineering position. He was married to Sova Mukherjee. Sova Mukherjee is the daughter of H.P. Roy. Pratima Chowdhury has lived for a very long time in the house of H.P. Roy. During that period (after his marriage) Partha Mukherjee also shared the residential accommodation in the same house with Pratima Chowdhury, for over a decade. In Indian society the relationship between Partha Mukherjee and Pratima Chowdhury, is a very delicate and sensitive one. It is therefore, that Pratima Chowdhury extended all help and support to him, at all times. She gave him her flat when he was transferred to Calcutta. She also extended loans to him, when he wanted to set up an independent business at Bombay. These are illustrative instances of his authority, command and influence. Instances of his enjoying the trust and confidence of Pratima Chowdhury include, amongst others, the joint account of Pratima Chowdhury with Partha Mukherjee, which the latter operated exclusively, and the drafting of the letters on behalf of Pratima Chowdhury. In such fact situation, we are of the view, that the onus of substantiating the validity and genuineness of

the transfer of flat no. 5D, by Pratima Chowdhury, through the letter dated 11.11.1992 and the document dated 13.11.1992, rested squarely on the shoulders of Kalpana Mukherjee. Because it was only the relationship between Partha Mukherjee and Pratima Chowdhury, which came to be extended to Kalpana Mukherjee. The document dated 13.11.1992 clearly expressed, that the above transfer was without consideration. Kalpana Mukherjee in her written reply before the Arbitrator asserted, that the above transfer was on a consideration of Rs.4,29,000/-. The Arbitrator in his order dated 5.2.1999 concluded, that Kalpana Mukherjee could not establish the passing of the above consideration to Pratima Chowdhury. The Cooperative Tribunal, as well as, the High Court, despite the factual assertion of Kalpana Mukherjee were of the view, that passing of consideration was not essential in determination of the genuineness of the transaction. We are of the view, that the Cooperative Tribunal, as well as, the High Court seriously erred in their approach, to the determination of the controversy. Even though the onus of proof rested on Kalpana Mukherjee, the matter was examined by requiring Pratima Chowdhury to establish all the alleged facts. We are of the view, that Kalpana Mukherjee miserably failed to discharge the burden of proof, which essentially rested on her. Pratima Chowdhury led evidence to show, that she was at Bombay on 11.11.1992 and 13.11.1992. In view of the above, the letter dated 11.11.1992 and the document dated 13.11.1992, shown to have been executed at Calcutta could not be readily accepted as genuine, for the said documents fell in the zone of suspicion, more so, because the manuscript of the letter dated 11.11.1992 was in the hand-writing of Partha Mukherjee. Leading to the inference, that Partha Mukherjee was the author of the above letter. It is therefore not incorrect to infer, that there seems to be a ring of truth, in the assertion made by Pratima Chowdhury, that Partha Mukherjee had obtained her signatures for executing the letter and document referred to above. We find no justification whatsoever for Pratima Chowdhury, to have transferred flat no.

5D to Kalpana Mukherjee, free of cost, even though she had purchased the same for a consideration of Rs. 4 lakhs in the year 1987. Specially so, when she had no direct intimate relationship with Kalpana Mukherjee. By the time the flat was transferred, more than a decade had passed by, during which period, the price of above flat, must have escalated manifold. Numerous other factual aspects have been examined by us above, which also clearly negate the assertions made by Kalpana Mukherjee. The same need not be repeated here, for reasons of brevity. Keeping in mind the above noted aspects, we are of the considered view, that invocation of the principle of justice and equity, and the doctrine of fairness, would in fact result in returning a finding in favour of Pratima Chowdhury, and not Kalpana Mukherjee.

32. For the reasons recorded hereinabove, the instant appeal is allowed, the order dated 16.5.2002 passed by the Co-operative Tribunal, and the order dated 14.2.2006 passed by the High Court, are hereby set aside. The determination rendered by the Arbitrator in his award dated 5.2.1999, is hereby affirmed. Kalpana Mukherjee is directed to handover the possession of flat no. 5D to Pratima Chowdhury, within one month from today. The Society is also directed to retransfer the shares of the Society earlier held by Pratima Chowdhury, and the ownership rights of flat no. 5D to the name of Pratima Chowdhury, without any delay.

D.G. Appeal allowed.

MATHEW VARGHESE

v.

M. AMRITHA KUMAR & ORS.

(Civil Appeal Nos. 1927-1929 of 2014)

FEBRUARY 10, 2014

[A.K. PATNAIK AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

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

s.13(1) - Held: Any secured creditor may be entitled to enforce the secured asset created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, however, such enforcement should be in conformity with the other provisions of the SARFAESI Act.

s.13(8) - Right of borrower - Held: There is a valuable right recognized and asserted in favour of the borrower, who is the owner of the secured asset and who is extended an opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be effected - Such an ownership right is a Constitutional Right protected under Article 300A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law - Therefore, de hors, the extent of borrowing made and whatever costs, charges were incurred by the secured creditor in respect of such borrowings, when it comes to the question of realizing the dues by bringing the property entrusted with the secured creditor for sale to realize money advanced without approaching any Court or Tribunal, the secured creditor as a trustee cannot deal with the said property in any manner it likes and property can be disposed of only in the manner prescribed in the SARFAESI Act -

Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property or at least ensure that in the process of sale the secured asset derives the maximum benefit and the secured creditor or anyone on its behalf is not allowed to exploit the situation of the borrower by virtue of the proceedings initiated under the SARFAESI Act - Constitution of India, 1950 - Article 300A.

s.13(8) - Conflict with r.15(1) of Income Tax Rules, 1962 - Held: r.15 of the Income Tax Rules, 1962 does not in any way conflict with either s.13(8) of the SARFAESI Act or rr.8 and 9 of the Security Interest (Enforcement) Rules, 2002 - The sub-rule (1) of r.15 only deals with the discretion of the Tax Recovery Officer to adjourn the sale by recording his reasons for such adjournment - As far as sub-rule (2) is concerned, the same is clear to the effect that a sale of immovable property once adjourned under sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale should be made unless the defaulter consents to waive it - The said sub-rule also does not conflict with any of the provisions of the SARFAESI Act, in particular s.13 or rr.8 and 9.

s.35 - Non obstante clause - Held: s.35 states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force - Therefore, reading s.35 and s.37 together, it will have to be held that in the event of any of the provisions of RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, SARFAESI Act and RDDB Act, would be complementary to each other - The effect of s.37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the

provisions of the other Acts mentioned in s.37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Finances Institutions Act, 1993, or any other law for the time being in force - Recovery of Debts Due to Banks and Finances Institutions Act, 1993.

SECURITY INTEREST (ENFORCEMENT) RULES, 2002:

rr.8 and 9 - Procedure to be followed by a secured creditor while resorting to a sale after the issuance of the proceedings u/ss.13(1) to (4) of the SARFAESI Act - Held: Reading sub-rule (6) of r.8 and sub-rule (1) of r.9 together, the service of individual notice to the borrower, specifying clear 30 days time gap for effecting any sale of immovable secured asset is a statutory mandate - No sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers - Therefore, the requirement u/r.8(6) and r.9(1) contemplates a clear 30 days individual notice to the borrower and also a public notice by way of publication in the newspapers.

rr.8 and 9 - Sale effected in favour of appellant without complying with the mandatory requirement of 30 days notice to the borrower - High Court set aside the sale and passed interim order directing the borrower to furnish demand draft of Rs.2 crores in favour of appellant and in case of non-payment directed to confirm sale in favour of appellant - Payment not made by borrowers - Request by borrowers for six weeks time to arrange money - By another interim order, High Court extended time and permitted 8th respondent to deposit Rs.2.03 crores and on such deposit to cancel sale in favour of appellant - Held: Since very valuable rights of the appellant were at stakes, there was no justification at all for High Court to interfere with the said right in such a casual manner by passing interim orders on [illegible]d

by borrowers - Ownership right which accrued in favour of appellant ought not to have been interfered with by the High Court - Interim orders set aside - Value of the property was knocked out in favour of the appellant for Rs.1.27 crores - Since proper procedure for effecting sale was not followed, the price fetched through the appellant cannot be held to be the correct price for the mortgaged property - In the year 2010 the property could fetch Rs.2.03 crores while the price paid by the appellant was Rs.1.27 crores - Therefore, after giving credit of Rs.1.27 crores, the appellant directed to pay a further sum of Rs.76 lacs to the borrowers.

Respondents no.1 and 2 stood guarantors in respect of credit facility for Rs.30 lacs granted by the 4th respondent bank and created an equitable mortgage in favour of bank by depositing the title deeds of their property. The transaction became non performing asset and the respondent bank filed recovery suit. The respondent bank also issued a notice under Section 13(2) of SARFAESI Act for Rs.77 lacs. The respondents no.1 and 2 filed a Securitisation Application before the DRT challenging the possession notice issued by respondent bank and also restraining the bank from evicting them. The attempts for one time settlement between them failed and the bank withdrew its offer of OTS of Rs.55 lacs.

On 14.8.2007, the 4th respondent bank issued a notice to Respondents no.1 and 2 of its intention to sell the property under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 by fixing reserve price of Rs.1.25 crores. The notice was issued in two newspapers inviting tenders-cum-auction from public. The appellant and one M/s KC submitted their tenders.

Respondents no.1 and 2 filed a writ petition before the High Court. The single judge of the High Court disposed of the writ petition directing DRT to hear the

parties and dispose of cases without delay and directed respondent bank to defer the sale posted on 25.9.2007 by six weeks by imposing condition on respondents no.1 and 2 to deposit Rs.10 lacs before the date of sale. On 27.12.2007, the DRT dismissed the Securitisation Application. On 28.12.2007, the 4th Respondent-Bank accepted the tender of Rs.1.27 crores offered by the appellant and asked the appellant to deposit 25% of the amount on that day itself and pay the balance amount within 15 days. The appellant complied with it. The respondent bank confirmed the sale in favour of the appellant. Respondents no.1 and 2 were informed about the confirmation of sale and were directed to collect the balance amount available with the 4th Respondent-Bank. Respondents no.1 and 2 filed a writ petition challenging the vires of the Rules, 2002 on the ground that it violated their right of redemption by denying them adequate opportunity and time to repay the borrowed sum and the action of the Bank in having acted surreptitiously in selling the property without informing them. The said writ petition was dismissed by the single judge on the ground that the Respondents no.1 and 2 got an alternative efficacious remedy available under the SARFAESI Act. Respondents no.1 and 2 filed writ appeal. In the meantime, on 24.06.2009, the 4th Respondent-Bank transferred the property in favour of the appellant under a duly registered certificate of sale.

By the impugned order, the Division Bench set aside the sale on the ground that it was not conducted in a fair and proper manner and imposed condition on Respondents 1 and 2 to furnish a Demand Draft of Rs.2 crores in favour of the appellant and if payment is not made, as directed, the sale in favour of the appellant would stand confirmed and the writ appeal would automatically stand dismissed. In the event of the payment of Rs.2 crores, the appell... o

hand over the original sale deed obtained by him from the Bank to enable Respondents no.1 and 2 to approach the Sub-Registrar and Revenue Authorities for cancellation of registration, consequent mutation, etc.

Respondents no.1 and 2 did not make the payment within the said date, as directed by the Division Bench. Instead an application was filed by the Respondents 1 and 2 seeking further six weeks time to effect the payment of Rs.2 crores. The Division Bench passed order on 18.06.2010, extending the time till 20.06.2010. The said extension was granted by holding that on such deposit, sale made by the 4th Respondent-Bank in favour of the appellant would stand cancelled and the Bank should effect the sale in favour of the 8th Respondent. The 8th Respondent was directed to deposit Rs.2.03 crores before the 4th Respondent-Bank on 19.06.2010 and the time granted for payment in terms of the judgment was extended till 20.06.2010. On 8.7.2010, after noting that appellant had not withdrawn the amounts deposited with the 4th respondent bank, the Division Bench allowed the I.A. and directed 4th respondent Bank to execute the sale deed in favour of the 8th Respondent for the sale consideration of Rs.2.03 crores. The instant appeals were filed challenging the order of the Division Bench of the High Court.

Disposing of the appeals, the Court

HELD: 1. Under Section 13(1) of the SARFAESI Act, it is provided that any security interest created in favour of the SECURED CREDITOR may be enforced without the intervention of the Court and Tribunal by such creditor in accordance with the provisions of this Act. The non-obstante clause in the opening set of expressions contained in Section 13(1) is restricted to Section 69 or Section 69A of the T.P. Act. The only other relevant aspect contained in the said sub-section is that such

enforcement should be in accordance with the provisions of this Act. Section 13(1) says that while on the one hand, any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act. [Paras 24] [767-G-H; 768-B-C]

2. Sub-section (8) of Section 13 states that a borrower can tender to the SECURED CREDITOR the dues together with all costs, charges and expenses incurred by the SECURED CREDITOR at any time before the date fixed for sale or transfer. In the event of such tender once made as stipulated in the said provision, the mandate is that the SECURED ASSET should not be sold or transferred by the SECURED CREDITOR. It is further reinforced to the effect that no further step should also be taken by the SECURED CREDITOR for transfer or sale of the SECURED ASSET. There is a valuable right recognized and asserted in favour of the borrower, who is the owner of the SECURED ASSET and who is extended an opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be effected. Having regard to such a valuable right of a debtor having been embedded in the said sub-section, it will have to be stated in uncontroverted terms that the said provision has been engrafted in the SARFAESI Act primarily with a view to protect the rights of a borrower, inasmuch as, such an ownership right is a Constitutional Right protected under Article 300A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law. Therefore, de hors, the extent of borrowing made and whatever costs, charges were incurred by the SECURED CREDITOR in respect of such borrowings, when it comes to the [illegible]g

the dues by bringing the property entrusted with the SECURED CREDITOR for sale to realize money advanced without approaching any Court or Tribunal, the SECURED CREDITOR as a TRUSTEE cannot deal with the said property in any manner it likes and can be disposed of only in the manner prescribed in the SARFAESI Act. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property or at least ensure that in the process of sale the SECURED ASSET derives the maximum benefit and the SECURED CREDITOR or anyone on its behalf is not allowed to exploit the situation of the borrower by virtue of the proceedings initiated under the SARFAESI Act. [Para 26] [768-F-H; 769-C-H; 770-A]

Valji Khimji and Company vs. Official Liquidator of Hindustan NitroProduct (Gujarat) Limited and Ors. **(2008) 9 SCC 299: 2008 (12) SCR 1;** *United Bank of India vs. Satyawati Tondon and Ors.* **(2010) 8 SCC 110: 2010 (9) SCR 1;** *Narandas Karsondas vs. S.A. Kamtam and Anr.* **(1977) 3 SCC 247: 1977 (2) SCR 341;** *Mardia Chemicals Ltd. and Ors. vs. Union of India and Ors.* **(2004) 4 SCC 311: 2004 (3) SCR 982 - referred to.**

3. Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 prescribe the procedure to be followed by a SECURED CREDITOR while resorting to a sale after the issuance of the proceedings under Section 13(1) to (4) of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that

the authorized officer should serve to the borrower a notice of 30 days for the sale of the immovable SECURED ASSETS. Reading sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days time gap for effecting any sale of immovable SECURED ASSET is a statutory mandate. It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. The use of the expression 'or' in Rule 9(1) should be read as 'and' as that alone would be in consonance with Section 13(8) of the SARFAESI Act. The other prescriptions contained in the proviso to sub-rule (6) of Rule 8 relates to the details to be set out in the newspaper publication, one of which should be in 'vernacular language' with sufficient circulation in the locality by setting out the terms of the sale. While setting out the terms of the sale, it should contain the description of the immovable property to be sold, the known encumbrances of the SECURED CREDITOR, the secured debt for which the property is to be sold, the reserve price below which the sale cannot be effected, the time and place of public auction or the time after which sale by any other mode would be completed, the deposit of earnest money to be made and any other details which the authorized officer considers material for a purchaser to know in order to judge the nature and value of the property. Such a detailed procedure while resorting to a sale of an immovable SECURED ASSET is prescribed under Rules 8 and 9(1). The paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale or transfer, or ensure that the SECURED ASSET derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed. [Paras 28 to 30] [770-D-G; 771-B-F; 772-C-D]

4. Rules 8(1) to (3) and in particular sub-rule (3) speaks about the responsibility of the SECURED CREDITOR vis-à-vis the SECURED ASSET taken possession of. Under sub-rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under sub-rule (2) of Rule 8 again, it is stated as to how the SECURED CREDITOR should publish the notice of possession as prescribed under sub-rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in the locality and also such publication should have been made seven days prior to the intention of taking possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the SECURED CREDITOR once possession is actually taken by its authorised officer. Under sub-rule (3) of Rule 8, the property taken possession of by the SECURED CREDITOR should be kept in its custody or in the custody of a person authorized or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence would under similar circumstances take care of such property. The underlining purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. A reading of Rules 8 and 9, in particular, sub-rule (1) to (4) and (6) of Rule 8 and sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a SECURED ASSET is created by the borrower in favour of the SECURED CREDITOR, the said asset in the event of the same having become a NON-PERFORMING ASSET cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the Rules. [paras 31, 32] [772-E-H; 773-A-C, F-G]

5. A close reading of Section 37 shows that the provisions of the SARFAESI Act or the rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, SARFAESI Act and RDDB Act, would be complementary to each other. The HEADING of the said Section also makes the position clear that application of other laws are not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Finances Institutions Act, 1993, or any other law for the time being in force. [paras 42, 43] [780-H; 781-A-C, H; 782-A-B]

Transcore Vs. Union of India and Anr. **(2008) 1 SCC 125: 2006 (9) Suppl. SCR 785;** *Ram Kishun and Ors. vs. State of Uttar Pradesh and Ors.* **(2012) 11 SCC 511: 2012 (6) SCR 105;** *Bhinka and Ors. vs. Charan Singh* **AIR 1959 SC 960: 1959 Suppl. SCR 798 - relied on.**

Eastern Counties etc. Railway Vs. Marriage **(1861) 9 HLC 32 - referred to.**

Craies on Statute Law, Seventh Edition **p.207- referred to.**

6. The application of the SARFAESI Act will be in addition to, in the instant case to Section 29 of the RDDB Act. Whatever stipulations contained in Section 29 as regards the application of certain provisions of the Income Tax Act, 1961 in particular Schedule 2 Part I Rule 15 of the Income Tax Rules, 1962 for effecting a sale or transfer would apply automatically. Therefore, what is to be considered is as to what is the mode prescribed under the above provisions, namely, Rule 15 prescribed under Schedule 2 Part I of the Income Tax Rules, 1962. Section 29 of the RDDB Act is an enabling provision under which the Second and Third schedule to the Income Tax Act, 1961 (43 of 1961) and the Income Tax Rules, 1962 can be applied as far as possible with necessary modifications as if the provisions and the rules are referable to the DEBT DUE, instead of the income tax due. Therefore, fictionally, by virtue of Section 29 of the RDDB Act, the mode and method by which a recovery of income tax can be resorted to under the Second and Third Schedule to the Income Tax Act and the Income Tax Rules, 1962 have to be followed. Therefore, a reading Section 37 of the SARFAESI Act and Section 29 of the RDDB Act, the only aspect which has to be taken care of is that while applying the procedure prescribed under Rule 15 of the Income Tax Rules, 1962, no conflict with reference to any of the provisions of the SARFAESI Act, takes place. [paras 45, 46] [783-B-H]

7. A reading of the Rule 15 of the Income Tax Rules, 1962 does not in any way conflict with either Section 13(8) of the SARFAESI Act or Rules 8 and 9 of the Rules, 2002. Sub-rule (1) of Rule 15 only deals with the discretion of the Tax Recovery Officer to adjourn the sale by recording his reasons for such adjournment. The said Rule does not in any way conflict with either Rules 8 or 9 or Section 13, in particular sub-section (1) or sub-section (8) of the SARFAESI Act. Therefore, to that extent there is no

difficulty in applying Rule 15. As far as sub-rule (2) is concerned, the same is clear to the effect that a sale of immovable property once adjourned under sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale should be made unless the defaulter consents to waive it. The said sub-rule also does not conflict with any of the provisions of the SARFAESI Act, in particular Section 13 or Rules 8 and 9. In fact there is no provision relating to grant of adjournment or issuance of a fresh proclamation for effecting the sale after the earlier date of sale was not adherered to in the SARFAESI Act. In such circumstances going by the prescription contained in Section 37 of the SARFAESI Act, the provision contained in Section 29 of the RDDB Act will be in addition to and not in derogation of the provisions of the SARFAESI Act, the provisions contained in Rule 15, which is applicable by virtue of the stipulation contained in Section 29 of the RDDB Act, whatever stated in sub-rule (2) of Rule 15 should be followed in a situation where a notice of sale notified as per Rules 8 and 9(1) of the Securitisation Trust Rules, read along with Section 13(8) gets postponed. Such a construction of the provisions, namely, Sections 37, 13(8) and 37 of the SARFAESI Act, read along with Section 29 with the aid of Rule 15 could alone be made and in no other manner, therefore, hold that unless and until a clear 30 days notice is given to the borrower, no sale or transfer can be resorted to by a SECURED CREDITOR. In the event of any such sale properly notified after giving 30 days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the SECURED CREDITOR cannot effect the sale or transfer of the SECURED ASSET on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9 read along with Section 13(8) for which the entir[illegible]e

thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. As per sub-rule (8) of Rule 8, sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the SECURED CREDITOR and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale. Any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act. [para 48, 49] [784-D-H; 785-A-H; 786-A-B]

8. In the instant case, the initial sale was notified to take place on 25.09.2007. The paper publication was made on 23.08.2007. Respondents 1 and 2 were informed by the 4th Respondent-Bank only on 30.08.2007. Therefore, as the sale date was 25.09.2007 it did not fulfill the mandatory requirement of 30 clear days notice to the borrower as stipulated under sub-rule (6) of Rule 8. But at the intervention of the Court, the sale date fixed on 25.09.2007 was adjourned by six weeks. In any case, the sale was not effected even after the six weeks period expired as directed. The Securitisation Application came to be disposed of by the DRT only on 27.12.2007. Therefore, once the Securitisation Application was dismissed on 27.12.2007, even assuming that there was no impediment for the SECURED CREDITOR, namely, the 4th Respondent-Bank to resort to sale under the provisions of the SARFAESI Act, there should have been a fresh notice issued in accordance with Rules 8(6) and 9(1) of the Rules, 2002. Unfortunately, the 4th Respondent-Bank stated to have effected the sale on

28.12.2007 by accepting the tender of the appellant and by way of further process, directed the appellant to deposit the 25% of the amount on that very day and also directed to deposit the balance amount within 15 days, which was deposited by the appellant on 11.01.2008. In fact, after the deposit of the 25% of the amount on 28.12.2007, the 4th Respondent-Bank stated to have confirmed the sale in favour of the appellant on 31.12.2007. After the deposit of the balance amount on 11.01.2008, the 4th Respondent-Bank informed the Respondents no.1 and 2 about the confirmation of sale and thereby, provided no scope for Respondents no.1 and 2 to tender the dues of the SECURED CREDITOR, namely, the 4th Respondent-Bank with all charges, expenses etc., as has been provided under Section 13(8) of the SARFAESI Act. Therefore, the whole procedure followed by the 4th Respondent-Bank in effecting the sale on 28.12.2007 and the ultimate confirmation of the sale on 11.01.2008, stood vitiated as the same was not in conformity with the provisions of the SARFAESI Act and the Rules framed thereunder. Though, such a detailed consideration of the legal issues was not made by the Division Bench while setting aside the sale effected in favour of the appellant, having regard to the construction of the provisions of the SARFAESI Act, the RDDB Act and the relevant Rules, the Judgment of the Division Bench was perfectly justified. [Paras 50, 51] [786-C-H; 787-A-G]

9. In the order dated 18.06.2010 passed by the Division Bench, reference was made to the stand of Respondents 1 and 2 that they had to raise funds by arranging for the sale of the very same SECURED ASSET, which took time as many buyers were reluctant to come forward because of the chance of continued litigation. The Division Bench without anything more, accepted the said reason and by allowing the I.A. permitted the 8th Respondent to de y

19.06.2001 and on such deposit it held that the time granted for payment stood extended till 20.06.2010. It further held that on such deposit being made, the sale made by the 4th Respondent-Bank in favour of the appellant would be cancelled and the 4th Respondent should effect a sale in favour of the 8th Respondent. In the subsequent I.A., the Division Bench directed the 4th Respondent-Bank to execute the sale in favour of the 8th Respondent taking note of the fact of deposit of Rs.2.03 crores by the 8th Respondent with the 4th Respondent-Bank. After the Order dated 18.06.2010 and 08.07.2010, the Appellant filed the Special Leave Petition in this Court. Vide Order dated 08.08.2013, while declining to vacate Status Quo Order dated 30.07.2010, the Special Leave Petition itself was directed to be listed for final hearing. Though the 8th Respondent is stated to have deposited the sum of Rs.2.03 crores with the 4th Respondent-Bank, as per the Order dated 18.06.2010 in IA, the other directions in the main Order and the subsequent directions contained in the Orders dated 18.06.2010 and 08.07.2010, were not carried out. The sale which was already fixed in favour of the appellant continued to remain in force and the sum of Rs.2.03 crores deposited by the 8th Respondent remained with the 4th Respondent-Bank. [Paras 56, 57] [791-B-F; 792-A-C]

10. There was absolutely no justifiable grounds for the Division Bench to grant further time in its Order dated 18.06.2010, it will be travesty of justice if the earlier Judgment dated 08.03.2010, which worked itself out on 08.05.2010, is to be reversed for the flimsy grounds raised by the Respondents no. 1 and 2 that they could not raise funds in spite of two months time granted to them for paying a sum of Rs.2 crores in favour of the appellant. While the time granted by the Division Bench expired by 08.05.2010, the application for extension was filed 40 days later, i.e. on 10.06.2010. Therefore, for such a

recalcitrant attitude displayed by Respondents 1 and 2 in respect of a litigation which involved very high stakes, the Division Bench should not have come for their rescue in the absence of any weighty reasons. The reason adduced on behalf of Respondent 1 and 2 is the standard reason which any party would plead while seeking for extension of time. Since very valuable rights of the appellant were at stakes and the Order of the Division Bench also remained in force, in so far as it related to the cancellation of the sale deed, which existed in favour of the appellant till 08.05.2010 and by virtue of the non-compliance of the conditions imposed in the said Judgment dated 08.03.2010 by the Respondents no.1 and 2, the ownership rights of the appellant got crystallized on and after 09.05.2010, there was no justification at all for the Division Bench to interfere with the said right in such a casual manner by accepting the flimsy reasons of the Respondents no.1 and 2. The ownership right which got crystallized in favour of the appellant as on 09.05.2010, could not have been snatched away by the Division Bench by passing the impugned orders dated 18.06.2010 and 08.07.2010. With reference to the right of ownership of the Respondents 1 and 2 with reliance upon Article 300A of the Constitution would equally apply to the appellant as well in such a situation. Therefore, such a right which accrued in favour of the appellant ought not to have been interfered with by the Division Bench and the Orders passed in the interim application filed at the instance of the Respondents no.1 and 2, along with the 8th Respondent herein are not justified. Therefore, while upholding the Judgment of the Division Bench dated 08.03.2010, the Orders dated 18.06.2010 and 08.07.2010 are set aside. [Para 58] [792-E-H; 793-A-F]

11. There is another very relevant factor which cannot be ignored, namely, that the value of the property which was knocked out in favour a

sum of Rs.1.27 crores by confirming the sale by the 4th Respondent-Bank on 31.12.2007 and 11.01.2008, the same was found to be not in accordance with the provisions of the SARFAESI Act. Since the proper procedure for effecting the sale was not followed, it will have to be held that the price fetched through the appellant cannot be held to be the correct price for the mortgaged property involved in these proceedings. Further, the very fact that in the year 2010 the property could fetch Rs.2.03 crores, in all fairness even while confirming the Order of the Division Bench, by which the sale in favour of the appellant came to be confirmed, the difference in the sale price should be directed to be paid by the Appellant. While the price paid by the appellant was Rs.1.27 crores, the price ultimately fetched at the instance of the Respondents no.1 and 2 was Rs.2.03 crores. Therefore, after giving credit to Rs.1.27 crores, the appellant would still be liable to pay a further sum of Rs.76 lacs to the Respondents no.1 and 2. Accordingly, the order is passed. [Para 59] [793-G-H; 794-A-D]

Case Law Reference:

2008 (12) SCR 1	**referred to**	**Para 16**
2010 (9) SCR 1	**referred to**	**Para 16**
1977 (2) SCR 341	**referred to**	**Para 17**
2012 (6) SCR 105	**relied on**	**Para 21**
2004 (3) SCR 982	**referred to**	**Para 37**
2006 (9) Suppl. SCR 785	**relied on**	**Para 42**
(1861) 9 HLC 32	**referred to**	**Para 43**
1959 Suppl. SCR 798	**relied on**	**Para 44**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1927-1929 of 2014.

From the Judgment and Order dated 08.03.2010 in WA No. 1555/2009 dated 18/06/2010 in IA No. 437/2010 in WA No.1555/2009 and dated 08/07/2010 in IA No. 507/2010 in WA No. 1555/2009 of the High Court of Kerala at Ernakulam.

Krishnan Venugopal, Abir Phukhan, Uday Rathore, A. Raghunath for the Appellant.

Shyam Diwan, M.K.S. Menon, Meena, C.R., K. Prabhakaran, Himanshu Munshi, Manish Garani, Durga Dutt, Robin V.S., Abhinav Malhotra, Usha Nandini V. for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Leave granted.

2. This appeal by the purchaser, in a tender-cum-auction sale held by the 4th Respondent-Bank, is directed against the judgments and final orders dated 08.03.2010 in Writ Appeal No.1555 of 2009, Order dated 18.06.2010 in I.A. No.437 of 2010 in Writ Appeal No.1555 of 2009 and Order dated 08.07.2010 in I.A. No.507 of 2010 in Writ Appeal No.1555 of 2009 passed by the High Court of Kerala at Ernakulam.

3. The interesting but very serious question that arises for consideration in this appeal is as regards the interpretation of Section 13(8) of the SARFAESI Act read with Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "the Rules, 2002").

4. The 1st and 2nd Respondents herein stood as guarantors in respect of a credit facility to the tune of Rs.30,00,000/- granted by the 4th Respondent-Bank in favour of a company called 'Jerry Merry Exports Private Limited'. As guarantors, the 1st and 2nd Respondents created an EQUITABLE MORTGAGE in favour of 4th Respondent-Bank by depositing the title deeds of their pr y

No.150/12A (40.20 cents), Survey No.150/12C (11 cents) and Survey No.150/13 (26 cents) totaling 77.20 cents situated in Padivattom Kana, Edappally South Village, Kanayanoor Taluk, Ernakulam District Kochi, Kerala (hereinafter referred to as "the mortgage property"). When the transaction became a NON-PERFORMING ASSET, the 4th Respondent-Bank filed O.A. No.31 of 2002 for recovery of Rs.33,77,053/- along with interest @ 18% per annum. The 4th Respondent-Bank also issued a notice under Section 13(2) of the SARFAESI Act on 11.08.2006 for a sum of Rs.70,77,590/-. On 20.02.2007, the 4th Respondent-Bank is stated to have taken possession of the mortgaged property by invoking Section 13(4) of SARFAESI Act, read along with Rules 8 and 9 of the Rules, 2002.

5. The 1st and 2nd Respondents filed a Securitisation Application i.e. S.A. No.20 of 2007, before the Debt Recovery Tribunal (hereinafter referred to as "the DRT") Ernakulam, challenging the possession notice dated 20.02.2007 and additionally also for an Order to restrain the 4th Respondent-Bank from evicting Respondents 1 and 2. Between 09.05.2007 and 24.07.2007 the attempts made for One Time Settlement (hereinafter referred to as "OTS") also failed and the 4th Respondent-Bank withdrew its offer of OTS, which was in a sum of Rs.55,00,000/-.

6. On 14.08.2007, the 4th Respondent-Bank issued a notice to Respondents 1 and 2, as well as others of its intention to sell the property under Rule 8(6) of the Rules, 2002 by fixing a reserve price of Rs.1,25,00,000/-. On 23.08.2007, the 4th Respondent-Bank published its notice of sale of property in Indian Express and Mathrubhoomi, inviting tenders-cum-auction from the public. The 1st and 2nd Respondents were informed by the 4th Respondent-Bank by its notice dated 30.08.2007, about the publication made on 23.08.2007 and also enclosed a tender form along with the terms and conditions for participation in the tender. The Appellant and one M/s Kent Construction stated to have submitted their tenders on 30.08.2007 and 01.09.2007.

7. On 20.09.2007, the 1st and 2nd Respondents filed W.P. No.27182 of 2007 challenging the proceedings initiated under the SARFAESI Act. The said writ petition was disposed of by a learned Single Judge of the Kerala High Court by Order dated 20.09.2007. By the said order, the High Court after taking note of the O.A. filed by the 4th Respondent-Bank, as well as S.A. filed by the 1st and 2nd Respondents, directed the DRT to hear the parties and dispose of both the cases or at least the Securitisation Application filed by the 1st and 2nd Respondents without any delay. The High Court also noted that at that point of time, the DRT had fixed 12.10.2007 as the date for disposal of both the applications. While issuing the said directions, the learned Judge gave liberty to the parties to settle the liability and also directed the 4th Respondent-Bank to defer the sale posted on 25.09.2007 by six weeks, by imposing a condition on Respondents 1 and 2 to deposit a sum of Rs.10,00,000/- before the date of sale, i.e. 25.09.2007. It was also observed therein that since the 4th Respondent-Bank had agreed for OTS in a sum of Rs.55,00,000/-, the bank should waive interest if the 1st and 2nd Respondents offer a settlement within a reasonable time and by making payment of the said amount.

8. It is common ground that pursuant to the said Order dated 20.09.2007, the sale which was scheduled to be held on 25.09.2007 was postponed. In fact, though the six weeks period prescribed in the Order dated 20.09.2007 expired by 10.11.2007, it is stated that even thereafter the sale was not effected. Pursuant to the said order, the 1st and 2nd Respondents stated to have deposited the sum of Rs.10,00,000/- with the 4th Respondent-Bank. On 27.12.2007, the DRT passed Orders in S.A. No.20 of 2007 dismissing the said application with costs. On the next day i.e. on 28.12.2007, the 4th Respondent-Bank accepted the tender of the Appellant who offered a sum of Rs.1,27,00,101/- and asked the Appellant to deposit 25% of the amount i.e. Rs.31,75,025/- on that day itself and pay the balance amount within

is stated to have deposited the 25% of the total bid amount offered by it with the 4th Respondent-Bank. The Appellant is also stated to have deposited the balance amount on 11.01.2008. After deposit of 25% of the bid amount on 31.12.2007, the 4th Respondent-Bank confirmed the sale in favour of the Appellant and gave further time of 15 days for depositing the balance amount.

9. After depositing the balance amount by the Appellant on 11.01.2008 and the confirmation of the sale in favour of the Appellant, the 4th Respondent-Bank informed the Respondents 1 and 2 on 02.02.2008, about the confirmation of sale in favour of the Appellant and also the receipt of the entire consideration. The Respondents 1 and 2 were directed to collect the balance amount available with the 4th Respondent-Bank. On 12.02.2008, the Respondents 1 and 2 filed a Review Petition No.157 of 2008 in W.P. No.27182 of 2007. The said Review Petition was dismissed giving liberty to Respondents 1 and 2 to challenge the sale. The Respondents 1 and 2 filed a Writ Petition No.5876 of 2008 on 18.02.2008, challenging the vires of the Rules, 2002 on the ground that it violated their right of redemption by denying them adequate opportunity and time to repay the borrowed sum and the action of the Bank in having acted surreptitiously in selling the property without informing them. The said writ petition was dismissed by the learned Single Judge by Order dated 12.06.2009, on the ground that the Respondents 1 and 2 got an alternative efficacious remedy available under the SARFAESI Act. As against the said Order, Respondents 1 and 2 filed Writ Appeal No.1555 of 2009, on 16.07.2009. In the meantime, on 24.06.2009, the 4th Respondent-Bank transferred the property in favour of the Appellant under a duly registered certificate of sale.

10. By the order impugned, the Division Bench took the view that the sale was not conducted in a fair and proper manner, that when the sale was initially postponed by six weeks from 25.09.2007, the Bank ought to have renotified the sale or

at least extended the time for receiving further tenders, particularly when only one valid tender was received on the last date notified for sale. The Division Bench further held that the sale was not even informed to Respondents 1 and 2 and they were informed only after the confirmation of the sale and after receipt of their full consideration. The Division Bench, therefore, set aside the sale which was already executed in favour of the Appellant by imposing a condition that Respondents 1 and 2 furnish a Demand Draft of Rs.2,00,00,000/- from a local branch of a Nationalised Bank in favour of the Appellant and hand over the same to him, within a period of two months from the date of the Order. It further held that if payment was not made, as directed, the sale in favour of the Appellant would stand confirmed and the Writ Appeal would automatically stand dismissed. In the event of the payment of Rs.2,00,00,000/- being made in the form of a Demand Draft, the Appellant was directed to hand over the original sale deed obtained by him from the Bank to enable Respondents 1 and 2 to approach the Sub-Registrar and Revenue Authorities for cancellation of registration, consequent mutation, etc.

11. There was also a direction to the Sub-Registrar to restore the property in the name of the 1st and 2nd Respondents. On payment of the sum of Rs.2,00,00,000/-, the Bank was directed to remit the excess amount available with them to the Tax Recovery Officer in pursuance of the demand already made by it and to credit the said amount in the account of Respondents 1 and 2. Liberty was also given to Respondents 1 and 2 to claim for refund, if they were eligible for any. Additionally, liberty was also given to Respondents 1 and 2 to refund the stamp duty, if they were eligible for such refund. The period of two months granted by the Division Bench for Respondents 1 and 2 to deposit a sum of Rs.2,00,00,000/- expired by 08.05.2010.

12. Respondents 1 and 2 did not make the payment within the said date, as directed by the Divis[illegible]n

application was filed by the Respondents 1 and 2 in I.A. No.437 of 2010 in Writ Appeal No.1555 of 2009 seeking for further six weeks time to effect the payment of Rs.2,00,00,000/- to the Appellant. In the said I.A. No.437 of 2010, the Division Bench passed its order on 18.06.2010, extending the time till 20.06.2010. The said extension was granted by holding that on such deposit, sale made by the 4th Respondent-Bank in favour of the Appellant would stand cancelled and the Bank should effect the sale in favour of the 8th Respondent in Special Leave Petition No.21434 of 2010, namely, Mr. Koshi Phillip s/o Mathai Koshi, who shall hereinafter be referred to as the 8th Respondent. The 8th Respondent herein was directed to deposit Rs.2,03,00,000/- before the 4th Respondent-Bank on 19.06.2010 and the time granted for payment in terms of the judgment was extended till 20.06.2010. Subsequently, in I.A. No.507 of 2010, the Division Bench after noting that the Appellant had not withdrawn the amounts deposited with the 4th Respondent-Bank by stating that he has approached this Court by way of a Special Leave Petition and after finding that mere steps taken by the Appellant for filing the Special Leave Petition need not stand in the way of executing the sale deed in favour of the 8th Respondent who had deposited the entire amount. In effect, the said I.A. No.507 of 2010 in Writ Appeal No.1555 of 2009 was allowed and the Bank was directed to execute the sale deed in favour of the 8th Respondent for the sale consideration of Rs.2,03,00,000/-.

13. As against the judgment in Writ Appeal No.1555 of 2009 and the orders passed in I.A Nos.437 of 2010 and 507 of 2010, the Appellant has come forward with these appeals.

14. We heard Mr. Krishnan Venugopal, Senior Counsel for the Appellant, Mr. Shyam Divan, Senior Counsel for the 8th Respondent and Mr. C.U. Singh, Senior Counsel for the Respondents 1 and 2. Mr. Krishnan Venugopal, Senior Counsel for the Appellant in his submissions after referring to Section 13(8) of the SARFAESI Act and Rules 8 and 9 of the Rules,

2002 and after drawing our attention to the initial order of the learned Single Judge dated 20.09.2007 in Writ Petition No.27182 of 2007, submitted that by virtue of the said order of the High Court, the requirement of Section 13(8), as well as corresponding Rules were duly taken care of and the outer date for sale was prescribed in the said order itself and once the debtor, namely, Respondents 1 and 2 failed to avail the said opportunity extended by the High Court, they cannot be allowed to complain about the ultimate sale effected on 28.12.2007. The learned Senior Counsel contended that in the Order dated 20.09.2007, the High Court while directing the DRT to hear the parties and dispose of the O.A. and S.A. without any delay gave an option to Respondents 1 and 2 to settle the dues by making the payment of Rs.55,00,000/-, which was the OTS offered by the 4th Respondent-Bank with an observation that in the event of Respondents 1 and 2 making the said payment, the 4th Respondent-Bank should consider waiving interest on the said amount.

15. According to the learned Senior Counsel, when the 1st and 2nd Respondents failed to avail the said opportunity offered in the Order dated 20.09.2007, by which order, the sale which was scheduled to be held on 25.09.2007 was directed to be postponed by six weeks, the 1st and 2nd Respondents cannot subsequently be heard to complain of any irregularity in the sale. The learned Senior Counsel would, therefore, contend that in effect, the said Order dated 20.09.2007 of the High Court, took into account the entitlements of the guarantors who stepped into the shoes of the borrowers as provided under Section 13(8) of the SARFAESI Act, and therefore, the sale effected after the expiry of the period of six weeks granted by the High Court and after the dismissal of the guarantors application, namely, S.A. by the DRT, i.e. on 28.12.2007, cannot be held to be in violation of the Section 13(8) of the SARFAESI Act.

16. The learned Senior Counsel fur[illegible]y

the impugned order, the Division Bench exercised its jurisdiction under Article 226 of the Constitution, which this Court held ought not to have been exercised, when Respondents 1 and 2, as guarantors, had every right to work out their remedy as against the sale effected on 28.12.2007, under the provisions of the SARFAESI Act. The learned Senior Counsel also contended that once the sale has been effected and confirmed in accordance with law, merely because someone else can offer a higher amount, the Court should not have interfered with the already confirmed sale as that would become an unending affair if such approach made by parties are entertained. In support of his submissions, the learned Senior Counsel relied upon *Valji Khimji and Company Vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and others* - (2008) 9 SCC 299 and *United Bank of India Vs. Satyawati Tondon and others* - (2010) 8 SCC 110. The learned Senior Counsel also contended that in any event, once the Division Bench ultimately directed Respondents 1 and 2 to deposit the sum of Rs.2,00,00,000/- within two months, i.e. on or before 08.05.2010, and the Respondents 1 and 2 failed to comply with the said condition, the order worked itself out and the Writ Appeal stood dismissed without any further reference to the Court. According to the counsel, the extension of further time granted by the Division Bench in a belated application of Respondents 1 and 2 and modification of the conditional payment to be made by the 8th Respondent, was beyond the powers of the Court and consequently the sale already effected by the 4th Respondent-Bank in favour of the Appellant became final and conclusive. The learned senior counsel, therefore, contended that the subsequent Order of the Division Bench dated 18.06.2010 in I.A. No.437 of 2010 and the order dated 08.07.2010 in I.A. No.507 of 2010, cannot be sustained.

17. As against the above submissions made on behalf of the Appellant, the submission of Mr. Shyam Divan, learned Senior Counsel for the 8th Respondent was six-fold. According to Mr. Divan, the mortgagor's right of redemption is a statutorily

recognized one and continues till the time of registration of the sale, that the said general principle is engrafted in Section 13(8) of the SARFAESI Act read with Rules 8 and 9 of the Rules, 2002, that it is incumbent upon the Bank to have informed the borrower about the date and time of the sale, which is implicit in the provision, that admittedly no notice was given by the Bank with reference to the sale held on 28.12.2007, that in any case since there was a postponement of the original sale scheduled, there ought to have been a fresh notification and, therefore, the High Court's conclusion about non-issuance of sale notice was well justified. The learned senior counsel contended that eventually the order of the Division Bench of the High Court was equitable and, therefore, does not call for interference. Mr. Divan, learned Senior Counsel, drew support from Section 60 of the Transfer of Property Act, 1882 (hereinafter referred to as "the T.P. Act") by relying upon the interpretation made by this Court on mortgagor's right of redemption engrafted in Section 60 of the T.P. Act in the decision reported in *Narandas Karsondas Vs. S.A. Kamtam and another* - (1977) 3 SCC 247.

18. By drawing a parallel to Section 13(8) of the SARFAESI Act vis-à-vis Section 60 of the T.P. Act, the learned Senior Counsel submitted that there should have been a definite intimation to the borrower before the sale or transfer, which is a legal requirement both under Section 13(8) read with Rules 8(6) and 9(1), as well as Section 60 of the T.P. Act. By referring to the initial notice issued by the Bank on 23.08.2007, the learned Senior Counsel contended that the period mentioned therein did not survive after the passing of the order by the DRT on 27.12.2007 and if that initial notice was to be revived for the purpose of effecting the sale and transfer, the borrower ought to have been mandatorily put on notice as prescribed under Section 13(8) of the SARFAESI Act. The learned Senior Counsel also relied upon Order XXI Rules 64 to 69 and submitted that in common law as well, when once a sale is adjourned to a specified date,

was the requirement as that alone would enable the mortgagor to ensure that his valuable right of ownership is not frittered away without providing any opportunity for redemption.

19. The learned Senior Counsel by relying upon Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the RDDB Act") and Section 37 of the SARFAESI Act, read along with Rule 15 of the Second Schedule of the Income Tax (Certificate Proceedings Rules, 1962) (hereinafter referred to as "the Income Tax Rules, 1962"), contended that even under the provisions of the SARFAESI Act, there is a statutory requirement for renotification to effect the sale and, therefore, the non-compliance of the said requirement would render the sale effected by the Bank on 28.12.2007 invalid in law.

20. The learned Senior Counsel pointed out that after the postponement of the sale pursuant to the deposit of Rs.10,00,000/- on 25.09.2007, based on the judgment of the High Court dated 20.09.2007, the only intimation to the borrower at the instance of the Bank was dated 02.02.2008, which only said that surplus amount over and above the money due to the Bank was adjusted and, therefore, the said notice was not in consonance with the provisions of the SARFAESI Act and the other statutory provisions required to be complied with and, therefore, the judgment of the Division Bench of the High Court does not call for interference. The learned Senior Counsel drew our attention to various grounds raised in the writ petition wherein the above contentions of the borrower have been set out.

21. Supporting the submissions made by Mr. Shyam Divan, Mr. C.U. Singh, learned Senior Counsel for the Respondents No.1 and 2, submitted that the non-obstante clause in Section 13(1) of the SARFAESI Act read along with Section 60, as well as, Sections 69 and 69A of the T.P. Act, would show that under Section 13(1) of the SARFAESI Act the non-obstante clause is restricted to Section 69 or 69A of the T.P. Act, and that the

implication of Section 60 of the T.P. Act would apply in full force. According to the learned Senior Counsel, while the 4th Respondent-Bank made no mention about the other bidders in the High Court and merely submitted that the bid submitted by the Appellant was opened and confirmed, in the counter filed before this Court, they came forward with a statement that pursuant to the paper publication two tenders were received and the Appellant was one of them, while the other one was one M/s Kent Construction. The learned Senior Counsel also pointed out that in paragraph 35 of the said Counter Affidavit of the Bank before this Court, they further stated that the conclusion of the Division Bench that there was a sole bidder was incorrect, as there were two bidders wherein one of them withdrew from bid on account of the earlier order of the High Court dated 20.09.2007. By referring to the above facts stated on behalf of the Bank before the High Court and before this Court, the learned Senior Counsel contended that the only conclusion that can be drawn was that there was no transparency at all in conducting the sale. The learned Senior Counsel relied upon in *Ram Kishun and others Vs. State of Uttar Pradesh and others* - (2012) 11 SCC 511.

22. Having heard the learned counsel for the respective parties and having perused the Judgments and the Orders impugned in these appeals and other material papers, in the first instance, we wish to deal with the appeal filed against the Judgment dated 08.03.2010 in Writ Appeal No.1555 of 2009. The Division Bench, after holding that the sale was not conducted in a fair and reasonable manner and thereby the borrowers' rights have been seriously infringed, set aside the sale effected on 28.12.2007, in favour of the Appellant and directed the borrowers to give a Demand Draft for Rs.2,00,00,000/- drawn on a local branch of a Nationalised Bank in favour of the Appellant and hand over the same to him within a period of two months from the date of the Judgment. It further held that if the payment was not made, as directed, the sale in favour of the Appellant would st[illegible]e

writ appeal would stand dismissed.

23. In order to examine the correctness of the impugned Judgment of the Division Bench, a serious look into Section 13, in particular sub-section (8) of the SARFAESI Act along with Rules 8 and 9 of the Rules, 2002 is required. We, therefore, deem it appropriate to extract Sections 2(zc), 2(zf), 13(1) and (8) of the SARFAESI Act, as well as Rule 8 sub-rules (1), (3), (5) and (6) and also Rule 9(1) which are as under:

"2(zc) "secured asset" means the property on which security interest is created;

2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;

13. Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(8). If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

Rule 8. Sale of immovable secured assets.- (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and

by affixing the possession notice on the outer door or at such conspicuous place of the property.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sa ,-

(a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

Rule 9. Time of sale, issue of sale certificate and delivery of possession, etc.-

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.

24. Under Section 13(1), it is provided that any security interest created in favour of the SECURED CREDITOR may be enforced without the intervention of the Court and Tribunal by such creditor in accordance with the provisions of this Act. The non-obstante clause in the opening set of expressions contained in Section 13(1), as pointed out by Mr. Singh, learned Senior Counsel for the borrowers, is restricted to Section 69 or Section 69A of the T.P. Act. Apart from noting the said statutory impediment, to be noted in Section 13(1), the

more important feature to be noted is that a free hand is given to the SECURED CREDITOR for the purpose of enforcing any security interest created in favour of SECURED CREDITOR, without the intervention of the Court or Tribunal. The only other relevant aspect contained in the said sub-section is that such enforcement should be in accordance with the provisions of this Act. A reading of Section 13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act.

25. Keeping the said stipulation contained in Section 13(1) in mind, it will have to be examined as to what are the other statutory requirements to be fulfilled when enforcement of a right created in favour of any SECURED CREDITOR in respect of a security interest is created. As we are concerned with the sale of property mortgaged by the borrowers, for the present we leave aside any other form or mode of enforcement, except the one relating to the equitable mortgage created in favour of the Bank. For that purpose, we find that sub-section (8) of Section 13 would be relevant.

26. A careful reading of sub-section (8), therefore, has to be made to appreciate the legal issue involved and the submissions made by the respective counsel on the said provision. A plain reading of sub-section (8) would show that a borrower can tender to the SECURED CREDITOR the dues together with all costs, charges and expenses incurred by the SECURED CREDITOR at any time before the date fixed for sale or transfer. In the event of such tender once made as stipulated in the said provision, the mandate is that the SECURED ASSET should not be sold or transferred by the SECURED CREDITOR. It is further reinforced to the effect that no further step should also be taken by the SECURED

CREDITOR for transfer or sale of the SECURED ASSET. The contingency stipulated in the event of the tender being made by a debtor of the dues inclusive of the costs, charges, etc., would be that such tender being made before the date fixed for sale or transfer, the SECURED CREDITOR should stop all further steps for effecting the sale or transfer. That apart, no further step should also be taken for transfer or sale. When we analyze in depth the stipulations contained in the said sub-section (8), we find that there is a valuable right recognized and asserted in favour of the borrower, who is the owner of the SECURED ASSET and who is extended an opportunity to take all efforts to stop the sale or transfer till the last minute before which the said sale or transfer is to be effected. Having regard to such a valuable right of a debtor having been embedded in the said sub-section, it will have to be stated in uncontroverted terms that the said provision has been engrafted in the SARFAESI Act primarily with a view to protect the rights of a borrower, inasmuch as, such an ownership right is a Constitutional Right protected under Article 300A of the Constitution, which mandates that no person shall be deprived of his property save by authority of law. Therefore, de hors, the extent of borrowing made and whatever costs, charges were incurred by the SECURED CREDITOR in respect of such borrowings, when it comes to the question of realizing the dues by bringing the property entrusted with the SECURED CREDITOR for sale to realize money advanced without approaching any Court or Tribunal, the SECURED CREDITOR as a TRUSTEE cannot deal with the said property in any manner it likes and can be disposed of only in the manner prescribed in the SARFAESI Act. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property or at least ensure that in the process of sale the SECURED ASSET derives the maximum benefit and the SECURED CREDITOR or anyone on its behalf is not allowed to exploit the situation of the borrower

by virtue of the proceedings initiated under the SARFAESI Act. More so, under Section 13(1) of the SARFAESI Act, the SECURED CREDITOR is given a free hand to resort to sale of the property without approaching the Court or Tribunal.

27. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a SECURED ASSET, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the SECURED CREDITOR with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale.

28. Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said rules prescribe as to the procedure to be followed by a SECURED CREDITOR while resorting to a sale after the issuance of the proceedings under Section 13(1) to (4) of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that the authorized officer should serve to the borrower a notice of 30 days for the sale of the immovable SECURED ASSETS. Reading sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days time gap for effecting any sale of immovable SECURED ASSET is a statutory mandate. It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. Therefore, the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days individual

and also a public notice by way of publication in the newspapers. In other words, while the publication in newspaper should provide for 30 days clear notice, since Rule 9(1) also states that such notice of sale is to be in accordance with proviso to sub-rule (6) of Rule 8, 30 days clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well. Therefore, the use of the expression 'or' in Rule 9(1) should be read as 'and' as that alone would be in consonance with Section 13(8) of the SARFAESI Act.

29. The other prescriptions contained in the proviso to sub-rule (6) of Rule 8 relates to the details to be set out in the newspaper publication, one of which should be in 'vernacular language' with sufficient circulation in the locality by setting out the terms of the sale. While setting out the terms of the sale, it should contain the description of the immovable property to be sold, the known encumbrances of the SECURED CREDITOR, the secured debt for which the property is to be sold, the reserve price below which the sale cannot be effected, the time and place of public auction or the time after which sale by any other mode would be completed, the deposit of earnest money to be made and any other details which the authorized officer considers material for a purchaser to know in order to judge the nature and value of the property.

30. Such a detailed procedure while resorting to a sale of an immovable SECURED ASSET is prescribed under Rules 8 and 9(1). In our considered opinion, it has got a twin objective to be achieved. In the first place, as already stated by us, by virtue of the stipulation contained in Section 13(8) read along with Rules 8(6) and 9(1), the owner/borrower should have clear notice of 30 days before the date and time when the sale or transfer of the SECURED ASSET would be made, as that alone would enable the owner/borrower to take all efforts to retain his or her ownership by tendering the dues of the SECURED CREDITOR before that date and time. Secondly, when such a SECURED ASSET of an immovable property is

brought for sale, the intending purchasers should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the minimum price below which one cannot make a bid and the total liability of the borrower to the SECURED CREDITOR. Since, the proviso to sub-rule (6) also mentions that any other material aspect should also be made known when effecting the publication, it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question. Be that as it may, the paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale or transfer, or ensure that the SECURED ASSET derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed.

31. At this juncture, it will also be worthwhile to refer to Rules 8(1) to (3) and in particular sub-rule (3), in order to note the responsibility of the SECURED CREDITOR vis-à-vis the SECURED ASSET taken possession of. Under sub-rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under sub-rule (2) of Rule 8 again, it is stated as to how the SECURED CREDITOR should publish the notice of possession as prescribed under sub-rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in the locality and also such publication should have been made seven days prior to the intention of taking possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the SECURED CREDITOR once possession is actually taken by its authorised officer. Under sub-rule (3) of Rule 8 [illegible] n

possession of by the SECURED CREDITOR should be kept in its custody or in the custody of a person authorized or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence would under similar circumstances take care of such property. The underlining purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. Merely because the provisions of the SARFAESI Act and the Rules enable the SECURED CREDITOR to take possession of such an immovable property belonging to the owner and also empowers to deal with it by way of sale or transfer for the purpose of realizing the secured debt of the borrower, it does not mean that such wide power can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.

32. Under sub-rule (4) of Rule 8, it is further stipulated that the authorized officer should take steps for preservation and protection of SECURED ASSETS and INSURE them if necessary till they are sold or otherwise disposed of. Sub-rule (4), governs all SECURED ASSETS, movable or immovable and a further responsibility is created on the authorised officer to take steps for the preservation and protection of SECURED ASSETS and for that purpose can even INSURE such assets, until it is sold or otherwise disposed of. Therefore, a reading of Rules 8 and 9, in particular, sub-rule (1) to (4) and (6) of Rule 8 and sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a SECURED ASSET is created by the borrower in favour of the SECURED CREDITOR, the said asset in the event of the same having become a NON-PERFORMING ASSET cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the abovesaid Rules mentioned by us.

33. Having analyzed the relevant statutory prescriptions

under the SARFAESI Act, as well as, the Rules, 2002 it will be necessary to refer to the decisions placed before us on the above aspects, before examining the manner in which the sale of the SECURED ASSET of the 1st and 2nd Respondents was dealt with by the 4th Respondent-Bank and by effecting the sale in favour of the Appellant herein.

34. Mr. Shyam Divan, learned Senior Counsel relied upon the decision in *Narandas Karsondas* (supra), in which the right of a mortgagor as prescribed under Section 60 of the T.P. Act has been spelt out. Under Section 60 of the T.P. Act, at any time after the principal money fell due, there is a right in the mortgagor on payment or tender at a proper time and place of the mortgage money, to require a mortgagee to restore the property to the mortgagor with all rights prescribed as it stood prior to the mortgage. Under the proviso, the only impediment would be that if such a right of a mortgagor stood extinguished by act of the parties or by the decree of a Court. Certain other conditions are also stipulated in the said provision for the mortgagor to seek for redemption of the mortgaged property. Dealing with the said provision, this Court held as under in paragraphs 34 and 35. Paragraphs 34 and 35 are as under:

> "34. The right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties. The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a mortgage deed by itself will not deprive the m[illegible]o

redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

35. The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to 68uthorize the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption."

(Emphasis added)

35. On a reading of the above paragraphs, we are able to discern the Ratio to the effect that a mere conferment of power to sell without intervention of the Court in the mortgage deed by itself will not deprive the mortgagor of his right to redemption, that the extinction of the right of redemption has to be subsequent to the deed conferring such power, that the right of redemption is not extinguished at the expiry of the period, that the equity of redemption is not extinguished by mere contract for sale and that the mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. The ratio is also to the effect that the power to sell should not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. The above proposition of law of course was laid down by this Court while construing Section 60 of the T.P. Act. But as rightly contended by Mr. Shyam

Divan, we fail to note any distinction to be drawn while applying the abovesaid principles, even in respect of the sale of SECURED ASSETS created by way of a secured interest in favour of the SECURED CREDITOR under the provisions of the SARFAESI Act, read along with the relevant Rules. We say so, inasmuch as, we find that even while setting out the principles in respect of the redemption of a mortgage by applying Section 60 of the T.P. Act, this Court has envisaged the situation where such mortgage deed providing for resorting to the sale of the mortgage property without the intervention of the Court. Keeping the said situation in mind, it was held that the right of redemption will not get extinguished merely at the expiry of the period mentioned in the mortgage deed. It was also stated that the equity of redemption is not extinguished by mere contract for sale and the most important and vital principle stated was that the mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. The completion of sale, it is stated, can be held to be so unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Therefore, it was held that until the sale is complete by registration of sale, the mortgagor does not loose the right of redemption. It was also made clear that it was erroneous to suggest that the mortgagee would be acting as the agent of the mortgagor in selling the property.

36. When we apply the above principles stated with reference to Section 60 of the T.P. Act in respect of a secured interest in a SECURED ASSET in favour of the SECURED CREDITOR under the provisions of the SARFAESI Act and the relevant Rules applicable, under Section 13(1), a free hand is given to a SECURED CREDITOR to resort to a sale without the intervention of the Court or Tribunal. However, under Section 13(8), it is clearly stipulated that the mortgagor, i.e. the borrower, who is otherwise called as a debtor, retains his full right to redeem the property by tendering all the dues to the SECURED CREDITOR at any time be

sale or transfer. Under sub-section (8) of Section 13, as noted earlier, the SECURED ASSET should not be sold or transferred by the SECURED CREDITOR when such tender is made by the borrower at the last moment before the sale or transfer. The said sub-section also states that no further step should be taken by the SECURED CREDITOR for transfer or sale of that SECURED ASSET. We find no reason to state that the principles laid down with reference to Section 60 of the T.P. Act, which is general in nature in respect of all mortgages, can have no application in respect of a secured interest in a SECURED ASSET created in favour of a SECURED CREDITOR, as all the above-stated principles apply in all fours in respect of a transaction as between the debtor and SECURED CREDITOR under the provisions of the SARFAESI Act.

37. Reliance was also placed upon the decision in *Mardia Chemicals Ltd. and others Vs. Union of India & others.* - (2004) 4 SCC 311. In paragraph 54, while dealing with the contention raised on behalf of the SECURED CREDITOR that the right of redemption would be available to the mortgagor only if the amount due according to the SECURED CREDITOR is deposited, this Court held as under:

> "54….Shri Sibal, however, submits that it is the amount due according to the secured creditor which shall have to be deposited to redeem the property. Maybe so, some difference regarding the amount due may be there but it cannot be said that right of redemption of property is completely lost. In cases where no such dispute is there, the right can be exercised and in other cases the question of difference in amount may be kept open and got decided before sale of property."
>
> (underlining is ours)

38. Here again we find that even if there were some difference in the amount tendered by the borrower while

exercising his right of redemption under Section 13(8), the question of difference in the amount should be kept open and can be decided subsequently, but on that score the right of redemption of the mortgagor cannot be frustrated. Elaborating the statement of law made therein, we wish to state that the endeavour or the role of a SECURED CREDITOR in such a situation while resorting to any sale for the realization of dues of a mortgaged asset, should be that the mortgagor is entitled for some lenience, if not more to be shown, to enable the borrower to tender the amounts due in order to ensure that the Constitutional Right to property is preserved, rather than it being deprived of.

39. In *Ram Kishun* (supra), paragraphs 13, 14 and 28 are relevant for our purpose, which are as under:

> "13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.
>
> 14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide *Lachhman Dass v. Jagat Ram* and *State of M.P. v. Narmada Bachao Andolan*) Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions.
>
> 28. In view of the above, the law can be 68ummarized to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is c of

the principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud."

(Emphasis added)

40. The above principles laid down by this Court also makes it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a Constitutional Right, as well as the Human Right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside.

41. Before taking up the facts of the case on hand, it is necessary to refer to certain other provisions referred to and relied upon by Mr. Shyam Divan, learned Senior Counsel appearing for the 8th Respondent. The learned Senior Counsel referred to Section 37 of the SARFAESI Act, Section 29 of the RDDB Act and Rule 15 of the Income Tax Rules, 1962. The said provisions have to be noted in detail and therefore, the same are extracted hereunder:

"Section 37 - Application of other laws not barred:-

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

Section 29 - Application of certain provisions of Income-tax Act:-

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961), and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the income-tax:

Provided that any reference under the said provisions and the rules to the assessee shall be construed as a reference to the defendant under this Act.

Sch. II Part I Rule 15 - Adjournment or Stoppage of Sale:-

(1) The Tax Recovery Officer may, in his discretion, adjourn any sale hereunder to a specified day and hour; and the officer conducting any such sale may, in his discretion, adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the office of the Tax Recovery Officer, no such adjournment shall be made without the leave of the Tax Recovery Officer.

(2) Where a sale of immovable property is adjourned under sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale under this Schedule shall be made unless the defaulter consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the arrears and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such arrears and costs has been paid to the Tax Recovery Officer who ordered the sale."

42. A close reading of Section 37 sh s

of the SARFAESI Act or the rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, SARFAESI Act and RDDB Act, would be complementary to each other. In this context reliance can be placed upon the decision in *Transcore Vs. Union of India and another* reported in (2008) 1 SCC 125. In paragraph 64 it is stated as under after referring to Section 37 of the SARFAESI Act.

> "…….According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."
>
> (Emphasis added)

43. A reading of Section 37 discloses that the application of SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. We are also fortified by our above statement of law as the HEADING of the said Section also makes the position clear that application of other laws are not barred. The

effect of Section 37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Finances Institutions Act, 1993, or any other law for the time being in force. On this aspect, it would be apposite to refer to a principle set down in *Eastern Counties etc. Railway Vs. Marriage* reported in (1861) 9 HLC 32, as stated in Craies on Statute Law, Seventh Edition, p.207. The proposition of law as regards the HEADINGS of a provision has been succinctly stated as under:

> "These various headings", "are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to explain its enactments, but as affording as it appears to me a better key to the constructions of the sections which follow them than might be afforded by the mere preamble."
>
> (Emphasis added)

44. We can also rely upon a similar principle declared by this Court by His Lordship Justice Subba Rao, as His Lordship then was, speaking for the Bench in *Bhinka and others Vs. Charan Singh* reported in AIR 1959 SC 960. In paragraph 15, the learned Judge after referring to the HEADING of Section 180 of the UP Tenancy Act, (17 of 1939) held as under. "The heading reads thus:

> "Ejectment of person occupying land without Title." "Maxwell On Interpretation of Statutes", 10th Edn., gives the scope of the user of suc[illegible]e

interpretation of a section thus, at p.50:

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words".

45. Reference to the above principles laid down in the various decisions also supports our conclusion that the application of the SARFAESI Act will be in addition to, in the present case to Section 29 of the RDDB Act. Once we steer clear of the said position without any hesitation, it can be held that whatever stipulations contained in Section 29 as regards the application of certain provisions of the Income Tax Act, 1961 in particular Schedule 2 Part I Rule 15 of the Income Tax Rules, 1962 for effecting a sale or transfer would apply automatically. We have already extracted Section 29 of the RDDB Act, as well as Schedule 2 Part I Rule 15 of the Income Tax Rules, 1962. Therefore, what is to be considered is as to what is the mode prescribed under the above provisions, namely, Rule 15 prescribed under Schedule 2 Part I of the Income Tax Rules, 1962.

46. Section 29 of the RDDB Act is an enabling provision under which the Second and Third schedule to the Income Tax Act, 1961 (43 of 1961) and the Income Tax Rules, 1962 can be applied as far as possible with necessary modifications as if the provisions and the rules are referable to the DEBT DUE, instead of the income tax due. Therefore, fictionally, by virtue of Section 29 of the RDDB Act, the mode and method by which a recovery of income tax can be resorted to under the Second and Third Schedule to the Income Tax Act and the Income Tax Rules, 1962 have to be followed. Therefore, a reading Section 37 of the SARFAESI Act and Section 29 of the RDDB Act, the only aspect which has to be taken care of is that while applying the procedure prescribed under Rule 15 of the Income Tax Rules, 1962, no conflict with reference to any of the provisions of the SARFAESI Act, takes place.

47. Mr. Shyam Divan, learned Senior Counsel, also referred to Order XXI Rule 64 to 69 of the Civil Procedure Code in support of his submission that by virtue of Section 37 of SARFAESI Act, as it states that the provisions of SARFAESI Act will be in addition to and not in derogation of any other law for time being in force apart from Companies Act, RDDB Act etc., the provisions contained in CPC can also be imparted to support the stand of the Respondents 1 & 2. Since we have held that by applying Section 37 of SARFAESI Act, read along with Section 29 of the RDDB Act, the requirement of the statutory prescription under Section 13(8) read along with Rule 8 and 9(1) of the Security Interest Rule would be sufficiently supported, we do not find any necessity to delve into the submission made by referring to Rules 64 to 69 of Order XXI CPC.

48. Keeping the said basic principle in applying the above provisions in mind, when we refer to Rule 15 of the Income Tax Rules, 1962, in the first place it will have to be stated that a reading of the said rule does not in any way conflict with either Section 13(8) of the SARFAESI Act or Rules 8 and 9 of the Rules, 2002. As far as sub-rule (1) of Rule 15 is concerned, it only deals with the discretion of the Tax Recovery Officer to adjourn the sale by recording his reasons for such adjournment. The said Rule does not in any way conflict with either Rules 8 or 9 or Section 13, in particular sub-section (1) or sub-section (8) of the SARFAESI Act. Therefore, to that extent there is no difficulty in applying Rule 15. As far as sub-rule (2) is concerned, the same is clear to the effect that a sale of immovable property once adjourned under sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale should be made unless the defaulter consents to waive it. The said sub-rule also does not conflict with any of the provisions of the SARFAESI Act, in particular Section 13 or Rules 8 and 9. In fact there is no provision relating to grant of adjournment or issuance of a fresh proclamation for effecting the sale after the earlier date of sale was not adherered to in the S[illegible]h

circumstances going by the prescription contained in Section 37 of the SARFAESI Act, as we have reached a conclusion that the provision contained in Section 29 of the RDDB Act will be in addition to and not in derogation of the provisions of the SARFAESI Act, the provisions contained in Rule 15, which is applicable by virtue of the stipulation contained in Section 29 of the RDDB Act, whatever stated in sub-rule (2) of Rule 15 should be followed in a situation where a notice of sale notified as per Rules 8 and 9(1) of the Securitisation Trust Rules, read along with Section 13(8) gets postponed. In our considered view such a construction of the provisions, namely, Sections 37, 13(8) and 37 of the SARFAESI Act, read along with Section 29 with the aid of Rule 15 could alone be made and in no other manner.

49. We, therefore, hold that unless and until a clear 30 days notice is given to the borrower, no sale or transfer can be resorted to by a SECURED CREDITOR. In the event of any such sale properly notified after giving 30 days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the SECURED CREDITOR cannot effect the sale or transfer of the SECURED ASSET on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the SECURED CREDITOR and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with 9(1) has to be necessarily followed,

inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act.

50. Having pronounced the legal position as above, when we refer to the facts of the present case, the initial sale was notified to take place on 25.09.2007. The paper publication was made on 23.08.2007. Therefore, applying Rule 9(1) read along with the proviso to sub-rule (6) of Rule 8, there can be no quarrel as to the procedure followed in effecting the publication for resorting to sale on 25.09.2007. When it comes to the question of the intimation to the borrower as required under sub-rule (6) of Rule 8, we find that admittedly Respondents 1 and 2 were informed by the 4th Respondent-Bank only on 30.08.2007. Therefore, as the sale date was 25.09.2007 it did not fulfill the mandatory requirement of 30 clear days notice to the borrower as stipulated under sub-rule (6) of Rule 8. In fact, on this score itself it can be held that if the sale had been effected on 25.09.2007, it would not have been in accordance with Section 13(8) of the SARFAESI Act, read along with Rules 8 and 9(1). But at the intervention of the Court, namely, the orders passed in Writ Petition 27182 of 2007 dated 20.09.2007, the sale date fixed on 25.09.2007 was adjourned by six weeks. In any case, the sale was not effected even after the six weeks period expired as directed in the said Order dated 20.09.2007. The Securitisation Application No.20 of 2007, came to be disposed of by the DRT only on 27.12.2007.

51. Therefore, once the Securitisation Application of the borrowers, namely, Respondents 1 and 2 was dismissed on 27.12.2007, even assuming that there was no impediment for the SECURED CREDITOR, namely, the 4th Respondent-Bank to resort to sale under the provisions of [illegible]s

held by us in the earlier paragraphs, there should have been a fresh notice issued in accordance with Rules 8(6) and 9(1) of the Rules, 2002. Unfortunately, the 4th Respondent-Bank stated to have effected the sale on 28.12.2007 by accepting the tender of the Appellant and by way of further process, directed the Appellant to deposit the 25% of the amount on that very day and also directed to deposit the balance amount within 15 days, which was deposited by the Appellant on 11.01.2008. In fact, after the deposit of the 25% of the amount on 28.12.2007, the 4th Respondent-Bank stated to have confirmed the sale in favour of the Appellant on 31.12.2007. After the deposit of the balance amount on 11.01.2008 by communication dated 02.02.2008, the 4th Respondent-Bank informed the 1st and 2nd Respondents about the confirmation of sale and thereby, provided no scope for Respondents 1 and 2 to tender the dues of the SECURED CREDITOR, namely, the 4th Respondent-Bank with all charges, expenses etc., as has been provided under Section 13(8) of the SARFAESI Act. Therefore, the whole procedure followed by the 4th Respondent-Bank in effecting the sale on 28.12.2007 and the ultimate confirmation of the sale on 11.01.2008, stood vitiated as the same was not in conformity with the provisions of the SARFAESI Act and the Rules framed thereunder. Though, such a detailed consideration of the legal issues was not made by the Division Bench while setting aside the sale effected in favour of the Appellant, having regard to the construction of the provisions of the SARFAESI Act, the RDDB Act and the relevant Rules, we are convinced that the Judgment of the Division Bench dated 08.03.2010, passed in Writ Appeal 1555 of 2009, was perfectly justified and we do not find any infirmity with the same.

52. We now take up for consideration the correctness of the Order of the Division Bench dated 18.06.2010 in I.A. 437 of 2010 in Writ Appeal 1555 of 2009 and the order dated 08.07.2010 in I.A.507 of 2010 in Writ Appeal 1555 of 2009. Though we have held that the Judgment of the Division Bench in Writ Appeal 1555 of 2009 cannot be found fault with, when

we examined the subsequent Orders dated 18.06.2010 and 08.07.2010 in I.A.437 of 2010 and I.A.507 of 2010, we are of the view that in the peculiar facts of this case and the ultimate directions issued by the Division Bench in its main Judgment of 08.03.2010 in Writ Appeal 1555 of 2009, the said Orders could not have been validly issued.

53. In the foremost, it will have to be noted that the Division Bench of the High Court while allowing the Writ Appeal in its order dated 08.03.2010, held as under:

> "(i) The sale by the Bank of the appellant's property in favour of the fifth respondent will stand set aside and the sale deed shall stand invalidated on condition that appellant gives a DD for Rs.2 crores from a local Branch of a Nationalised Bank in favour of the fifth respondent and the same will be handed over to him within two months from now. If payment is not made as above, sale in favour of the fifth respondent will stand confirmed and Writ Appeal will stand dismissed.
>
> (ii) If appellant makes payment as above, and sale gets cancelled by operation of judgment, then on giving DD the fifth respondent will hand over original sale deed obtained by him from the Bank to the appellant for the appellant to produce before the Sub Registry and revenue authorities for cancellation of registration, mutation, if any effected, and for restoration of property in the records of the Sub Registry and revenue authorities in favour of the appellant.
>
> (iii) The Bank will remit the excess amount available with them to the Tax Recovery Officer in pursuance to the demand to be credited in the account of the appellant, and it is for the appellant to claim refund, if eligible for him.

(iv) We leave it open to the appellant to claim refund of stamp duty, if refund is eligible. However, we make it clear that in view of the above judgment, if there is eligibility for refund of stamp duty, the same should be the appellant."

54. In the High Court, the Appellant herein was arrayed as the 5th Respondent. The Division Bench taking into account the amount remitted by the Appellant, namely, Rs.1,27,00,101/- and the stamp duty and registration charges of Rs.23,00,000/- in all Rs.1,50,00,101/- directed Respondents 1 and 2 to pay a lump sum of Rs.2,00,00,000/- to the Appellant for cancelling the sale. The amount of 2,00,00,000/- was arrived at taking into account the rate of interest at 18% per annum and the stamp duty and registration charges spent by the Appellant. However, the direction number (i) made it clear that while the sale in favour of the Appellant would stand set aside and invalidated on a condition that Respondents 2 and 3 forwarded a Demand Draft of Rs.2,00,00,000/- from a local branch of a Nationalised Bank in favour of the Appellant by handing it over to him within 2 months from the date of the Order, namely, 08.03.2010, made it tacitly clear that if the payment was not made as directed, the sale in favour of the Appellant would stand confirmed and the writ appeal would stand dismissed. Therefore, subject to the compliance of the directions contained in sub-para (i) of paragraph 5, the cancellation of the sale in favour of the Appellant was ordered. Under sub-para (ii) of paragraph 5, once the sale gets cancelled by virtue of the operation of the Judgment, namely, by handing over the Demand Draft in favour of the Appellant, the original sale deed obtained by the Appellant was directed to be produced before the Sub-Registrar and other Revenue Authorities for the cancellation of registration/mutation etc. On such compliance of the said direction contained in sub-para (ii), the restoration of the property in the records of the sub-registry and revenue authorities were also directed to be effected in favour of Respondents 1 and 2. Under sub-para (iii) of paragraph 5, the

4th Respondent-Bank was directed to remit the excess amount available with it, i.e over and above the dues to the bank to the Tax Recovery Officer, in pursuance to their demand by crediting into the account of Respondents 1 and 2, with further liberty to Respondents 1 and 2 to claim for refund if they were eligible. Liberty was also given to Respondents 1 and 2 to claim refund of stamp duty if eligible.

55. The said period of two months stipulated in sub-para (i) of paragraph 5 expired by 08.05.2010. It was pointed out to us by Mr. Krishnan, learned Senior Counsel for the Appellant that the very application seeking further six weeks time from 08.05.2010 for giving the Demand Draft of Rs.2,00,00,000/- to the Appellant as per the Judgment dated 08.03.2010, was filed only on 10.06.2010 and that the Division Bench thereafter passed the present Order dated 18.06.2010 in I.A.437, i.e. more than a month after the expiry of the initial two months period, namely, 08.05.2010. Before adverting to the details of the Order dated 18.06.2010 passed in I.A. 437 of 2010, at the very outset it will have to be stated that having regard to the specific direction contained in sub-para (i) and (ii) of para 5 of the Judgment dated 08.03.2010 in Writ Appeal 1555 of 2009, by 08.05.2010, when Respondents 1 and 2 failed to hand over the Demand Draft of Rs.2,00,00,000/-, as directed by the Division Bench to the Appellant, the Writ Appeal stood dismissed without any further reference to anyone, even to the Court. In fact, since the application for extension, namely, I.A. 437 of 2010 came to be filed only on 10.06.2010, it should be held that there was no right in Respondents 1 and 2 or for the 8th Respondent herein to seek for any further indulgence before the Division Bench for further extension of time. It is relevant to note that the two months period expired on 08.05.2010. Thereafter, Respondents 1 and 2 took their own time to file the application for extension, namely, after more than 30 days, by which time the writ appeal stood dismissed and there was no right available with Respondents 1 and 2 or with the 8th Respondent herein to seek for any relie[illegible]t

in favour of the 8th Respondent, much less for cancellation of the sale already effected in favour of the Appellant herein.

56. When we refer to the said order dated 18.06.2010 to examine the reasons which weighed with the Division Bench, we find that the sum and substance of the grievance expressed on behalf of Respondents 1 and 2 herein was that they had to raise funds by arranging for the sale of the very same SECURED ASSET, which took time as many buyers were reluctant to come forward because of the chance of continued litigation. By making reference to the stand of Respondents 1 and 2, the Division Bench without anything more, accepted the said reason and by allowing the I.A. permitted the 8th Respondent herein to deposit 2,03,00,000/- by 19.06.2001 and on such deposit it held that the time granted for payment in terms of the Judgment dated 08.03.2010, stood extended till 20.06.2010. It further held that on such deposit being made, the sale made by the 4th Respondent-Bank in favour of the Appellant would be cancelled and the 4th Respondent should effect a sale in favour of the 8th Respondent herein. The other directions contained in sub-para (iv) of para 5 was maintained. In the subsequent I.A.507 of 2010 the Division Bench directed the 4th Respondent-Bank to execute the sale in favour of the 8th Respondent herein, taking note of the fact of deposit of Rs.2,03,00,000/- by the 8th Respondent with the 4th Respondent-Bank.

57. Be that as it may, after the Order dated 18.06.2010 and 08.07.2010, the Appellant filed the Special Leave Petition in this Court on 26.07.2010 and the Special Leave Petition came up for orders on 30.07.2010. While directing the Registry to list the SLP on the notified date, the parties were directed to maintain status quo with regard to the impugned order of the High Court dated 08.03.2010 till then. Thereafter, on 09.08.2010, service of notice on the Respondent was dispensed with since a caveat was entered on behalf of the 1st and 8th Respondents. While granting time for filing counter

affidavit, as well as rejoinder, the Interim Order dated 30.07.2010, was directed to be continued. Vide Order dated 08.08.2013, while declining to vacate Status Quo Order dated 30.07.2010, the Special Leave Petition itself was directed to be listed for final hearing. Though the 8th Respondent is stated to have deposited the sum of Rs.2,03,00,000/- with the 4th Respondent-Bank, as per the Order dated 18.06.2010 in IA No.437 of 2010, the other directions in the main Order dated 08.03.2010 in Writ Appeal No.1555 of 2009 and the subsequent directions contained in the Orders dated 18.06.2010 and 08.07.2010, were not carried out. The sale which was already fixed in favour of the Appellant continued to remain in force and the sum of Rs.2,03,00,000/- deposited by the 8th Respondent remains with the 4th Respondent-Bank.

58. In the light of our conclusion that the Judgment passed in Writ Appeal No.1555 of 2009 dated 08.03.2010, was a self contained one and due to the failure of the 1st and 2nd Respondents in not handing over the Demand Draft for Rs.2,00,00,000/- to the Appellant within the stipulated time limit, namely, on or before 08.06.2010, the sale effected in favour of the Appellant stood confirmed. Inasmuch as we have found there was absolutely no justifiable grounds for the Division Bench to grant further time in its Order dated 18.06.2010, we are of the view that it will be travesty of justice if the earlier Judgment dated 08.03.2010, which worked itself out on 08.05.2010, is to be reversed for the flimsy grounds raised by the 1st and 2nd Respondents that they could not raise funds in spite of two months time granted to them for paying a sum of Rs.2,00,00,000/- in favour of the Appellant. We have also found that while the time granted by the Division Bench expired by 08.05.2010, the application for extension was filed 40 days later, i.e. on 10.06.2010. Therefore, for such a recalcitrant attitude displayed by Respondents 1 and 2 in respect of a litigation which involved very high stakes, the Division Bench should not have come for their rescue in the absence of any weighty reasons. The reason adduced o nt

1 and 2 is the standard reason which any party used to plead while seeking for extension of time. Since very valuable rights of the Appellant were at stakes and the Order of the Division Bench also remained in force, in so far as it related to the cancellation of the sale deed, which existed in favour of the Appellant till 08.05.2010 and by virtue of the non-compliance of the conditions imposed in the said Judgment dated 08.03.2010 by the 1st and 2nd Respondents the ownership rights of the Appellant got crystallized on and after 09.05.2010, we fail to find any justification at all for the Division Bench to interfere with the said right in such a casual manner by accepting the flimsy reasons of the 1st and 2nd Respondents. At the risk of repetition it will have to be stated that the ownership right which got crystallized in favour of the Appellant as on 09.05.2010, could not have been snatched away by the Division Bench by passing the present impugned order dated 18.06.2010 and 08.07.2010. Whatever stated by us with reference to the right of ownership of the 1st and 2nd Respondents with reliance upon Article 300A of the Constitution would equally apply to the Appellant as well in such a situation. Therefore, such a right which accrued in favour of the Appellant ought not to have been interfered with by the Division Bench and the Orders passed in the interim application filed at the instance of the 1st and 2nd Respondents, along with the 8th Respondent herein are not justified. Therefore, while upholding the Judgment of the Division Bench dated 08.03.2010 passed in Writ Appeal 1555 of 2009, for the reasons stated herein, the Orders dated 18.06.2010 and 08.07.2010 passed in I.A. Nos.437 and 507 of 2010 are set aside.

59. Though we have found good grounds in favour of the Appellant to set at naught the above Orders passed in I.A. Nos.437 and 507 of 2010, we cannot also ignore one other very relevant factor, namely, that the value of the property which was knocked out in favour of the Appellant in a sum of Rs.1,27,00,101/- by confirming the sale by the 4th Respondent-Bank on 31.12.2007 and 11.01.2008, the same was found to

be not in accordance with the provisions of the SARFAESI Act. Since the proper procedure for effecting the sale was not followed, it will have to be held that the price fetched through the Appellant cannot be held to be the correct price for the mortgaged property involved in these proceedings. Further, the very fact that in the year 2010 the property could fetch Rs.2,03,00,000/-, we are of the view that in all fairness even while confirming the Order of the Division Bench, by which the sale in favour of the Appellant came to be confirmed, the difference in the sale price should be directed to be paid by the Appellant. While the price paid by the Appellant was Rs.1,27,00,101/-, the price ultimately fetched at the instance of the 1st and 2nd Respondents was Rs.2,03,00,000/-. Therefore, after giving credit to Rs.1,27,00,000/-, the Appellant would still be liable to pay a further sum of Rs.76,00,000/- to the 1st and 2nd Respondents.

60. Accordingly, while disposing of these appeals as directed above, we pass the following Order:

(A) The 4th Respondent-Bank shall refund a sum of Rs.2,03,00,000/- deposited by the 8th Respondent, along with 18% interest. Such refund shall be made by the 4th Respondent to the 8th Respondent by way of Bank's Pay Order within two weeks from the date of production of copy of this Order.

(B) The 4th Respondent-Bank having adjusted its due from and out of the sale consideration paid by the Appellant, shall pay the balance amount to the Tax Recovery Officer pursuant to the demand, which is to be credited in the account of the Appellant. Such deposit shall also be made along with accrued interest @ 18% per annum while making the deposit. It is for the Respondents 1 & 2 to claim refund if they are eligible for the same by approaching the concerned Authority under the Income Tax Act and in the manner known to Law.

(C) The Appellant shall deposit the balance sale consideration determined by us in a sum of Rs. 76,00,000/- with the 4th Respondent-Bank, which shall be kept in an interest bearing account. If there is any further demand by way of tax recovery, it would be open for the Tax Recovery Officer concerned to raise such a demand and forward it to the 4th Respondent-Bank and on such demand being made, the 4th Respondent-Bank shall deposit the same to the credit of the Tax Recovery Officer in the name of the 1st and 2nd Respondents and it will be for the 1st and 2nd Respondents to claim for refund if eligible. If there is no tax due, the 4th Respondent - Bank shall release the said sum of Rs.76,00,000/- forthwith on deposit being made by the Appellant to Respondents 1 and 2.

(D) Such deposit of Rs.76,00,000/- shall be made by the Appellant within four weeks from the date of receipt of the copy of this Judgment. As and when the Appellant deposit the sum of Rs.76,00,000/- towards the sale price of the property transferred in its favour, necessary receipt for the said payment by way of additional sale price shall be executed by the 4th Respondent-Bank along with the 1st and 2nd Respondents and whatever stamp duty and registration charges payable for that purpose shall be borne by the Appellant.

(E) If the Appellant fails to deposit the balance sale consideration of Rs.76,00,000/- within the stipulated time limit, as directed in paragraph 60(D), the sale already effected by the 4th Respondent-Bank shall stand cancelled automatically without any further reference to this Court. Eventually, the sale consideration deposited by the Appellant with the 4th Respondent-Bank shall be refunded to him after deducting the amount due and payable by the borrower as on the date of previous sale i.e. 31.12.2007 and the balance amount alone shall be refunded to the Appellant. Further the 4th Respondent-Bank shall bring the

property for auction afresh, following the provisions of the SARFAESI Act. Thereafter, from and out of the money realized from the said sale, the 4th Respondent-Bank shall refund the amount retained by it towards the amounts due from the borrower to the Appellant. After paying the said amount to the Appellant, it shall arrange for refund of the balance amount to the 1st and 2nd Respondents after meeting whatever tax liability to the Income Tax Department or any other statutory dues for which any demand was already raised and pending with the 4th Respondent-Bank.

61. With the above directions, appeal filed against the Judgment dated 08.03.2010 passed in Writ Appeal No.1555 of 2009 stands dismissed and appeals filed against the Orders dated 18.06.2010 and 08.07.2010, passed in I.A. Nos.437 of 2010 and 507 of 2010 in Writ Appeal No.1555 of 2009 stand allowed. No costs.

D.G. Appeals disposed of.

VOLTAS LTD.

v.

ROLTA INDIA LTD.

(Civil Appeal No. 2073 of 2014)

FEBRUARY 14, 2014

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

ARBITRATION AND CONCILIATION ACT, 1996: ss.21, 43 - Counter claim - Limitation period - Held: Limitation period for filing counter claim should be computed as on the date of service of notice of such claim on the claimant and not on the date of final counter claim - Exception to the said rule is if a party against whom a claim is made in arbitration can satisfy that he had previously made a claim against the claimant and sought arbitration by serving a notice to the claimant - However, limitation cannot be saved solely on the ground that a party had previously in a notice vaguely stated that it would be claiming liquidated damages.

JUDGMENT/ORDER: Binding effect of - Held: A judgment is not to be read as a statute but to understand the correct ratio stated in the case it is necessary to appreciate the repetitive use of the words.

The appellant and the respondent entered into a civil construction contract for construction of buildings. Dispute arose between them and on 03.12.2004, the respondent terminated the contract. By letter dated 29.03.2006, the appellant invoked the arbitration clause. On 17.04.2006, the respondent denied any amount being payable by them and called upon the appellant to pay Rs.68.63 crores. The appellant filed an application for appointment of arbitrator and a sole arbitrator was appointed by the High Court. Before the arbitrator, the appellant filed its statement of claim on 13.04.2011

claiming Rs. 23.31 crores. The respondent filed statement of defence and counter claim of Rs.333.73 crores on 24.08.2011. The Arbitrator passed interim order that the limitation for making a counter claim is required to be asserted with reference to the date on which the cause of action arose and the date on which counter claim was filed. The respondent filed an application under Section 34 of Arbitration Act for setting aside decision of Arbitrator. The Single Judge of the High court rejected the section 34 application holding that when the notice was given by the appellant on 29.03.2006, the said notice was only in respect of the disputes having arisen between the parties due to refusal of claims made by the respondent. On the date of issuance of such notice, the respondent had not even asserted its claim and after issuance of notice dated 29.03.2006, the respondent by its letter dated 17.04.2006 had asserted its claim for the first time and, therefore, counter claim was beyond the period of limitation. On appeal, the Division Bench of the High Court set aside the order of the Single Judge. Hence the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1. By letter dated 01.03.2005, the appellant, while referring to the letter dated 03.12.2004 issued by the respondent terminating the contract on the ground of alleged delay and default in completion of the project, without prejudice had made a request for payment of final bill in full and settle the claim made therein at the earliest. It was also suggested therein that if the respondent needed any additional information or material in support of the claim put forth, the appellant would furnish the same. On 18.03.2005, the respondent communicated to the appellant that it would compute its losses, damages, costs, charges, expenses, etc. after the building work was over and claim the same from the ap

by letter dated 7.4.2005 intimated the respondent that it was not liable to pay any alleged losses, damages, costs, charges and expenses, allegedly suffered by the respondent. On 27.04.2005 by another communication an assertion was made about the losses suffered by the respondent. The respondent asseverated that it was not liable to pay to the appellant any compensation and damages or other amounts as claimed in the letter dated 01.03.2005. In fact, the respondent was compelled to terminate the contract as per the recommendation of the architects and the respondent had suffered huge losses and damages and had incurred heavy costs, charges and expenses for which the appellant was solely responsible. It was also mentioned in the letter that the respondent reserved its right to take appropriate steps against the appellant as per the agreement entered into between the parties as per law. On 29.3.2006, the appellant, referring to its earlier communications dated 14.04.2004, 23.04.2004, 24.05.2004, 18.06.2004, 13.07.2004 and 01.03.2005, claimed for appointment of an arbitrator. On 17.4.2006, the respondent specified the claims under various heads and also claimed payment to be made within seven days failing which it will invoke the arbitration clause. Thus, the correspondences between the parties make it vivid that the claims made by the respondent were denied by the appellant on many a ground and, therefore, it would be inappropriate to say that there was inaction or mere denial. [Paras 15 and 16] [812-E-H; 813-A-E; 814-A-B]

Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority **(1988) 2 SCC 338: 1988 (3) SCR 351;** *Jammu and Kashmir State Forest Corporation v. Abdul Karim Wani and Ors.* **(1989) 2 SCC 701: 1989 (2) SCR 380 - held inapplicable.**

1.2. The two communications dated 17.04.2006 and 21.04.2006 make it clear that the respondent had

crystallized the claims on various heads by letter dated 17.4.2006 and the appellant had agreed to appoint an arbitrator within thirty days. The heads that have been mentioned in the letter dated 17.4.2006 pertained to liquidated damages for delay in performance, cost of repairs and rework which had to be done by the respondent, differential cost of the works left over by the appellant and was completed by the respondent through other agencies, cost of direct consequential damages to the respondent due to defect in the work done by the appellant, cost of consultancy fees and other expenses, loss of profit for four years based on revenue generated per employee, etc. and outstanding mobilization advance remaining with the appellant. The total sum as mentioned in the letter was Rs.74.78 crores. From the said amount monies retained by the respondent and monies received by the respondent as per the contract, i.e., Rs.6.14 crores were reduced. The validity of the claims had to be addressed by the Arbitrator but the fact remained that the respondent had raised the claims by giving heads. Thus, there can be no scintilla of doubt that the respondent had particularized or specified its claims and sought arbitration for the same. [Para 19] [815-E-H; 816-A-B]

2. In *Praveen Enterprises, the two-Judge Bench, after referring to, Sections 21 and 43 of the Act and Section 3 of the Limitation Act opined, regard being had to the language employed in Section 21, that an exception has to be carved out. It saves the limitation for filing a counter claim if a respondent against whom a claim has been made satisfies the twin test, namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant. The said exception squarely applies to the case at hand inasmuch as the respondent had raised the counter claim and sought arbitration by expressing its intention on number of occasions. That apart, it is also e

appellant had assured for appointment of an arbitrator. Thus, the counter claim was instituted on 17.4.2006 and hence, the irresistible conclusion is that it was within limitation. In *Praveen Enterprises, the Court while carving out an exception, has clearly stated that the limitation for "such counter claim" should be computed as on the "date of service of notice" of "such claim on the claimant" and not on the date of final counter claim. A judgment is not to be read as a statute but to understand the correct ratio stated in the case it is necessary to appreciate the repetitive use of the words. That apart, if the counter claim filed after the prescribed period of limitation before the arbitrator is saved in entirety solely on the ground that a party had vaguely stated that it would be claiming liquidated damages, it would not attract the conceptual exception carved out in *Praveen Enterprises. In fact, it would be contrary to the law laid down not only in the said case, but also to the basic principle that a time barred claim cannot be asserted after the prescribed period of limitation. [Paras 24, 26] [819-B-E; 820-E-H; 821-A]

State of Goa v. Praveen Enterprises* **(2012) 12 SCC 581: 2011 (10) SCR 1026 - relied on.

Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. **(2003) 5 SCC 705: 2003 (3) SCR 691;** *Bharat Sanchar Nigam Limited and another v. Motorola India Private Limited* **(2009) 2 SCC 337: 2008 (13) SCR 445 - held applicable.**

3. In the instant case, when it is absolutely clear that the counter claim in respect of the enhanced sum is totally barred by limitation and is not saved by exception carved out by the principle stated in Praveen Enterprises, the view of the Division Bench of the High Court that the counter claim, as a whole, is not barred by limitation is not correct. Thus analysed, the counter claim relating to the appeal which deals with civil contracts shall be

restricted to the amount stated in the letter dated 17.4.2006, i.e., Rs.68.63 crores, and as far as the other appeal which pertains to air-conditioning contract, the quantum shall stand restricted to as specified in the letter dated 21.3.2006. The interim award passed by Arbitrator as regards rejection of the counter claims in toto stands nullified. [Paras 29, 31] [822-A-C, G; 823-A]

Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran **2012 5 SCC 306; 2012 (4) SCR 1 - Distinguished.**

Ispat Industries Limited v. Shipping Corporation of India Limited **Arbitration Petition No. 570 of 2001 decided on 4.12.2001;** *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* **(2003) 5 SCC 705;** *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors.* **(2006) 11 SCC 181: 2006 (2) Suppl. SCR 409;** *K. Raheja Constructions Ltd. and another v. Alliance Ministries and Ors.* **1995 Supp (3) SCC 17: 1995 (3) SCR 960;** *South Konkan Distilleries and Anr. v. Prabhakar Gajanan Naik and Ors.* **(2008) 14 SCC 632: 2008 (13) SCR 295;** *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) v. Ramesh Chander and others* **(2010) 14 SCC 596: 2010 (12) SCR 1045;** *Revajeetu Builders and Developers v. Narayanaswamy and sons and Ors.* **(2009) 10 SCC 84: 2009 (15) SCR 103 - referred to.**

Case Law Reference:

2011 (10) SCR 1026	**relied on**	**Para 7**
2003 (3) SCR 691	**referred to**	**Para 9**
2012 (4) SCR 1	**distinguished**	**Para 10**
2006 (2) Suppl. SCR 409	**referred to**	**Para 11**
1988 (3) SCR 351	**held inapplicable**	**Para 12**
1989 (2) SCR 380	**held inapplicable**	**Para 12**
2008 (13) SCR 445	**referred**	

1995 (3) SCR 960	**referred to**	**Para 27**
2008 (13) SCR 295	**referred to**	**Para 27**
2010 (12) SCR 1045	**referred to**	**Para 27**
2009 (15) SCR 103	**referred to**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2073 of 2014.

From the Judgment and Order dated 16/08/2013 of the High Court of Bombay in APL No. 1239/2012, AN No. 7/2013.

WITH

Civil Appeal No. 2076 of 2014.

K.K. Venugopal, Prateek Jalan, R.N. Karanjawala, Manik Karanjawala (for Karanjawala & Co.) for the Appellant.

R.F. Nariman, Pratap Venugopal, S. Ganoo, Surekha Raman, Meenakshi Chauhan, Anuj Sharma (for K.J. John & Co.) for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in both the Special Leave Petitions.

2. Regard being had to the similitude of controversy in both the appeals they were heard together and are disposed of by a common judgment. Be it noted, the Division Bench of the High Court of Judicature at Bombay, by two separate judgments and orders passed on 16.8.2013 in Appeals Nos. 7 of 2013 and 8 of 2013 has set aside the judgment and order dated 1.10.2012 passed by the learned single Judge in Arbitration Petition (L) Nos. 1239 of 2012 and 1240 of 2012 respectively as a consequence of which two interim awards passed by the learned Arbitrator on 26.7.2012 in respect of two contracts between the same parties rejecting the counter claim of the respondent-herein have been annulled. For the sake of

clarity and convenience we shall state the facts from Civil Appeal arising out of Special Leave Petition (C) No. 30015 of 2013, for the Division Bench has observed that the Appeal No. 7 of 2013 had emanated from the disputes which arose in respect of civil construction agreement dated 2.2.2001 and in Appeal No. 8 of 2013 the disputes related to agreement dated 8.1.2003 for air-conditioning of the two buildings to be constructed for the appellant therein and no separate submissions were advanced before it and the position was the same before the learned single Judge.

3. The expose' of facts are that the appellant and respondent entered into a civil construction contract for construction of two buildings known as Rolta Bhawan II (RB-II) and Rolta Bhawan III (RB-II) and also for modification of building Rolta Bhawan I(RB-I) previously constructed by the respondent. As certain disputes arose, on 3.12.2004 the respondent terminated the contract. After certain correspondences between the parties pertaining to the termination of the contract the appellant by letter dated 29.3.2006 invoked the arbitration clause in respect of its claims against the respondent. As the respondent failed to appoint an arbitrator, it filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the Act") before the High Court of Bombay for appointment of arbitrator and the designated Judge vide order dated 19.11.2010 appointed the sole arbitrator.

4. After the controversy came in seisin before the learned Arbitrator, he issued certain directions and, as the facts would unfurl, the appellant filed its statement of claim on 13.4.2011 claiming a sum of Rs.23,31,62,429.77 together with interest at the rate of 15% per annum from the respondent. The respondent, after filing its defence on 24.8.2011, filed the counter claim of Rs.333,73,35,026/- together with interest at the rate of 18% per annum from the date of filing till payment/ realization thereof. In the counter claim the respondent justified the termination of the agreement and [illegible]s

entitled to damages for breach of contract. In the counter claim the notice dated 17.4.2006 sent by the respondent detailing its counter claim to the appellant was referred to.

5. After the counter claim was lodged, the appellant-herein filed its objections about the tenability of the counter claim stating that the same was not maintainable and was also barred by limitation. The learned Arbitrator on 7.1.2012 framed two issues regarding the tenability and limitation of the counter claim as preliminary issues. They are: -

"(i) Whether the counter claim, or a substantial part thereof, is barred by the law of limitation?

(ii) Whether the counter claim is not maintainable and beyond the scope of reference?"

6. After adumbrating to the facts the learned Arbitrator came to hold that the limitation for making a counter claim is required to be asserted with reference to the date on which the cause of action arises and the date on which the counter claim is filed. After so opining the learned Arbitrator recorded as follows: -

"The respondent has been vigilant and assertive of its legal rights right from 3rd December 2004 on which date the Contract was terminated. The assertions in the letters dated 27th April 2005 and 29th March 2006 show unmistakable consciousness of its rights on the part of the Respondent. The last letter dated 29th March 2006 is the notice of the Advocates of the Respondent asserting its right to invoke arbitration. The Tribunal is of the view that cause of action for the Counter-claim which must be treated as an independent action to be instituted, really arose latest by 29th March 2008, if not earlier it is clear that the Counter claim is filed only on 26th September, 2011 and as such it is beyond the period of limitation of three years."

It may be noted here that the learned Arbitrator, however,

overruled the objection with regard to the maintainability of the counter claim being beyond the scope of reference.

7. After the interim award was passed by the learned Arbitrator, the respondent filed an application under Section 34 of the Act for setting aside the decision of the learned Arbitrator rejecting the counter claims made by it on the ground of limitation. The learned single Judge, after adverting to the facts in detail and the contentions raised by the learned counsel for the parties, referred to certain authorities, namely, *Ispat Industries Limited v. Shipping Corporation of India Limited*[1] and *State of Goa v. Praveen Enterprises*[2], and came to hold that the arbitral proceedings in respect of those disputes commenced on the date on which the request for the said disputes to be referred to arbitration was received by the respondent, and further that only such disputes which were referred to in the notice invoking arbitration agreement with a request to refer the same to arbitration, the arbitral proceedings commenced and it would not apply to the counter claim. Thereafter the learned single Judge proceeded to state as follows: -

"When the notice was given by the respondent on 29th March, 2006, the said notice was only in respect of the disputes having arisen between the parties due to refusal of claims made by the petitioner. On the date of issuance of such notice, the petitioner had not even asserted its claim. After issuance of such notice on 29th March, 2006, the petitioner by its letter dated 17th April, 2006 had asserted its claim for the first time. The dispute in respect of the counter claim raised when the petitioner did not pay the said amount as demanded. Such disputes thus did not exist when the notice invoking arbitration agreement was given by the respondent on 29th March, 2006. In my view, the arbitral proceedings therefore, cannot be said to have

1. Arbitration Petition No. 570 of 2001 decided on 4.12.2001.
2. (2012) 12 SCC 581.

commenced in respect of the counter claim when the notice was given by the respondent on 29th March, 2006. The counter claim was admittedly filed on 26th September, 2011 which was made beyond the period of limitation. The arbitral proceedings commenced in respect of the counter claim only when the said counter claim was lodged by the petitioner on 26th September, 2011. Even if the date of refusal on the part of the respondent, to pay the amount as demanded by the petitioner by its notice dated 17th April, 2006 is considered as commencement of dispute, even in such case on the date of filing the counter claim i.e. 26th September, 2011, the counter claim was barred by law of limitation. In my view, thus the tribunal was justified in rejecting the counter claim filed by the petitioner as time barred."

8. After so stating the learned single Judge held that the opinion expressed by the learned Arbitrator was not perverse and based on correct appreciation of documents and was resultant of a plausible interpretation and accordingly rejected the application preferred under Section 34 of the Act.

9. Being dissatisfied, the respondent-herein preferred an appeal before the Division Bench which chronologically referred to the correspondences made between the parties, the reasoning ascribed by the learned Arbitrator, the submissions propounded before it, the principles stated in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*[3] as regards the jurisdiction of the Court while dealing with an application under Section 34 of the Act, the concept of limitation as has been explained in *Praveen Enterprises* (supra), the demand made by the appellant therein by letter dated 17.4.2006 quantifying a sum of Rs.68.63 crores, exclusion of period between 3.5.2006 to 19.11.2010 during which period the application under Section 11 of the Act was pending before the High Court and on that foundation, in the ultimate eventuate, came to hold

3. (2003) 5 SCC 705.

that the counter claim filed on 26.9.2011 was within limitation. The aforesaid view obliged the Division Bench to allow the appeal, set aside the judgment and order passed by the learned single Judge as a consequence thereof the rejection of the counter claim by the learned Arbitrator stood overturned. Be it noted, rest of the interim award of the learned Arbitrator was not disturbed.

10. Assailing the legal substantiality of the view expressed by the Division Bench, Mr. K.K. Venugopal, learned senior counsel appearing for the appellant, has raised the following contentions: -

(i) Existence of dispute is fundamentally essential for a controversy to be arbitrated upon and in the case at hand there being no dispute raised by the respondent as warranted in law, the counter claim put forth before the learned Arbitrator deserved to be thrown at the threshold and the High Court would have been well advised to do so.

(ii) The limitation for a counter claim has to be strictly in accordance with Section 43(1) of the Act read with Section 3(2)(b) of the Limitation Act, 1963 and any deviation therefrom is required to be authorized by any other provision of law. The only other provision of law which can depart from Section 43(1) of the Act read with Section 3(2)(b) of the Limitation Act, is the provision contained in Section 21 of the Act, where the respondent to the claimant's claim invokes arbitration in regard to specific or particular disputes and further makes a request for the said disputes to be referred to arbitration and in that event alone, the date of filing of the counter claim would not be the relevant date but the date of making such request for arbitration would be the date for computing limitation. The Division Bench has not kept itself alive to the requisite twin tests and has erroneously ruled that the counter claim as filed by the respondent is not barred by limitation.

(iii) The principle stated in Praveen[illegible]s

not applicable to the present case because the correspondences made by the respondent, including the letter dated 17.4.2006, show that there had neither been any enumeration of specific claims nor invocation of the arbitration clause but merely computation of certain claims, though for application of the exception as carved out in *Praveen Enterprises* (supra), both the conditions precedent, namely, making out a specific claim and invocation of arbitration are to be satisfied.

(iv) The exclusion of the period during pendency of the application under Section 11 of the Act, as has been held by the Division Bench, is wholly contrary to the principle laid down in paragraphs 20 and 32 in *Praveen Enterprises* (supra).

(v) Assuming the principle stated in *Praveen Enterprises* (supra) is made applicable, the claims asserted by the respondent in its letter dated 17.4.2006 could only be saved being not hit by limitation and not the exaggerated counter claim that has been filed before the learned Arbitrator.

(vi) The Division Bench completely erred in interfering with the interim award in exercise of power under Section 34 of the Act, though the principle stated in *Saw Pipes Ltd.* (supra) is not attracted and further that the recording of finding that the award passed by the learned Arbitrator suffers from perversity of approach is not acceptable inasmuch as a possible and plausible interpretation of the contract and documents has been made which is within the domain of the learned Arbitrator as has been stated in *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran*[4].

11. Mr. R.F. Nariman, learned senior counsel appearing for the respondent, defending the impugned judgment, has proponed the following: -

(a) The documents brought on record demonstrably establish that dispute existed between the parties

4. (2012) 5 SCC 306.

as regards the counter claim and hence, the submission raised on behalf of the appellant on that score is sans substance.

(b) The Division Bench has rightly come to hold that the counter claim filed by the respondent-herein was within time on the basis of the law laid down in *Praveen Enterprises* (supra) inasmuch as the date of filing of the counter claim has to relate back to the date of claim made by the respondent and the correspondences between the parties do clearly show that the respondent had raised its claim and also sought for arbitration in a legally accepted manner.

(c) The alternative submission that the counter claim has to be confined to the amount quantified in the letter dated 17.4.2006 is unacceptable in law, for in *Praveen Enterprise*s (supra) it has been held that the statement of claim need not be restricted to the claims in the notice and on that base it can safely be concluded that the said proposition holds good for counter claims as well. That apart, the principle also gets support from what has been laid down in *McDermott International Inc. v. Burn Standard Co. Ltd. and others*[5].

12. First, we shall address to the submissions pertaining to existence and raising of dispute as regards the counter claim. We are required to deal with the same in the case at hand since Mr. Venugopal, learned senior counsel, has urged that if no dispute was raised at any point of time, it could not have been raised before the learned Arbitrator as it would be clearly hit by limitation. Learned senior counsel has placed reliance on *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*[6] and *Jammu and Kashmir State*

5. (2006) 11 SCC 181.
6. (1988) 5 SCC 338.

Forest Corporation v. Abdul Karim Wani and others[7], to bolster the submission that in the case at hand the disputes as regards the counter claim really had not arisen, for mere assertions and denials do not constitute a dispute capable of reference to arbitration and hence, not to be entertained when it is dead or stale.

13. In *Major (Retd.) Inder Singh Rekhi* (supra) the High Court had rejected the petition preferred under Section 20 of Arbitration Act, 1940 as barred by limitation. The two-Judge Bench referred to Section 20 of the 1940 Act and opined that in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, dispute must arise to which the agreement applied. In the said case, there had been an assertion of claim of the appellant and silence as well as refusal in respect of the same by the respondent. The Court observed that a dispute had arisen regarding non-payment of the alleged dues to the appellant and, in that context, observed thus: -

> "A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

14. In *Abdul Karim Wani and others* (supra) the question arose whether the dispute mentioned in the contractor's

7. (1989) 2 SCC 701.

application could have been referred to the arbitration at all. The majority came to hold that the claim raised by the plaintiff in his application was not covered by the arbitration clause and, therefore, was not permissible to be referred for a decision to the arbitrator. Be it noted, in the said case, the work under the contract had already been executed without any dispute. The majority also observed that in the absence of a repudiation by the Corporation of the respondent's right to be considered, if and when occasion arises, no dispute could be referred for arbitration. It further ruled that in order that there may be a reference to arbitration, existence of a dispute is essential and the dispute to be referred to arbitration must arise under the arbitration agreement.

15. The principles laid down in the aforesaid cases were under the 1940 Act at the stage of appointment of arbitrator. In the case at hand, though we are dealing with a lis under the 1996 Act, yet we are to deal with the said facet as the learned Arbitrator has passed an interim award as regards the sustenance of the counter claim. In this regard, it is necessary to refer to the correspondences entered into between the parties and to appreciate the effect and impact of such communications. By letter dated 1.3.2005 the appellant, while referring to the letter dated 3.12.2004 issued by the respondent terminating the contract on the ground of alleged delay and default in completion of the project, without prejudice had made a request for payment of final bill in full and settle the claim made therein at the earliest. It was also suggested therein that if the respondent needed any additional information or material in support of the claim put forth, the appellant would furnish the same. On 18.3.2005 the respondent communicated to the appellant through its counsel that it would compute its losses, damages, costs, charges, expenses, etc. after the building work was over and claim the same from the appellant. The appellant vide letter dated 7.4.2005, through its counsel, intimated the respondent that it was not liable to pay any alleged losses, damages, costs, charges and expenses y

the respondent. On 27.4.2005 by another communication an assertion was made about the losses suffered by the respondent. The respondent asseverated that it was not liable to pay to the appellant any compensation and damages or other amounts as claimed in the letter dated 1.3.2005 to the respondent. In fact, the respondent was compelled to terminate the civil contractor as per the recommendation of the Architects, M/s. Master & Associates, and the respondent had suffered huge losses and damages and had incurred heavy costs, charges and expenses for which the appellant was solely respondible. It was also mentioned in the letter that the respondent reserved its right to take appropriate steps against the appellant as per the agreement entered into between the parties as per law. As the factual exposition would unfurl, on 29.3.2006 the appellant, referring to its earlier communications dated 14.4.2004, 23.4.2004, 24.5.2004, 18.6.2004, 13.7.2004 and 1.3.2005, claimed for appointment of an arbitrator. On 17.4.2006 the respondent specified the claims under various heads and also claimed payment to be made within seven days failing which it will invoke the arbitration clause. To the said communication and another communication dated 21.4.2006 we shall refer to at a later stage while dealing with the other facet of submission. It may be noted here that on 9.5.2006 the appellant, referring to letter dated 17.4.2006 whereby the respondent had raised its claims, stated as follows: -

> "Our clients deny that the claim made against you is false and frivolous. Our clients deny that any amount is due to you for the alleged breach of the aforesaid contract. Our clients deny that they have committed any breach of the aforesaid contract.
>
> xxx xxx xxx
>
> In view of what is stated hereinabove, our clients deny that they are liable to pay to you a sum of Rs.68,63,72,743.08 or any other sum."

16. Thus, the correspondences between the parties make it vivid that the claims made by the respondent were denied by the appellant on many a ground and, therefore, it would be inappropriate to say that there was inaction or mere denial. Therefore, in the obtaining fact situation, the principles stated in *Major (Retd.) Inder Singh Rekhi* (supra) and *Abdul Karim Wani and others* (supra) are not applicable.

17. The next aspect that has been highlighted by Mr. Venugopal is that the respondent had never, in the true sense of the term, invoked arbitration by appropriately putting forth specified claims. In this context, we may refer to the letter dated 29.3.2006 which would show that the appellant had asserted that the disputes and differences had arisen between the parties to the agreement and invoked the arbitration clause calling upon the respondent to appoint an independent unbiased arbitrator within 30 days from the receipt of the said notice, failing which they would be constrained to approach the designated Judge of the Chief Justice of Bombay High Court for appointment of an arbitrator under Section 11 of the Act. The respondent, vide letter dated 17.4.2006, sent through its counsel while stating that it was surprised to receive the demand made by the appellant with regard to the final R.A. bill dated 21.12.2004, clearly stated that the earlier letter dated 1.3.2005 had already been replied to vide letter dated 18.3.2005. In the said letter it was mentioned by the respondent that it had crystallized its claim amounting to Rs.68,63,72,743.08 and, be it noted, the said claim was made on various heads by the respondent. Reproduction of part of the said letter would be apposite: -

> "The final R.A. Bill sent by you is incorrect in many respects; one of them being that you have made claims based on works actually not done by you Nothing is due and payable by us to you against your final R.A. Bill. We call upon you to pay to us the aforesaid sum of Rs.68,63,72,743.08 within seven days of the receipt of

you will be liable to pay interest at the rate of 18% p.a. on expiry of seven days after receipt of this letter by you, till payment and/or realization. Please note that if the aforesaid payment is not made within seven days of the receipt of this letter, we will invoke the arbitration clause of the civil contract and refer the disputes to arbitration."

18. In this regard reference to letter dated 21.4.2006 written by the appellant is seemly. The relevant part of the said letter is as follows: -

"We are instructed to inform you that our client was out of India in connection with the business tour and returned to India on 19th April, 2006. Our client thereafter has been extremely busy with the work of the Company. He has seen your letter dated 29th March, 2006.

Please, therefore, ask your clients to note that our client will appoint an Arbitrator within 30 days from the date of his return to India."

19. These two communications make it clear that the respondent had crystallized the claims on various heads by letter dated 17.4.2006 and the appellant had agreed to appoint an arbitrator within thirty days. The heads that have been mentioned in the letter dated 17.4.2006 pertained to liquidated damages for delay in performance, cost of repairs and rework which had to be done by the respondent, differential cost of the works left over by the appellant and was completed by the respondent through other agencies, cost of direct consequential damages to the respondent due to defect in the work done by the appellant, cost of consultancy fees and other expenses, loss of profit for four years based on revenue generated per employee, etc. and outstanding mobilization advance remaining with the appellant. The total sum as mentioned in the letter was Rs.74,78,34,921.54. From the said amount monies retained by the respondent and monies received by the respondent as per the contract, i.e., Rs.6,14,62,178.46 were reduced. Needless

to emphasize, the validity of the claims had to be addressed by the learned Arbitrator but the fact remains that the respondent had raised the claims by giving heads. Thus, there can be no scintilla of doubt that the respondent had particularized or specified its claims and sought arbitration for the same.

20. Keeping in view the aforesaid factual scenario we shall now proceed to appreciate what has been stated by this Court in *Praveen Enterprises* (supra). In the said case, the respondent therein had raised certain claims and given a notice to the appellant-therein to appoint an arbitrator in terms of the arbitration clause. As the appellant did not do so, the respondent filed an application under Section 11 of the Act and an arbitrator was appointed. The respondent filed its claim statement before the arbitrator and the learned arbitrator passed an award. In regard to the counter claims made by the appellant, the arbitrator awarded certain sum without any interest. An application under Section 34 of the Act was filed by the respondent challenging the award for rejection of its other claims and award made on a particular item of the counter claim. The civil court disposed of the matter upholding the award in respect of the claims of the respondent but accepted the objection raised by it in regard to the award made on the counter claim opining that the arbitrator could not have enlarged the scope of the reference and entertain either fresh claims by the claimants or counter claims from the respondent. The said judgment came to be assailed before the High Court which dismissed the appeal by holding that the counter claims were bad in law as they were never placed before the court by the appellant in the proceeding under Section 11 of the Act and they were not referred to by the court to arbitration and, therefore, the arbitrator had no jurisdiction to entertain the matter.

21. This Court posed two questions, namely, whether the respondent in an arbitration proceedi[illegible]n

making a counter claim, unless (a) it had served a notice upon the claimant requesting that the disputes relating to that counter claim be referred to arbitration and the claimant had concurred in referring the counterclaim to the same arbitrator; and/or (b) it had set out the said counterclaim in its reply statement to the application under Section 11 of the Act and the Chief Justice or his designate refers such counter claim also to arbitration. Thereafter, the Court referred to the concept of "reference to arbitration" and, analyzing the anatomy of Sections 21 and 43 of the Act and Section 3 of the Limitation Act, 1963, opined thus: -

> "Section 3 of the Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of "institution" for arbitration proceedings. Section 21 of the Act supplies the omission. But for Section 21 there would be considerable confusion as to what would be the date of "institution" in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under Section 11 of the Act. In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "a request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore, the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not."

22. Thereafter, addressing the issue pertaining to counter claims, the Court observed as follows: -

> "20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made applicable to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of "institution" insofar as counterclaim is concerned. There is, therefore, no need to provide a date of "commencement" as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."
>
> [Italics is ours]

23. Mr. R.F. Nariman, learned senior counsel appearing for the respondent, submitted that the case of the respondent comes within that exception because it had raised its claims on various dates and crystallized it by letter dated 17.4.2006 and had sought arbitration also. It is his submission that the learned single Judge had incorrectly understood the exception carved out in the aforesaid case and has opined that the date of filing of the counter claims, i.e., 26.9.2011 is the pertinent date. It is urged by him that the Division Bench has correctly determined the date to be 17.4.2006. M d

senior counsel, has disputed the said position by relying upon Section 3 of the Limitation Act which stipulates the limitation to be mandatory.

24. On a careful reading of the verdict in *Praveen Enterprises* (supra), we find that the two-Judge Bench, after referring to, as we have stated hereinbefore, Sections 21 and 43 of the Act and Section 3 of the Limitation Act has opined, regard being had to the language employed in Section 21, that an exception has to be carved out. It saves the limitation for filing a counter claim if a respondent against whom a claim has been made satisfies the twin test, namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant. In our considered opinion the said exception squarely applies to the case at hand inasmuch as the appellant had raised the counter claim and sought arbitration by expressing its intention on number of occasions. That apart, it is also perceptible that the appellant had assured for appointment of an arbitrator. Thus, the counter claim was instituted on 17.4.2006 and hence, the irresistible conclusion is that it is within limitation.

25. Presently to the alternative submission of Mr. Venugopal, learned senior counsel for the appellant. It basically pertains to the nature, scope and gamut of applicability of the exception carved out in *Praveen Enterprises* (supra) for the purpose of saving a counter claim being barred by limitation. The learned senior counsel would submit that the respondent had crystallized its claims by letter dated 17.4.2006 amounting to Rs.68,63,72,743.08 whereas in the counter claim dated 26.9.2011 filed before the learned Arbitrator amounts to Rs.333,73,35,026/- which is impermissible. In essence, the submission of Mr. Venugopal is that the claims which were not raised in the letter dated 17.4.2006 have to be treated as being barred by limitation. Mr. R.F. Nariman, learned senior counsel for the respondent, on the contrary, has referred to paragraph 11 of the *Praveen Enterprises* (supra) to buttress his

submission that when all the disputes are referred to the arbitrator, he has the jurisdiction to decide all the disputes, i.e., both the claims and counter claims. That apart, the respondent had reserved its rights to quantify the claim. In this regard, he has also drawn inspiration from *McDermott International Inc.* (supra) wherein this Court has stated that while claiming damages, the amount therefor is not required to be quantified, for quantification of a claim is merely a matter of proof. Mr. Nariman has also commended us to the decision in *Bharat Sanchar Nigam Limited and another v. Motorola India Private Limited*[8] wherein it has been ruled that the question of holding a person liable for liquidated damages and the question of quantifying the amount to be paid by way of liquidated damages are entirely different. Fixing of liability is primary while the quantification is secondary to it.

26. In our considered opinion, the aforesaid decisions do not render any assistance to the proposition canvassed by the learned senior counsel for the respondent. We are inclined to think so on two counts. First, in *Praveen Enterprises* (supra) the Court has carved out an exception and, while carving out an exception, has clearly stated that the limitation for "such counter claim" should be computed as on the "date of service of notice" of "such claim on the claimant" and not on the date of final counter claim. We are absolutely conscious that a judgment is not to be read as a statute but to understand the correct ratio stated in the case it is necessary to appreciate the repetitive use of the words. That apart, if the counter claim filed after the prescribed period of limitation before the arbitrator is saved in entirety solely on the ground that a party had vaguely stated that it would be claiming liquidated damages, it would not attract the conceptual exception carved out in *Praveen Enterprises* (supra). In fact, it would be contrary to the law laid down not only in the said case, but also to the basic principle that a time barred claim cannot be asserted after the prescribed

8. (2009) 2 SCC 337.

period of limitation.

27. Mr. Nariman, learned senior counsel, has also contended that the counter claims filed before the learned Arbitrator is an elaboration of the amount stated in the notice and, in fact, it is an amendment of the claim of the respondent which deserved to be dealt with by the learned Arbitrator. In this context, we may refer with profit to the ruling in *K. Raheja Construcitons Ltd. and another v. Alliance Ministeries and others*[9] wherein the plaintiff had filed a suit for permanent injunction and sought an amendment for grant of relief of specific performance. The said prayer was rejected by the learned trial court. A contention was canvassed that the appellant had not come forward with new plea and, in fact, there were material allegations in the plaint to sustain the amendment of the plaint. The Court observed that having allowed the period of seven years to elapse from the date of filing the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent. The said principle has been reiterated in *South Konkan Distilleries and another v. Prabhakar Gajanan Naik and others*[10] and *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) v. Ramesh Chander and others*[11].

28. In *Revajeetu Builders and Developers v. Narayanaswamy and sons and others*[12], while laying down some basic principles for considering the amendment, the Court has stated that as a general rule the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

9. 1995 Supp. (3) SCC 17.
10. (2008) 14 SCC 632.
11. (2010) 14 SCC 596.
12. (2009) 10 SCC 84.

29. In the present case, when it is absolutely clear that the counter claim in respect of the enhanced sum is totally barred by limitation and is not saved by exception carved out by the principle stated in *Praveen Enterprises* (supra), we are unable to agree with the view of the Division Bench of the High Court that the counter claim, as a whole, is not barred by limitation. Thus analysed, the counter claim relating to the appeal which deals with civil contracts shall be restricted to the amount stated in the letter dated 17.4.2006, i.e., Rs.68,63,72,178.08, and as far as the other appeal which pertains to air-conditioning contract, the quantum shall stand restricted to as specified in the letter dated 21.3.2006, i.e., Rs.19,99,728.58.

30. At this juncture, we may, for the sake of completeness, deal with the justifiability of the interference by the Division Bench in the award passed by the learned Arbitrator. It has been urged by Mr. Venugopal, learned senior counsel for the appellant, that the view expressed by the learned Arbitrator being a plausible interpretation of the contract the same did not warrant interference. We have already analyzed at length how the interim award is indefensible as there has been incorrect and inapposite appreciation of the proposition of law set out in Praveen Enterprises's case. In *Rashtriya Ispat Nigam Limited* (supra) this Court has opined that the learned Arbitrator had placed a possible interpretation on clause 9.3 of the contract involved therein and hence, the interference was exceptionable. In the present case, the factual matrix and the controversy that have emanated are absolutely different and hence, the principle stated in the said authority is not applicable. Thus, we unhesitatingly repel the submission of the learned senior counsel for the appellant that the award passed by the learned Arbitrator did not call for any interference.

31. Consequently, both the appeals are allowed in part, the judgment of the Division Bench in Appeals Nos. 7 of 2013 and 8 of 2013 is modified and the interim award passed by learned

Arbitrator as regards rejection of the counter claims in toto stands nullified. The learned Arbitrator shall now proceed to deal with the counter claims, as has been indicated hereinabove by us. Needless to say, we have not expressed any opinion on the merits of the claims or the counter claims put forth by the parties before the learned Arbitrator. The parties shall bear their respective costs.

D.G. Appeal partly allowed.

M/S SIEMENS AKTIENGESELISCHAFT & S. LTD.
v.
DMRC LTD. & ORS.
(Civil Appeal No. 2068 of 2014)

FEBRUARY 14, 2014

[T.S. THAKUR AND C. NAGAPPAN, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 32 r/w Arts. 13 and 299 - Government contracts - Contract for supply of Standard Gauge Cars Electrical Multiple Units for use in Mass Rapid transit system - Award of contract to lowest bidder (L-1) - Challenged - Held: In any challenge to award of contract, the legality and regularity of the process leading to the award of contract is to be examined -- Court has to constantly keep in mind that it does not sit in appeal over the soundness of the decision - Court can only examine whether the decision making process was fair, reasonable and transparent - In cases involving award of contracts, court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest - High Court has, in the case at hand, undertaken that exercise and concluded that there was neither any illegality nor any irregularity in the process of evaluation of the bids or the final allotment of contract - The allotment of contract did not suffer from any illegality as it is understood in the matter of judicial review of administrative action -- The process by which the bids were evaluated and eventually accepted was transparent, fair and reasonable and does not, therefore, call for any interference Judicial review - Judicial restraint.

ADMINISTRATIVE LAW:

Government contract - Award of contract challenged before court - Thereafter, Government directing constitution

of a Committee - Held: Government ought to have stayed its hands once the matter landed in court - Inasmuch as Government did nothing of this kind, it did not act properly - Even otherwise, solong as the view taken by the experts of the authority competent to take a final decision is a possible view, the very fact that some other experts have expressed doubts about the sustainability of the GEC values will not be enough to declare that the values offered by respondent no. 2 are unachievable.

The award of contract for the supply of 486 Standard Gauge Cars Electrical Multiple Units meant for use in Phase-III of the Mass Rapid Transit System ('MRTS') for Delhi and its extension corridors, in favour of the lowest bidder (L-1), namely, respondent No.2(HR), was challenged by the two unsuccessful bidders, namely, the appellant and another. The High Court held that the process of evaluating the bids received and award of contract in favour of respondent no. 2 was transparent and did not suffer from any illegality, irregularity or perversity to warrant interference.

In the instant appeal, it was contended for the appellant that while the GEC value offered by the appellant was the highest, the one offered by the respondent successful bidder for 'X' factor was wholly untenable. It was submitted that the terms of the tender notice required the GEC values offered by the bidders to be validated before they could be used for processing the bids; and that the report submitted by the Director, Ministry of Urban Development, Government of India, indicated that the stimulation test conducted by DMRC as a part of the process of verification and validation of the GEC value offered by respondent no. 2 was not accurate. It was urged that the Government of India had appointed a two-member Committee to check the evaluation process of the bids and the report of the

Committee filed by the Government in the Court in a sealed cover could throw considerable light on the subject and help in deciding whether an independent verification of the GEC values was necessary.

Dismissing the appeal, the Court

HELD: 1.1 Judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. In any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest. The High Court has, in the case at hand, undertaken that exercise and concluded that there was neither any illegality nor any irregularity in the process of evaluation of the bids or the final allotment of the contract. [para 17,22 and 23] [842-F; 846-E-H]

Tata Cellular v. Union of India **1994 (2) Suppl. SCR 122 = (1994) 6 SCC 651;** *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.* **1979 (3) SCR 1014 = (1979) 3 SCC 489 - relied on.**

M.P. Oil Extraction v. State of M.P. & Ors. **1997 (1) Suppl. SCR 671 = (1997) 7 SCC 592;** *Jagdish Mandal v. State of Orissa & Ors.* **2006 (10) Suppl. SCR 606 = (2007) 14 SCC 517;** *Heinz India (P) Ltd. & Anr. v. State of U.P. & Ors.* **2012 (3) SCR 898 = (2012) 5 SCC 443 - re**

Reid v. Secy. of State for Scotland **(1999) 1 All ER 481- referred to.**

1.2 The allotment of contract did not suffer from any illegality as it is understood in the matter of judicial review of administrative action and as that expression has been used by this Court in Tata Cellular's case. It is also not the case of the appellant that the decision taken by the DMRC is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind could have arrived at the same. Perversity or irrationality in the decision or the decision making process is also not a ground that can be invoked in the case at hand. [para 23] [847-E-G]

1.3 It is common ground that the price bid offered by the tenderers was not itself determinative. What was equally important was the GEC values comprising X and Y factors which the tenderers had to disclose in their technical bids. That the values offered had to be converted into Indian Rupees and loaded to the price bid of the tenderers is also beyond question. That each one of the bidders had offered their GEC values comprising X and Y factors separately was also beyond doubt. There is no error even in the conversion of such values in terms of Indian Rupees nor is there any dispute about the effect of such loading of values to the price bid of all the tenderers because of which loading the bid offered by respondent no. 2 eventually emerged as L-1 with appellant sliding to L-4 position. That being so, the process of evaluation of bids could not be faulted as the same was strictly in accordance with the norms stipulated for such evaluation. [para 24] [848-B-E]

1.4 There is nothing in the tender document to suggest that the GEC values had to be tested for their achievability. All the six bidders declared eligible are

world leaders in the field and have sufficient expertise and know-how not only about the design and technology which they use but also about their capacity to validate their respective GEC values. Therefore, DMRC did not commit any error in considering that the GEC values offered by respondent no. 2 were achievable especially when such values offered by some of the bidders for X and Y factors were lower than those offered by respondent no. 2. At any rate the DMRC had sufficiently protected itself because under the terms and conditions stipulated in the tender notice failure of the successful tender to make good the GEC values offered by them would result in a penalty which was higher than the GEC value factor that was loaded to the price bid. Therefore, there was no basis for the DMRC to go any further than it did in protecting its interest. In the absence of any specific stipulation or requirement for validation of the GEC values by the DMRC and its experts or by any outside agency such a requirement could not be implied into the tender process. Inasmuch as the DMRC found the bid offered by respondent no. 2 to be acceptable, keeping in view the GEC values offered by it, the former had committed no illegality in the evaluation of the bids or in making its choice of the contractor. [para 24] [848-G-H; 849-A-D]

1.5 Even assuming that the process of validation of the GEC values and their achievability was an implied condition in the evaluation process, DMRC had on the basis of an internal simulation satisfied itself that the GEC values were not unachievable. The High Court has referred to the simulation results and the original record has also been produced by DMRC before this Court. There is no illegality or irregularity in the process of verification conducted by the DMRC to test the achievability of the GEC values. [para 25] [849-E-F]

1.6 Therefore, this Court is satisfied that the process by which the bids were evaluated and eventually accepted was transparent, fair and reasonable and does not, therefore, call for any interference from this Court. [para 25] [829-A]

2.1 Once the Government had known that the entire issue regarding the validity of the process adopted by DMRC including the transparency and fairness of the process of evaluation of the bids was sub judice before the High Court and later before this Court, it ought to have kept its hands off and let the law take its course. It could have doubtless placed all such material as was relevant, before the High Court and invited a judicial pronouncement on the subject instead of starting a parallel exercise. The Government could even approach the High Court and seek its permission to review the process of evaluation either by itself or through an expert Committee if it felt that any such process would help the court in determining the issues falling for consideration before the court more effectively. Nothing of that sort was, however, done. On the contrary even when the Secretary to the MoUD pointed out that the matter is subjudice and any further action in the matter could await the pronouncement of the court, the Minister heading MoUD directed the constitution of the Committee. [para 26] [850-E-H; 851-A]

2.2 The terms of reference give a clear indication that the process initiated by the Government was a parallel process of the adjudication of the very same issue as fell for consideration before the High Court and at a later stage before this Court. The Government could not have done this. Continuance of the process of review even after the High Court had delivered its judgment amounted to subjecting the judicial pronouncement to an administrative review. There was no question of any

such judicial determination or adjudication being subjected to any administrative review albeit in the name of a Committee constituted for the purpose. [para 27] [851-B-C, F-G]

2.3 Suffice it to say that the Government ought to have stayed its hands once the matter landed in the Court. Inasmuch as the Government did nothing of this kind, it did not act properly. [para 28] [852-B]

2.4 Even assuming that the Committee has taken expert advice regarding the tenability of the GEC values offered by respondent no. 2, it would simply mean that there is a conflict between the views taken by the experts of DMRC and those consulted by the Committee. Any such conflict cannot be resolved by this Court in exercise of its powers of judicial review. So long as the view taken by the experts of the authority competent to take a final decision is a possible view, the very fact that some other experts have expressed doubts about the sustainability of the GEC values will not be enough to declare that the values offered by respondent no. 2 are unachievable. [para 29] [852-E-G]

Federation of Railway Officers Association v. Union of India **(2003) 2 SCR 1085;** *N.D. Jayal v. Union of India* **2003 (3) Suppl. SCR 152 = (2004) 9 SCC 362 - referred to.**

2.5 Besides, the preparation and submission of a report that does not even take the view point of the party affected by it into consideration can hardly provide to this Court a good reason to scuttle the entire process at this stage when respondent no. 2, the successful bidder, has already taken substantial steps in the direction of executing the works allotted to it. [para 31] [854-A-B]

Amrik Singh Lyallpuri v. Union of India & Ors. **2011 (5) SCR 560 = (2011) 6 SCC 535 and** *Union of India v. K.M. Shankarappa* **2000 (5) Suppl. SCR 11[illegible]2;**

The King v. Parmanand and Ors. **AIR 1949 Patna 222 and** *D. Jones Shield v. N. Ramesam & Ors.* **AIR 1955 AP 156; In Re: P.C. Sen 1969 SCR 649 =AIR 1970 SC 1821 and** *Jang Bahadur Singh v. Baij Nath Tiwari* **1969 SCR 134 = AIR 1969 SC 30;** *Asia Foundation & Construction Ltd. v. Trafalgar House Construction* **1996 (10) Suppl. SCR 209 = (1997) 1 SCC 738;** *Monarch Infrastructure (P) Ltd. v. Ulhasnagar Municipal Corpn.* **2000 (3) SCR 1159 = (2000) 5 SCC 287;** *Jagdish Mandal v. State of Orissa* **2006 (10) Suppl. SCR 606 = (2007) 14 SCC 517 and** *Heinz India (P) Ltd. v. State of U.P.* **2012 (3) SCR 898 = (2012) 5 SCC 443- cited.**

Case Law Reference:

2011 (5) SCR 560	**cited**	**Para 16**
2000 (5) Suppl. SCR 117	**cited**	**Para 16**
AIR 1949 Patna 222	**cited**	**Para 16**
AIR 1955 AP 156	**cited**	**Para 16**
1969 SCR 649	**cited**	**Para 16**
1969 SCR 134	**cited**	**para 16**
1994 (2) Suppl. SCR 122	**cited**	**Para 16**
1996 (10) Suppl. SCR 209	**cited**	**Para 16**
2000 (3) SCR 1159	**cited**	**Para 16**
2006 (10) Suppl. SCR 606	**cited**	**Para 16**
2012 (3) SCR 898	**cited**	**Para 16**
1979 (3) SCR 1014	**relied on**	**para 17**
1997 (1) Suppl. SCR 671	**referred to**	**para 19**
2006 (10) Suppl. SCR 606	**referred to**	**para 21**
2012 (3) SCR 898	**referred to**	**para 21**

(1999) 1 All ER 481	**referred to**	**para 21**
(2003) 2 SCR 1085	**referred to**	**Para 29**
2003 (3) Suppl. SCR 152	**referred to**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2068 of 2014.

From the Judgment and Order dated 15.05.2013 in WPC No. 1853/2013 of the High Court of Delhi at New Delhi.

Mohan Parasaran, SG, U.U. Lalit, T.R. Andhyarujina, Maninder Singh, K.K. Venugopal, Dr. Rajeev Dhawan, C. Mukund, Pankaj Jain, Firdouse Qutb Wari, P.V. Saravanaraja, Anvesh Verma, Ashok Jain, Bijoy Kumar Jain, V.K. Biju, D.L. Chidanand, Ashwin Kumar D.S., Rajiv Nanda, Padma Laxmi Nigam, Sushma Surim Bhawna Singh Dev, Tarun Johri, Payal Chandra, Soumik Ghosal, Ankur Gupta, Santosh Kumar for the appearing parties.

The Judgment of the Court was delivered by

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

2. A Division Bench of the High Court of Delhi has by a common order passed in Writ Petition (C) No.1853 of 2013 filed by the appellant and Writ Petition No.2615 of 2013 filed by Alstom Transport India Ltd. declined to interfere with the award of a contract for the supply of 486 Standard Gauge Cars Electrical Multiple Units meant for use in Phase-III of the Mass Rapid Transit System ('MRTS' for short) for Delhi and its extension corridors. The High Court has taken the view that the process of evaluation of the bids received from eligible bidders culminating in the award of a contract in favour of respondent No.2-Hyundai Rotem Company ('HR' for short) was transparent and did not suffer from any illegality, irregularity or perversity of any kind to warrant interference by it. The High Court held that the bidders were well aware of a[illegible]e

tender conditions which were free from any vagueness or uncertainty. The parameters of evaluation conditions were also held to have been applied uniformly to all the bidders under a procedure that was open, transparent and fair as required by law. The present appeal assails the correctness of that judgment and order. Alstom Transport India Ltd. & Ors.-Writ-Petitioners in connected Writ Petition No.2615 of 2013 have, however, remained content with the view taken by the High Court and have not chosen to appeal.

3. Respondent-Delhi Metro Rail Corporation ('DMRC' for short) has planned to implement Phase-III of the MRTS for Delhi to keep pace with the ever increasing traffic demands in Delhi. Phase-III of the MRTS, Delhi comprises metro corridors of Mukundpur-Rajori Garden-Dhaula Kuan - Maujpur - Gokulpuri and Janakpuri (West)-Munirka - Kalkaji - Kalindi Kunj - Botanical Garden - (Noida). The project, it is common ground, is financed with the help of a loan secured by the DMRC from Japan International Cooperation Agency ('JICA' for short). The loan agreement, inter alia, stipulates the bid procedure to be followed by DMRC. What is noteworthy is that the procedure, inter alia, provides for submission of tenders to JICA for review, concurrence and analysis of bids by the DMRC and reserves with the JICA the discretion to convey its views regarding the analysis of the bids and the proposal for award of the works.

4. In keeping with the requirements of the agreement between DMRC and JICA, the former invited sealed tenders in two parts (Technical & Price Bid) on International Competitive Bid ('ICB' for short) basis for the design, manufacture, supply, testing, commissioning and training of 486 number of Standard Gauge Cars Electrical Multiple units referred to earlier at an estimated budget cost of Rs.3500 crores funded by JICA. Pre-bid meetings were held to answer the queries, if any, raised by the bidders. The DMRC in the meantime issued as many as 9 Addenda which necessitated the change in the dates fixed

for submission of bids to enable the bidders to formulate their offers and make their bids in accordance with the terms and conditions finally stipulated for the purpose. DMRC eventually received eight bids including one submitted by the appellant before us. The technical bids were opened on 18th September, 2012 whereupon only six of the bidders including the appellant were declared to be eligible. With the opening of the technical bids GEC values which the bidders were required to submit as a part of their technical bid and which were relevant and to a great extent critical for evaluation of the price bid under the applicable terms and conditions also became known to the bidders. The financial bids offered by these six bidders were then opened on 9th February, 2013 and the bid amount along with GEC values offered by each bidder announced by the DMRC. The price quotations of the six bidders found eligible were as under:

Bidder	Grand Total in INR	INR per Car (with-out loading)	Position before Loading due to differ-ence in GEC values
Siemens Consortium	3625,27,92,409	7,45,94,223	L-1
Bombardier Consortium	4242,27,83,378	8,72,89,678	L-2
Hyundai ROTEM	4290,57,94,689	8,82,83,528	L-3
Alstom Consortium	4373,87,65,001	8,99,97,459	L-4
CAF Consortium	4614,18,66,794	9,49,42,113	L-5
Hitachi + BHEL	4891,32,60,656	10,06,44,569	L-6

5. Significantly, however, the above did not represent the true inter se position of the bidders. That was so because apart from the price quotation, the terms and conditions of the tender notice required loading of GEC values duly converted into Indian rupee to the price quotation of each eligible bidder. The GEC values in turn comprised two distinct components, namely, 'X' factor representing the electricity e

operation of the train without HVAC and 'Y' factor for operation of HVAC. The GEC values offered by the six bidders found technically compliant were as under:

S.No.	Bidder	Other than HVAC ('X)	HVAC ('Y')	Total
1	ALSTOM	1434	595	2029
2	BTC	1621	564	2185
3	CAFC	1159	790	1949
4	HBC	1767	514	2281
5	HRC	1259	567	1826
6	SIEMENS	1560	786	2346

6. In terms of Annexure ITT-8 the GEC value of respondent No.2 which was the lowest was taken as the baseline for the purpose of loading the rupee equivalent of the higher values offered by other bidders on to their price bids. The Indian rupee conversion of the said value above the baseline, proportionate to the higher GEC values was worked out as under:

S.No.	Bidder	GEC ('X' + 'Y') KWH	GEC for loading	INR
1	ALSTOM	2029	203	6,911,264,587.08
2	BTC	2185	359	12,222,384,171.24
3	CAFC	1949	123	4,187,613,518.28
4	HBC	2281	455	15,490,765453.80
5	HRC	1826	O (baseline)	0
6	SIEMENS	2346	520	17,703,731,947.20

7. The position that emerged after the GEC values component was loaded to the price bid of the bidder was as under:

Bidder	Grand Total in INR	INR per Car (without loading)	Position before Loading	Grand Total (with energy loading) in INR	INR per Car (with loading)	Position after loading	Total Energy (kWH)	SEC value (kWH/ 1000 GTKM)
Siemens Consortium	3625,27,92,409	7,45,94,223	L-1	5395,65,24,355	11,10,21,655	L-4	2346	55.71
Bombardier Consortium	4242,27,83,378	8,72,89,678	L-2	5464,51,67,548	11,24,38,616	L-5	2185	51.89
Hyundai ROTEM	4290,57,94,689	8,82,83,528	L-3	4290,57,94,690	8,82,83,528	L-1	1826	43.36
Alstom Consortium	4373,87,65,001	8,99,97,459	L-4	5065,00,29,588	10,42,18,168	L-3	2029	48.18
CAF Consortium	4614,18,66,794	9,49,42,113	L-5	5032,94,80,313	10,35,58,601	L-2	1949	46.28
Hitachi + BHEL	4891,32,60,656	10,06,44,569	L-6	6440,40,26,108	13,25,18,572	L-6	2281	54.17

8. It is evident from a comparative study of the charts extracted above, that while the appellant was L-1 in the price bid, it went down to L-4 after GEC value was loaded to its price bid. On the contrary respondent No.2-HR who was L-3 in the price bid rose to L-1 position on account of its low GEC value in comparison to a higher GEC value offered by the appellant.

9. Allotment of the award in favour of HR as the lowest bidder, thus, appeared as a writing on the wall to the appellant who sent a communication dated 12th February, 2013 to DMRC alleging that the GEC values offered by HR were untenable and unsustainable and pointing out that since the appellant's price bid was lesser than that of the HR by 665 crores (approx.) it should be taken as L-1 instead of determining the inter se position of the bidders on the basis of a supposedly anticipated saving in the consumption of energy on a lifecycle of 30 years. Yet another letter dated 25th February, 2013 the appellant called for evaluation of energy values by an independent third party agency so as to ascertain whether the GEC values offered by HR were achievable. Yet another letter dated 1st March, 2013 to the same effect having failed to cut any ice with the DMRC, the appellant preferred Writ Petition No.1853 of 2013 before the High Court of Delhi. That writ petition was notified for hearing on 1st May, 2013. In the meantime DMRC issued a Letter of Acceptance in favour of HR under intimation to the appellant. The appellant, therefore, sought a restraint order against the award of the contract before the High Court who in turn accepted an undertaking given by the counsel for the DMRC and HR that they will not act in pursuance of the letter of award pending disposal of the writ petition.

10. Alstom Transport India Ltd. was the only other bidder aggrieved by the award of the contract who filed Writ Petition No.2615 of 2013 challenging the tender process. Both the writ petitions were eventually heard by the High Court on 1st May, 2013 and dismissed by the order under appeal before us.

11. Appearing for the appellant, Mr. U.U. Lalit, learned

senior counsel, fairly conceded that the appellant had not alleged any mala fides, bias or bad faith in the matter of evaluation of the bids by the DMRC or any process connected therewith nor even in the award of the contract in favour of HR, the successful bidder. He contended that the tender notice no doubt required GEC values to be offered by the bidders to be made use of in the process of the evaluation of the bids but such values were not sacrosanct or immune from scrutiny and evaluation to determine whether the same were at all achievable. He submitted that since all the six bidders competing for the contract are significant players in the international market, they could with a reasonable amount of certainty say whether or not the GEC values offered by the bidders were sustainable. It was contended by Mr. Lalit that while the GEC value offered by the appellant was the highest, the one offered by the respondent successful bidder for 'X' factor was wholly untenable. He urged that the terms of the tender notice required the GEC values offered by the bidders to be validated before they could be used for processing the bids. He drew considerable support from a report submitted by the Director, Ministry of Urban Development, Government of India, to suggest that the stimulation test conducted by DMRC as a part of the process of verification and validation of the GEC value offered by HR was not accurate and urged that the Government of India had appointed a two-member Committee to check the evaluation process of the bids. The report of the Committee filed by the Government in this Court in a sealed cover could, according to the learned Counsel, throw considerable light on the subject and help this Court in deciding whether an independent verification of the GEC values was necessary.

12. Mr. Andhyarujina, learned counsel for the respondent-DMRC, on the other hand, argued that the bids offered by the eligible tenderers were evaluated by three different Committees i.e. the Evaluation Committee, the Appraisal Committee and finally by the Tender Committee in a

manner. On receipt of the representations from the appellant-Siemens, Bombardier, Alstom and Hitachi regarding the GEC values offered by HR, the Board of Directors of DMRC constituted a sub-Committee to consider the said representations. The Board sub-Committee consisted of six directors out of whom three were Functional Directors besides MD of the DMRC, a nominee Director of MoUD of Indian Railways and one independent Director. The Sub-Committee met on 4th and 5th March, 2013 and thoroughly examined the issues raised in the representation and found the detailed explanations provided in the Tender Committee Minutes to be satisfactory. The Sub-Committee, therefore, agreed with the recommendations of the Tender Committee culminating in the issue of a Letter of Acceptance to respondent-HR. Our attention was drawn to the counter- affidavit filed by the DMRC in which the process of evaluation of the bids and the GEC values has been set out. The counter-affidavit further states that the DMRC was fully satisfied about the achievability of the GEC values offered by HR. There was, therefore, no room for validation of the GEC values by any outside agency.

13. It was further contended by Mr. Andhyarujina that the tender conditions specifically provide for levy of a penalty in case of failure of the committed GEC values. He referred to ERTC 3.24.1 according to which the defaulting Contractor shall be liable to pay penalty at the rate of Rs.4.03 crores per unit of electricity committed in excess of the GEC values declared by it. The penalty stipulated thus works out to be approximately 18.47% which is significantly higher than the rupee component loaded for each unit, argued the learned counsel. This implies that the lowest tenderer is under an onerous obligation to make good the GEC values or else end up paying a penalty at a rate which is higher than the amount by which the financial bid has been loaded on a per unit of energy basis. The Letter of Acceptance issued to HR also makes a specific provision for levy of penalty and, thus, fully secures the interest of the DMRC.

14. Reliance upon the additional documents and the report of the Committee appointed by the MoUD was, according to Mr. Andhyarujina, wholly misplaced. He submitted that there was no occasion for the Government to appoint a Committee for evaluation of the bids received by DMRC which was an autonomous entity. The appointment of the Committee at the instance of the Minister in disregard of the observations made by the Secretary MoUD was not proper, argued the learned counsel, especially when the matter was pending adjudication before the High Court. The appointment of the Committee was in any case not disclosed to the High Court by the Union of India on 1st May, 2013 when the matter was taken up for hearing. It was contended that the DMRC had at all times maintained that there was no question of any enquiry by an outside body regarding the evaluation of the bids received by it not even by the Government of India. He drew support for that submission from the following statement made in the affidavit filed by the Union of India in this Court:

> *"All tenders are floated and finalized by respective Metro Rail Corporations including DMRC. MoUD has no role in award/cancellation of any contract/tender."*

15. It was argued that the DMRC had also in its reply dated 14th August, 2013 sent to the Government clearly stated that it would not respond to the preliminary observations of the Committee as the matter had in the meantime travelled to this Court and was sub judice. Legal opinion obtained by the DMRC from a Senior Advocate of this Court, also advised that in a matter that is sub judice, any report by any outside Enquiry Committee appointed by the Government would be impermissible and improper nor would it be advisable for DMRC to participate in any such exercise. In the premises it was contended that the Report by the Enquiry Committee submitted to this Court in a sealed cover need not be looked into as the same was wholly extraneous to a judicial review of the process of evaluation and eventual

by DMRC, the authority competent to do so. Relying upon the decisions of this Court in *Amrik Singh Lyallpuri v. Union of India & Ors.* (2011) 6 SCC 535 and *Union of India v. K.M. Shankarappa* (2001) 1 SCC 582, it was argued that administrative review of a judicial decision was not legally permissible. It was also contended by Mr. Andhyarujina that pursuant to the allotment made in his favour, HR had taken substantial steps towards implementation of the project and that interference with the award of the contract at this belated stage was neither in public interest nor otherwise justified in the facts and circumstances of the case.

16. Appearing for the respondent No.2-HR, Mr. Venugopal, learned senior counsel adopted the submissions of Mr. Andhyarujina and took strong exception to the constitution of a Committee by the Minister of Urban Development, Government of India on a subject which was subjudice before the High Court. It was contended by Mr. Venugopal that the constitution of the Committee was not only against the sound advice tendered by the Secretary to the Government, Minister of Urban Development Department but was tantamount to interference with the course of justice. Relying upon the decision of the Full Bench of the High Court of Patna in *The King v. Parmanand and Ors.* AIR 1949 Patna 222 and *D. Jones Shield v. N. Ramesam & Ors.* AIR 1955 AP 156; In Re: P.C. Sen AIR 1970 SC 1821 and Jang Bahadur Singh v. Baij Nath Tiwari AIR 1969 SC 30, Mr. Venugopal argued that when a matter is pending adjudication before a Court of law, nothing can be done which might disturb the course of justice by either interfering with the judicial process or prejudging the merits of the case or by usurping the functions of the Court having seisin over the proceedings. Any such practice, argued the learned counsel, was fraught with danger and would amount to opening the door for contempt for those responsible for such interference. It was further contended by Mr. Venugopal that judicial review in tender cases was limited to examining the decision-making process and not the decision itself. Reliance in support of that

submission was placed by the learned counsel upon the decisions of this Court in *Tata Cellular v. Union of India* (1994) 6 SCC 651; *Asia Foundation & Construction Ltd. v. Trafalgar House Construction* (1997) 1 SCC 738; *Monarch Infrastructure (P) Ltd. v. Ulhasnagar Municipal Corpn.,* (2000) 5 SCC 287; *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517 and *Heinz India (P) Ltd. v. State of U.P.* (2012) 5 SCC 443. It was submitted that the decision making process in the instant case was transparent, fair and reasonable and that the High Court had after a careful examination of all aspects correctly held that there was no illegality or irregularity in the said process to warrant interference.

17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.* (1979) 3 SCC 489 which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in *Tata Cellular's* case (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following thr

(i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;

(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and

(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.

18. The principles governing judicial review were then formulated in the following words:

(i) The modern trend points to judicial restraint in administrative action.

(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19. In *M.P. Oil Extraction v. State of M.P. & Ors.* (1997) 7 SCC 592, this Court held that if an objective and rational foundation for the fixation of royalty is disclosed, the Court will not interfere with the exercise of governmental decision by undertaking an exercise to determine whether or not a better fixation was possible in the circumstances. This Court struck a note of caution that in economic and policy matters the scope of judicial review was limited.

20. It is unnecessary and platitudinous for us to burden this judgment with reference to the decisions of this Court on the subject for the governing principles are so well-known and well-settled that any review of the law on the subject is bound to be simply repetitive without any meaningful contribution to the existing legal literature on the subject. We remain content by referring to two only of a plentitude of judicial pronouncements on the subject in which the legal position has been succinctly restated. One of these decisions was delivered in *Jagdish Mandal v. State of Orissa & Ors.* (2007) 14 SCC 517, where too this Court was dealing with the exercise of power of judicial review in matters relating to tenders a[illegible]s.

This Court identified the special features should be borne in mind while judicially reviewing award of contracts. We can do no better than extract the following observations of this Court in this regard:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."
>
> (emphasis supplied)

21. More recently in *Heinz India (P) Ltd. & Anr. v. State of U.P. & Ors.* (2012) 5 SCC 443, this Court speaking through one of us (Thakur, J.) examined the legal dimensions of judicial review and quoted with approval the following passage from *Reid v. Secy. of State for Scotland* (1999) 1 All ER 481 which succinctly sums up the law.

> *"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."*

22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest.

23. The High Court has, in the case at hand, undertaken that exercise and concluded that there was neither any illegality nor any irregularity in the process of evaluation of the bids or the final allotment of the contract. That view has come to be assailed by the appellant on what is es[illegible]t

raised by Mr. Lalit in support of the appeal. The contention, as noticed earlier, is that while no malafide or extraneous considerations have prevailed to vitiate the decision of the DMRC allotting the contract in favour of HR, the process of evaluation of the bids offered by the eligible bidders should have in the facts and circumstances of the case included validation of the GEC values offered by HR to determine whether they were achievable having regard to the ground realities and the laws of physics relevant to the consumption of energy. That contention does not suggest any illegality in the process of allotment of the contract in favour of HR, for no violation of any law, rule or regulation governing the process of invitation of tenders by the DMRC or its evaluation and acceptance has been alleged or argued before us. No such statutory or other provision has been brought to our notice which could possibly provide to the appellant a reason to contend that the allotment of the contract was itself illegal or in breach of any such provision or procedure prescribed thereunder. It is no body's case that the decision-making authority had not understood the law that regulates its decision making power or failed to give effect to it. We have, therefore, no hesitation in holding that the allotment of contract did not suffer from any illegality as it is understood in the matter of judicial review of administrative action and as that expression has been used by this Court in *Tata Cellular's* case (supra). It is also not the case of the petitioner that the decision taken by the DMRC is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind could have arrived at the same. Perversity or irrationality in the decision or the decision making process is also not a ground that can be invoked in the case at hand.

24. The contention urged by Mr. Lalit may at best constitute an irregularity in the process of evaluation of the bids. That an irregularity can itself, in certain situations result in invalidating a process, cannot be disputed. The question, however, is whether there was any irregularity in the evaluation of the bids

in the present case and if so whether the same was sufficient to invalidate the evaluation process or the ultimate award of the contract. Whether or not there was any irregularity in the process of evaluation of the bids shall in turn have to be examined by a reference to the conditions of the tender notice under which the tenders were invited, received, processed, evaluated and eventually accepted. It is common ground that the price bid offered by the tenderers was not itself determinative. What was equally important was the GEC values comprising X and Y factors which the tenderers had to disclose in their technical bids. That the values offered had to be converted into Indian Rupees and loaded to the price bid of the tenderers is also beyond question. That each one of the bidders had offered their GEC values comprising X and Y factors separately was also beyond doubt. There is no error even in the conversion of such values in terms of Indian Rupees nor is there any dispute about the effect of such loading of values to the price bid of all the tenderers because of which loading the bid offered by HR eventually emerged as L-1 with appellant-Siemens sliding to L-4 position. That being so, the process of evaluation of bids could not be faulted as the same was strictly in accordance with the norms stipulated for such evaluation. Even Mr. Lalit fairly conceded that there was nothing that could be criticized in that process. What DMRC, according to him, should have done was to check whether the GEC values offered by the bidders were achievable. Inasmuch as no such verification was undertaken the evaluation process was flawed. There is, in our opinion, no merit in that contention. The reasons are not far to seek. In the first place, the contention urged by Mr. Lalit does not find support from any provision in the tender notice. There is nothing in the tender document to suggest that the GEC values had to be tested for their achievability. As rightly contended by Mr. Lalit all the six bidders declared eligible are world leaders in the field and have sufficient expertise and know-how not only about the design and technology which they use but also about their capacity to validate their respective GEC values. If that be so,

DMRC could be supremely confident that the GEC values offered by HR were achievable especially when such values offered by some of the bidders for X and Y factors were lower than those offered by HR. At any rate the DMRC had sufficiently protected itself because under the terms and conditions stipulated in the tender notice failure of the successful tender to make good the GEC values offered by them would result in a penalty which was higher than the GEC value factor that was loaded to the price bid. We, therefore, do not see any real basis for the contention that the DMRC was supposed to go any further than it did in protecting its interest. In the absence of any specific stipulation or requirement for validation of the GEC values by the DMRC and its experts or by any outside agency such a requirement could not be implied into the tender process. Inasmuch as the DMRC found the bid offered by HR to be acceptable, keeping in view the GEC values offered by it, the former had committed no illegality in the evaluation of the bids or in making its choice of the contractor.

25. Secondly, because even assuming that the process of validation of the GEC values and their achievability was an implied condition in the evaluation process, DMRC had on the basis of an internal simulation satisfied itself that the GEC values were not unachievable. The High Court has referred to the simulation results and so has our attention been drawn to the said result from the original record produced by DMRC. We do not see any illegality or irregularity in the process of verification conducted by the DMRC to test the achievability of the GEC values. It is true that DMRC had conducted the simulation in regard to the GEC values offered by HR only but then in the absence of any condition in the tender notice requiring DMRC to conduct such verification even in regard to other GEC values, there was no need for it to undertake any such exercise. DMRC was, in our opinion, entitled to adopt such methods as were reasonable to satisfy itself above about the GEC values and their achievability offered by lowest tenderer in whose favour it was considering the award of the

contract. The upshot of the above discussion, therefore, is that the process by which the bids were evaluated and eventually accepted was transparent, fair and reasonable and does not, therefore, call for any interference from this Court.

26. That brings us to the question whether the Government of India was justified in appointing a Committee to test the evaluation of bids and, if so, whether this Court ought to look into the Report of the Committee. There is more than one aspect that needs to be kept in view in this regard. The first and foremost is the fact that the Committee was appointed at a stage when the matter was already pending before the High Court. Considerable time was spent by learned counsel for the parties in debating whether the constitution of the Committee by the Government itself tantamounted to interference with the course of justice, hence contempt. We do not, however, consider it necessary to pronounce upon that aspect in these proceedings especially because we have not been called upon to initiate such contempt proceedings. All that we need say is that once the Government had known that the entire issue regarding the validity of the process adopted by DMRC including the transparency and fairness of the process of evaluation of the bids was subjudice before the High Court of Delhi and later before this Court, it ought to have kept its hands off and let the law take its course. It could have doubtless placed all such material as was relevant to that question before the High Court and invited a judicial pronouncement on the subject instead of starting a parallel exercise. The Government could even approach the High Court and seek its permission to review the process of evaluation either by itself or through an expert Committee if it felt that any such process would help the Court in determining the issues falling for consideration before the Court more effectively. Nothing of that sort was, however, done. On the contrary even when the Secretary to the MoUD pointed out that the matter is subjudice and any further action in the matter could await the pronouncement of the Court, the Hon'ble Minister heading MoUD directed e

Committee with the following terms:

"2(1) To examine if a fair, equitable and transparent tender process was followed by DMRC, as per the prescribed guidelines".

27. We have no manner of doubt that the terms of reference give a clear indication that the process initiated by the Government was a parallel process of the adjudication of the very same issue as fell for consideration before the High Court and at a later stage before this Court. We fail to appreciate how the Government could have possibly done this. Confronted with this situation Mr. Mohan Parasaran, learned Solicitor General, argued that a reference to the Committee was not meant to subvert judicial process but to only find ways and means to formulate policies and procedures for future allotment of contracts. We have no hesitation in rejecting that submission. The Reference Order extracted above speaks for itself. It no where states that the Committee has to look at anything beyond the process of evaluation of tenders received by DMRC. It does not even remotely suggest that the Government is concerned about the procedures that may be followed in the future or anxious to devise transparent methods by which such contract should be allotted. What is notable is that the Committee's hands were not stayed by the Government even when the High Court had pronounced upon the validity of the procedures adopted by the DMRC and the matter reached this Court. Continuance of the process of review even after the High Court had delivered its judgment amounted to subjecting the judicial pronouncement to an administrative review. There was no question of any such judicial determination or adjudication being subjected to any administrative review albeit in the name of a Committee constituted for the purpose.

28. Mr. Parasaran argued that the Committee's proceedings did not amount to sitting in appeal over the judgment of the High Court. The Committee may have not said anything adverse to view taken by the High Court but if the

Committee were to find fault with the evaluation process which the High Court has held to be valid it indirectly amounted to putting a question mark on the judgment of the High Court itself. Suffice it to say what the Government ought to have stayed its hands once the matter landed in the Court. Inasmuch as the Government did nothing of this kind, it did not act properly. Beyond that we do not consider it necessary or proper to say anything at this stage.

29. It was contended by Mr. Lalit that the report submitted by the Committee appointed by the Government ought to be taken as expert opinion on the subject and given due weight. That position was disputed by Mr. Andhyarujina appearing for DMRC and Mr. Venugopal appearing for HR. That the Committee comprised a former Finance Secretary to the Government of India and a Civil Engineer, none of whom could claim to be expert in the field relevant to the achievability of the GEC values, was not disputed by Mr. Parasaran who urged that the Committee may have taken the opinion of some experts on the subject. Even assuming that the Committee has taken expert advice regarding the tenability of the GEC values offered by HR, it would simply mean that there is a conflict between the views taken by the experts of DMRC and those consulted by the Committee. Any such conflict cannot be resolved by this Court in exercise of its powers of judicial review. So long as the view taken by the experts of the authority competent to take a final decision is a possible view the very fact that some other experts have expressed doubts about the sustainability of the GEC values will not be enough for us to declare that the values offered by HR are indeed unachievable. This Court has in *Federation of Railway Officers Association v. Union of India* (2003) 2 SCR 1085, stated the wholesome principle applicable in such situations in the following words:

"Further, when technical questions arise and experts in the field have expressed various views and all those aspects have been taken into

Government in deciding the matter, could it still be said that this Court should re-examine to interfere with the same. The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, courts would keep off the same."

30. Reference may also be made to the decision of this Court in *N.D. Jayal v. Union of India* (2004) 9 SCC 362 where this Court observed:

"This Court cannot sit in judgment over the cutting edge of scientific analysis relating to the safety of any project. Experts in science may themselves differ in their opinions while taking decisions on matters related to safety and allied aspects. The opposing viewpoints of the experts will also have to be given due consideration after full application of mind. When the Government or the authorities concerned after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere."

31. Reliance by the appellant upon the report of the Committee is misplaced also for the reason that the same was ex parte. It is common ground that HR was never associated with the process of evaluation or verification if any conducted by the Committee. In the absence of any such opportunity to the party whose GEC values were being test checked for their achievability, the report can hardly provide a sound basis for a writ court to upset a decision which the competent authority has taken after due deliberations by not one but four different Committees including experts in the field. That apart, Mr. Parasaran fairly submitted that even the Government have not accepted the report submitted by the Committee so far. He urged that since the matter was pending in this Court, the Government has simply placed the report of the Committee in

a sealed cover for the Court to decide as to what value has to be attached to it. That being the position, the preparation and submission of a report that does not even take the view point of the party affected by it into consideration can hardly provide to this Court a good reason to scuttle the entire process at this stage when HR, the successful bidder, has already taken substantial steps in the direction of executing the works allotted to it.

32. Last but not the least, if the note submitted by the Director in the MoUD is an indication of what the Committee may have said, the difference in the GEC values pointed out in the report of the Director, may have led to CAF which was also an eligible bidder emerging as L-1 and not the appellant. In terms of cost of the project it would hardly make a sizable difference so as to justify a reversal of the steps that have already been taken for execution of a project that is of utmost importance for the people living in the national capital execution whereof can brook no delay especially when the same is being financed by an agency from outside the country.

33. In the result this appeal fails and is, hereby, dismissed with costs of Rs.5,00,000/- to be deposited within six weeks from today with the Supreme Court Advocates-on-Record Welfare Fund.

R.P. Appeal dismissed.