COMMERCIAL TAX OFFICER, RAJASTHAN
v.
M/S BINANI CEMENT LTD. & ANR.
(Civil Appeal No. 336 of 2003)

FEBRUARY 19, 2014

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

SALES TAX NEW INCENTIVE SCHEME FOR INDUSTRIES, 1989:

Item 1E (Annexure C) - New cement industry - Entitlement to exemption under the Scheme - Held: Item 1E classified the cement units for eligibility of tax exemption into three categories: small, medium and large - The said categories are comprehensive whereby small and medium cement units have been prescribed to have maximum Fixed Capital Investment (FCI) of Rs.60/- lakhs and Rs.5/- crores, respectively and FCI of large to be over Rs.5/- crores - As against items 1, 4, 6 and 7, which deal with units of all industries and not only cement, item 1E restricted to only cement units and therefore being a special entry override the general provision - In the instant case, the respondent-Company would only be eligible for grant of exemption under Item 1E as a large new cement unit in accordance with its FCI being above Rs.5/- crores.

INTERPRETATION OF STATUTES:

General entry over specific - Held: Where a Statute contains both a general provision as well as specific provision, the latter must prevail - In other words, where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control - The principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields

to special law should they operate in the same field on same subject.

Rule of Harmonious Construction - Conflict between independent provisions of law - Held: When there is an apparent conflict between two independent provisions of law, the special provision must prevail - This rule has application in construction of taxing statutes along with the proposition that the provisions must be given the most beneficial interpretation - While determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act - With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions - Once it is held that intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted - The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction.

The respondent-assessee established a new cement unit within Panchayat Samiti and commenced commercial production in 1997. The total Fixed Capital Investment (FCI) in the new industrial unit claimed by the respondent was Rs.532.52 crores. The respondent filed an application for grant of eligibility certificate for exemption from payment of central sales tax and Rajasthan sales tax to the State Level Screening Committee under the "Sales Tax New Incentive Scheme for Industries, 1989". However, the Screening Committee accepted only Rs.5553.72 Lakhs (Rs.55.32 crores) as FCI eligible for availing the benefits under the Scheme. On the said basis the Screening Committee certified that the respondent company was entitled t of

tax to the extent of 25% of the tax liability by treating the same to be a Large Scale Industry. In the appeal, the Board took the view that since the respondent has invested more than Rs.25 crores and has employed more than 250 workmen, it has the status of `New Prestigious Unit' and thus, falls within the definition of a Prestigious Unit and should be governed by Item 4 of Annexure `C' and entitled to avail 75% of total tax liability. This view was accepted by the High Court, while dismissing the tax revision petition filed by the revenue.

In the instant appeal, it was contended for the revenue that the respondent-new unit being New Cement Unit and further being large scale unit is entitled to the benefit of the incentive scheme under 1E of Annexure 'C' which provides for exemption upto 25% of total liabilities and cannot avail the benefit of exemption at the rate of 75% under Item 4 as Prestigious Unit; that the benefit to cement industry is confined to the extent envisaged under the Item 1E of Annexure-C as the said item is a specific provision relating to cement industry and thus would prevail over other provisions which are general in character in terms of reference to new cement unit.

Allowing the appeal, the Court

HELD: 1. The High Court has erred in reaching its conclusion by holding that (a) the respondent-company would fall into all the three categories of industries referred to in the Scheme, that is to say it is a new unit which is a 'Large Scale Unit', a "Prestigious New Unit" and also a "Very Prestigious Unit"; (b) the classification of a new unit, viz. small scale, medium scale and large scale under item 1E on the basis of scale of investment does not denude a new industrial unit of any type of the special status of "Pioneer", "Prestigious" and "Very Prestigious" unit under items 4 and 5 to also exclude operation of General entry; and (c) the special entry

would not exclude the applicability of general entry in context of the Scheme so as to exclude the operation of items 4, 6 and 7. Thereby wrongly implying that though there exists an overlap between the general and special provision, the general provision would also be sustained and the two would co-exist. [para 26] [20-H; 21-A-C]

2.1. The settled legal position in law, that is, if in a Statutory Rule or Statutory Notification, there are two expressions used, one in General Terms and the other in special words, under the rules of interpretation, it has to be understood that the special words were not meant to be included in the general expression. Alternatively, it can be said that where a Statute contains both a General Provision as well as specific provision, the latter must prevail. The Court should examine every word of a statute in its context and must use context in its widest sense. [paras 27, 28] [21-D-F]

Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. **1987 SCR (2) 1 - relied on.**

2.2. It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law should they operate in the same field on same subject. [Para 29] [22-D-F]

Vepa P. Sarathi, Interpretation of Statutes, 5th Ed., Eastern Book Company; N. S. Bindra's Interpretation of Statutes, 8th Ed., The Law Book Company; Craies on Statute Law, S.G.G.Edkar, 7th Ed., Sweet & Maxwell; Justice G.P. Singh, Principles of Statutory Interpretation, 13th Ed., LexisNexis; Craies on

Greenberg, 9th Ed., Thomson Sweet & Maxwell, Maxwell on Interpretation of Statutes, 12th Ed., Lexis Nexis - referred to.

2.3. Generally, the principle has found vast application in cases of there being two statutes: general or specific with the latter treating the common subject matter more specifically or minutely than the former. Corpus Juris Secundum, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonized, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy. [Para 30] [22-H; 23-A-C]

Edmond v. U.S., **520 U.S. 651,** *Warden, Lewisburg Penitentiary v. Marrero,* **417 U.S. 653 - referred to.**

2.4. When there is an apparent conflict between two independent provisions of law, the special provision must prevail. This rule has application in construction of taxing statutes along with the proposition that the provisions must be given the most beneficial interpretation. [Para 36, 37] [27-B, D]

Sarabjit Rick Singh v. Union of India **(2008) 2 SCC 417:2007 (13) SCR 321;** *St. Stephen's College v. University of Delhi* **(1992) 1 SCC 558: 1991 (3) Suppl. SCR 121;** *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P.* **(1961) 3 SCR 185;** *Waverly Jute Mills Co. Ltd. v. Raymon &*

Co. (India) (P) Ltd., **(1963) 3 SCR 209;** *Union of India v. India Fisheries (P) Ltd.* **AIR 1966 SC 35: 1965 SCR 679;** *CIT v. Shahzada Nand & Sons* **(1966) 3 SCR 379;** *CCE v. Jayant Oil Mills (P) Ltd.* **(1989) 3 SCC 343: 1989 (2) SCR 291 - relied on.**

Effort Shipping Co Ltd. v. Linden Management, SA **(1998) AC 605;** *Associated Minerals Consolidated Ltd. v. Wyong Shire Council* **[1975] AC 538, 554 - referred to.**

Bennion, Statutory Interpretation, 5th ed. **(2008) p. 1155 - referred to.**

2.5. While determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act. With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions. If it is not possible then an effort will have to be made to ascertain whether the legislature had intended to accord a special treatment vis-à-vis the general entries and a further endeavour will have to be made to find out whether the specific provision excludes the applicability of the general ones. When the intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted. The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and descriptable subject is regarded as an exception to and would prev

provision relating to a broad subject. [Paras 41-42] [31-B-G]

LIC v. D.J. Bahadur **(1981) 1 SCC 315 : 1981 (1) SCR 1083 ;** *Ashoka Marketing Ltd. v. Punjab National Bank* **(1990) 4 SCC 406: 1990 (3) SCR 649;** *U.P. SEB v. Hari Shankar Jain* **(1978) 4 SCC 16: 1979 (2) SCR 355;** *Gobind Sugar Mills Ltd. v. State of Bihar* **(1999) 7 SCC 76 - relied on.**

3. In the instant case, the item 1E is subject specific provision introduced by an amendment in 1996 to the Scheme. The said amendment removed "new cement industries" from the non-eligible Annexure-B and placed it into Annexure-C amongst the eligible industries. It classified the cement units for eligibility of tax exemption into three categories: small, medium and large. The said categories are comprehensive whereby small and medium cement units have been prescribed to have maximum FCIs of Rs.60/- lakhs and Rs.5/- crores, respectively and the FCI of large to be over Rs.5/- crores. The maximum ceiling for large cement units has been purposefully left open and thereby reflects that the intention clearly is to provide for an all-inclusive provision for new cement units so as to avoid any ambiguity in determination of appropriate provision for applicability to new cement units to seek exemption. It leaves no doubt that what is specific has to be seen in contradistinction with the other items/entries. The provision more specific than the other on the same subject would prevail. Here it is subject specific item and therefore as against items 1, 4, 6 and 7, which deal with units of all industries and not only cement, item 1E restricted to only cement units would be a specific and special entry and thus would override the general provision. [Paras 43, 44] [31-H; 32-A-E]

4. The proposition put forth by the respondent-Company that the construction which is most beneficial

to the assessee must be applied and adopted is not accepted. Howsoever, it is true that the canons of construction must be applied to extract most beneficial re-conciliation of provisions. In case of fiscal statute dealing with exemption, it would require interpretation benefiting the assessee. But here the introduction of the subject specific entry vide amendment into general scheme of exemption speaks volumes in respect of intention of the legislature to restrict the benefit to cement industries as available only under Item 1E, which categorically classified them into three as per their FCI. The specific entries being mutually exclusive have been placed so systematically arranged and classified in the Scheme. The construction of provisions must not be divorced from the object of introduction of subject specific provision while retaining other generalized provision that now specifically exclude the new cement industries, which could otherwise fall into its ambit, lest such interpretation would be not ab absurdo (i.e., interpretation avoiding absurd results). Therefore, the respondent-Company would only be eligible for grant of exemption under Item 1E as a large new cement unit in accordance with its FCI being above Rs.5/- crores. [paras 45-46] [32-E-H; 33-A-C]

Case Law Reference:

1987 SCR (2) 1	**Relied on**	**Para 28**
1991 (3) Suppl. SCR 121	**Relied on**	**Para 33**
(1961) 3 SCR 185	**Relied on**	**Para 34**
SA (1998) AC 605	**Referred to**	**Para 35**
(1975) AC 538, 554	**Referred to**	**Para 35**
(1963) 3 SCR 209	**Relied on**	**Para 36**
1965 SCR 679	**Reli**	

1989 (2) SCR 291	**Relied on**	**Para 36**
2007 (13) SCR 321	**Relied on**	**Para 36**
(1966) 3 SCR 379	**Relied on**	**Para 37**
1981 (1) SCR 1083	**Relied on**	**Para 38**
1990 (3) SCR 649	**Relied on**	**Para 39**
1979 (2) SCR 355	**Relied on**	**Para 40**
(1999) 7 SCC 76	**Relied on**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 336 of 2003.

From the Judgment and Order dated 02.07.2001 of the High Court of Judicature for Rajasthan at Jodhpur in SB Sales Tax Revision Petition No. 582 of 1999.

R.F. Nariman, Sushil Kumar Jain, Puneet Jain, Chhaya Kirti, Pratibha Jain for the Appellant.

Sudhir Gupta, Amarjit Singh Bedi, Aparajita Sharma, Harsha Vinoy for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. The Revenue is in appeal before us against the impugned judgment and order passed by the High Court of Rajasthan at Jodhpur in S.B. Sales Tax Revision Petition No.582 of 1999, dated 02.07.2001 whereby and whereunder the High Court has dismissed the revision petition filed by the Revenue and upheld the case of the respondent-assessee.

2. The respondent-assessee is a new industrial unit manufacturing cement situated within Panchayat Samiti, Pindwara, Rajasthan. It is an admitted fact that it started its commercial production on 27.05.1997. It is also not disputed that the respondent-assessee has fixed capital investment (for

short, "the FCI") exceeding Rs.500/- Crores and employs more than 250 employees.

3. The core issue arises out of the respondent-assessee's application for grant of eligibility certificate for exemption from payment of Central Sales Tax and Rajasthan Sales Tax to the State Level Screening Committee, Jaipur under the "Sales Tax New Incentive Scheme for Industries, 1989" (for short "the Scheme").

4. For convenience of discussion, we would first notice the relevant scheme and certain provisions and thereafter proceed towards analysis of the facts in the instant case. The Scheme for exemption from payment of sales tax was notified by the State of Rajasthan in exercise of its powers under sub-section(2) of Section 4 of the Rajasthan Sales Tax Act, 1954 (for short, "the Act"). The scheme exempts certain industrial units from payment of tax on the sale of goods manufactured by them within the State. It specifies and categorizes the districts, types of units, the extent of exemption from tax (in percentage), the maximum exemption available in terms of percentage of fixed capital investment (FCI) and the maximum time limit for availing such exemption from tax. By introducing a deeming clause, the scheme is deemed to have come into operation with effect from 05.03.1987 and to remain in force upto 31.03.1992. An amendment to the aforesaid notification was brought in by issuing notification - S. No.763: F.4(35) FD/ Gr.IV/87-38, dated 06.07.1989 and was made operative/ effective with effect from 05.03.1987 and to remain in force upto 31.03.1995. Yet another amendment was introduced by the State Government by issuing notification No.763: F.4(35)FD/ Gr.IV/87-38 dated 06.07.1989. Once again by introducing a deeming clause, the notification was made operative with effect from 05.03.1987 and to remain in force upto 31.03.1997. The State Government has issued another subsequent notification amending the earlier notification in exercise of its power under Section 4(2) of the Act in 763: F.4(35)FD/Gr.IV/87-38 dated 06.07.1989 which is deemed to have co

effect from 05.03.1987 and to remain in force upto 31.03.1998. Clause 1 of the scheme notification provides for its operation. Clause 2 is the dictionary clause which provides for meaning of the expressions like "New Industrial Unit", "Sick Industrial Unit", "Eligible Fixed Capital Investment" etc. For the purpose of this case, we require to notice the definitions of New Industrial Unit, Eligible Fixed Capital Investment, Prestigious Unit and Very Prestigious Unit.

5. Clause 2(a) defines the meaning of the expression 'New Industrial Unit' to mean an industrial unit which commences commercial production during the operative period of the scheme. The definition provides an exclusion of certain industries from the purview of New Industrial Unit. They are industrial units established by transferring or shifting or dismantling an existing industry and an industrial unit established on the site of an existing unit manufacturing similar goods. Explanation I and II appended to the notification need not be noticed by us, since the same is not necessary for the purpose of disposal of this appeal.

6. It is neither in dispute nor could be disputed by the revenue that the respondent is not a 'New Industrial Unit'.

7. Clause 2(e) defines eligible fixed capital investment (FCI) to mean investment made in land, new buildings, new plant and machinery and imported second hand machinery from outside the country and installation expenditure capitalized for plant and machinery and installation capitalized for plant and machinery's capitalized interest during construction not exceeding 5% of the total fixed capital investment; and technical know-how fees or drawing fees paid in lump-sum to foreign collaborators or foreign suppliers as approved by Government of India or paid to laboratories recognized by the State Government or Central Government and Rail Sidings, rolling stock, racks and railway engines, owned by the unit.

8. Clause 2(i) defines 'Prestigious Unit'. The same is as under:-

> "Prestigious Unit" means a "new industrial unit" first established in any Panchayat Samiti of the State during the period of this Scheme in which investment in fixed capital exceeds Rs.10/- cores with a minimum permanent employment of 250 persons or a "new industrial unit" having a fixed capital investment exceeding Rs.25.00 crores and with a minimum permanent employment of 250 persons or a new electronic industrial unit having fixed capital investment exceeding Rs.25/- cro res'.

9. The definition is in three parts. The first part speaks of a 'New Industrial Unit' first established in any Panchayat Samiti of the State. The establishment is of the unit during the period of the Scheme. The investment in fixed capital must exceed Rs.10/- crores and lastly the industrial unit has minimum permanent employment of 250 persons. In the second limb, the necessity of establishing the 'New Industrial Unit' in Panchayat Samiti is done away with. The unit should have capital investment exceeding Rs.25/- crores and should have minimum permanent employment of 250 persons. The third limb of this definition applies only to Electronic Industrial Unit having fixed capital investment exceeding Rs.25/- crores.

10. Clause 2(ii) defines the expression "Very Prestigious Unit" as under:

> "Very Prestigious Unit" means a new industrial unit established in any Panchayat Samiti of the State during the period of this Scheme in which investment in fixed capital is Rs.100/- crores or more. However, the progressive investment of the amount of project cost as appraised by the financial institutions shall be considered as investment made by a new unit, and as soon as such investment reaches or crosses the point of Rs.100/- crores during the operative period of the Scheme, the unit shall acquire the status of a Very Prestigious Unit for the purpose of claiming enhanced proportionate benefits under this Scheme".

11. The 'Very Prestigious Unit' means a new industrial unit established in any Panchayat Samiti in the State during the operative period of the Scheme and the other important requirement is the investment in such industrial unit must be Rs.100/- crores or more. The second limb of the definition clause provides for a new industrial unit to acquire the status of Very Prestigious Unit. The project cost as appraised by the financial institution shall be considered as investment made by a new unit. The progressive investment of the amount of project cost as soon as it reaches or crosses the point of Rs.100/- crores during the operation of the Scheme, the industrial unit shall acquire the status of a Very Prestigious Unit in order to claim enhanced proportionate benefits under the Scheme.

12. Clause 2(k) provides for constitution of Screening Committee for the purpose of consideration and to grant Eligibility Certificate under the New Incentive Scheme both for small and medium and also large scale industrial units to avail benefit under the New Incentive Scheme. The note appended to this sub-clause speaks of Small Scale Units, Medium Scale Units and Large Scale Units. Small Scale Units means a unit of which investment in plant and machinery does not exceed Rs.60/- Lakhs, a Medium Scale Unit means a unit of which the project cost does not exceed Rs. Five Crores and Large Scale Unit means a unit of which the project cost exceeds Rs. Five Crores.

13. Clause 3 of the notification speaks of applicability of the Scheme. By this clause, the State Government has made the Scheme applicable to (a) new industrial units, (b) industrial units going in for expansion or diversification and (c) sick units.

14. Clause 4 of the Scheme provides for exemption from Payment of Sales Tax as per parameters mentioned in Annexure 'C' to the said notification. This clause also envisages that the industrial unit which is granted an eligibility certificate by the Screening Committee is alone exempted to claim benefit of this notification.

15. Annexure 'C' provides for the quantum of sales tax exemption under the Scheme. Para C therein is relevant for the purpose of this case, therefore, omitting what is not necessary is extracted hereunder:-

ANNEXURE 'C'

QUANTUM OF SALES TAX EXEMPTION UNDER THE NEW INCENTIVE SCHEME

Item No.	Type of Units	Extent of the percentage of exemption from tax	Maximum exemption in terms of percentage of fixed capital investment (FCI)	Maximum time limit for availing exemption from tax
1.	New Units (Other than the units mentioned at items 1A to 1F)	75% of total tax liability	100% of FCI in case of medium and large scale units and 125% of FCI in case of small scale units	Seven years
1A.	Leather based New Unit	90% of total tax liability	100% of FCI in case of medium and large scale units and 125% of FCI in case of SSI units	Seven years
1B.	New Units in Ceramic, Glass, Electronics and Telecommuni-cations industry having a FCI between Rs.5	90% of total tax liability for first three years, 80% for next three years and 75% for the	100% of FCI	Nine years.

	crores and Rs.25 crores	remaining period.		
1C.	New Units in Ceramic, Glass, Electronics, and Telecommunications industry having a FCI of Rs.25 crores or more	100% of total tax liability for the first four years, 90% for the next four years and 75% for the remaining period.	100% of FCI	Eleven years.
1D	New labour intensive units as defined in the Capital Investment Subsidy Scheme, 1990	75% of total tax liability	145% of FCI in case of SSI units and 120% of FCI in case of medium and large scale units.	Seven years.
1E.	New Cement units except in Tribal Sub-Plan area.	75%, 50% & 25% of total tax liability in case of small, medium and large scale units respectively	125% of FCI in case of small scale units subject to an overall limit of Rs.1.00 crore and 100% of FCI in case of medium and large scale units.	Seven years.
1F.	Large scale granite and marble units.	25% of total tax liability	100% of FCI	Seven years.
2.	Units (Other than (a) cement unit except in Tribal Sub-Plan area and (b) large scale granite and marble units going in for expansion or diversification.	75% of total tax liability	100% of additional FCI	Seven years
2A.	Leather based units going in for expansion or diversification	75% of total tax liability	100% of additional FCI	Seven years
3.	Sick Units	50% of total tax liability	100% of FCI in case of medium and large scale units & 125% of FCI in case of small scale units.	Seven years
4.	New Units producing pollution control equipments/ Pioneering units/ Prestigious units.	75% of total tax liability	100% of FCI	Nine years
5.	New Very Prestigious units (Other than cement units except in Tribal Sub-plan Area)	90% of total tax liability	100% of FCI	Eleven years
6.	100% Export Oriented Prestigious/ Pioneering units	100% of total tax liability	100% of FCI	Nine years
7.	100% Export Oriented Very Prestigious Units	100% of total tax liability	100% of FCI	Eleven years

16. As we have observed earlier, Annexure-C has five columns. The second column speaks of type of units, the third column speaks of the extent of percentage of exemption from tax, the fourth column provides for the maximum exemption in terms of percentage of FCI and the fifth and the last column provides the maximum time limit for availing exemption from tax. Prior to issuance of notification dated 13.12.1996, Annexure 'C' was primarily confined to 'New Units'. After the introduction of notification dated 13.12.1996, the exclusion is made to the expression 'New Units' by specifically including certain type of industrial units by inserting items 1A to 1F. Item 1E specifically talks of New Cement Units except in Tribal Sub-Plan area. The extent of percentage of exemption from tax under Item 1E depends on the type of unit or the industry. If it is a small scale unit, the extent of exemption is 75%, if it is medium scale, the extent of exemption is 50%, and if it is large scale unit, the extent of percentage of exemption from tax is 25%. The maximum time limit for availing exemption from tax is restricted to seven years. Item 4 speaks of New Units producing pollution control equipments, pioneering units and prestigious units. The extent of the percentage of exemption from tax is 75% of total liability and the maximum time limit for availing exemption from tax is 9 years from the date of commercial production. Item 5 relates to New Very Prestigious Units other than cement units except in Tribal Sub-plan Area and the total percentage of exemption from tax is 90% of total tax liability and the maximum time limit for availing exemption from tax is eleven years.

17. Reverting to state the facts, the respondent-assessee had applied to the State Level Screening Committee for claiming benefit of exemption at 75% under the Scheme. The Committee rejected the claim of the respondent-assessee and observed that since the respondent-assessee is a large scale unit covered under the specific provision of Item 1E of Annexure 'C', it is entitled to 25% exemption, by its order dated 15.01.1998.

18. Being aggrieved by the said order, the respondent-assessee filed appeal before Rajasthan Tax Board, Ajmer (for short, 'the Board') in respect of the calculation of eligible FCI as well as the exemption under the Scheme. The Board while remanding the matter to the State Level Screening Committee held that the respondent-assessee is entitled to 75% tax exemption by holding the respondent-unit as Prestigious Unit under the Scheme.

19. The revenue being aggrieved by the decision of the Board, filed Tax Revision Petition before the High Court under Section 86(2) of the Act. The High Court dismissed the revision petition filed by the revenue and upheld the decision of the Board by holding that the respondent-unit is a Prestigious Unit and therefore, entitled to 75% tax exemption under the Scheme.

20. Aggrieved by the order so passed by the High Court, the Revenue is before us in this appeal.

21. We have heard learned counsel for the parties to the lis and perused the documents on record as well as the order(s) passed by the authorities and the High Court, respectively.

22. Shri Rohington Nariman, learned senior counsel appearing for the appellant submits that the case pleaded by respondent-unit right from the beginning of filing the application before the State Level Screening Committee was that the new unit had made an investment of more than Rs.500/- crores by way of fixed capital assets and therefore they should be placed under the category of 'Prestigious Unit' and accordingly be granted eligibility certificate to claim 75% of exemption from tax for the maximum time limit provided under the Scheme. In aid of this submission, the learned senior counsel would draw our attention to the application and the accompanying affidavit filed by the respondent-new unit before the State Level Screening Committee. He would further contend that the respondent-unit before all the authoriti[illegible]e

High Court had adopted the stand that the fixed capital investment excluding investment made before 05.03.1987 was more than Rs.532/- crores and therefore the respondent-unit is a Prestigious Unit entitled to an exemption of 75% of total tax liability. It is further contended that the respondent-new unit being New Cement Unit and further being large scale unit though can avail the benefit of the incentive scheme under 1E of Annexure 'C' which provides for exemption upto 25% of total liabilities, it cannot avail the benefit of exemption at the rate of 75% under Item 4 as Prestigious Unit. He would further submit that benefit to cement industry is confined to the extent envisaged under the Item 1E of Annexure-C as the said item is a specific provision relating to cement industry and thus would prevail over other provisions which are general in character in terms of reference to new cement unit. Alternatively, it is contended that the respondent-unit being new cement unit, it may fall under `New Very Prestigious Unit', however Item 5 of Annexure `C' speaks of the New Very Prestigious Units other than cement units except those located in Sub-Plan area, respondent-unit may not be entitled to avail the benefit of the Scheme.

23. Per contra, learned counsel, Shri Sudhir Gupta would justify the reasoning and the conclusion reached by the High Court while rejecting the revenue's revision petition and thereby confirming the view expressed by the Board. He would, inter alia, submit that Item 1E is only an exception to the general rule envisaged in Item 1 and not an exception to the other Items in the Annexure-C, i.e., Items 2 to 7 as it is not intended to govern the entire field of exemptions made available to the cement industry so as to deny the benefits to a unit even if it falls under another Item envisaging better incentives. He would further submit that since new cement unit is specifically excluded from application of Item 1 (new units generally), Item 2 (expanding/ diversifying unit) and Item 5 (very prestigious unit) but not Item 4 (prestigious units), Item 6 (export oriented prestigious/ pioneering unit) and Item 7 (export oriented very prestigious units), it falls that the intention behind such express exclusion

is such that but for the said exclusion, cement industries would be included in the said entries. He would strenuously submit that since the tax exemption clauses are made with a beneficent object, i.e., to encourage investment in specified rural/semi-urban areas, their construction must be liberal such as to confer the most beneficial meaning to the provisions.

24. The facts which are not in dispute are that the respondent-assessee (hereinafter referred to as 'the Company') established a new cement unit within Panchayat Samiti, Pindwara and commenced commercial production some time in the year 1997. It engaged itself in the manufacture of cement. The total capital investment - (FCI) in the new industrial unit claimed by the Company was Rupees 53252.87 Lakhs (Rs.532.52/- crores)

25. The Company had applied for grant of Eligibility Certificate for exemption from payment of Central Sales Tax and Rajasthan Sales Tax before the State Level Screening Committee, Jaipur, under the Scheme. However, the Screening Committee accepted only Rs.5553.72 Lakhs (Rs.55.32 crores) as FCI eligible for availing the benefits under the Scheme. On the aforesaid basis the State Level Screening Committee certified that the company is entitled to avail exemption of tax to the extent of 25% of the tax liability by treating the same to be a Large Scale Industry. In the appeal, the Board took the view since the Company had invested more than Rs.25 crores and has employed more than 250 workmen, it has the status of `New Prestigious Unit' and thus, falls within the definition of a Prestigious Unit and should be governed by Item 4 of Annexure `C' being entitled to avail 75% of total tax liability. This view, as we have already observed, is accepted by the High Court, while dismissing the tax revision petition filed by the revenue.

26. At the outset, we would observe that the High Court has erred in reaching its conclusion by holding that (a) the

respondent-company would fall into all the three categories of industries referred to in the Scheme, that is to say it is a new unit which is a 'Large Scale Unit', a "Prestigious New Unit" and also a "Very Prestigious Unit"; (b) the classification of a new unit, viz. small scale, medium scale and large scale under item 1E on the basis of scale of investment does not denude a new industrial unit of any type of the special status of "Pioneer", "Prestigious" and "Very Prestigious" unit under items 4 and 5 to also exclude operation of General entry; and (c) the special entry would not exclude the applicability of general entry in context of the Scheme so as to exclude the operation of items 4, 6 and 7. Thereby implying that though there exists an overlap between the general and special provision, the general provision would also be sustained and the two would co-exist.

27. Before we deal with the fact situation in the present appeal, we reiterate the settled legal position in law, that is, if in a Statutory Rule or Statutory Notification, there are two expressions used, one in General Terms and the other in special words, under the rules of interpretation, it has to be understood that the special words were not meant to be included in the general expression. Alternatively, it can be said that where a Statute contains both a General Provision as well as specific provision, the later must prevail.

28. We are mindful of the principle that the Court should examine every word of a statute in its context and must use context in its widest sense. We are also in acquaintance with observations of this Court in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.,* 1987 SCR (2) 1 where Chinnappa Reddy, J. noting the importance of the context in which every word is used in the matter of interpretation of statutes held thus:

> "Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That

> interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

29. It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law should they operate in the same field on same subject.

(Vepa P. Sarathi, Interpretation of Statutes, 5th Ed., Eastern Book Company; N. S. Bindra's Interpretation of Statutes, 8th Ed., The Law Book Company; Craies on Statute Law, S.G.G.Edkar, 7th Ed., Sweet & Maxwell; Justice G.P. Singh, Principles of Statutory Interpretation, 13th Ed., LexisNexis; Craies on Legislation, Daniel Greenberg, 9th Ed., Thomson Sweet & Maxwell, Maxwell on Interpretation of Statutes, 12th Ed., Lexis Nexis)

30. Generally, the principle has found vast application in cases of there being two statutes: gene e

latter treating the common subject matter more specifically or minutely than the former. Corpus Juris Secundum, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonized, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy.

(Edmond v. U.S., 520 U.S. 651, Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653)

31. The maxim generalia specialibus non derogant is dealt with in Volume 44 (1) of the 4th ed. of Halsbury's Laws of England at paragraph 1300 as follows:

"The principle descends clearly from decisions of the House of Lords in *Seward v. Owner of "The Vera Cruz",* (1884) 10 App Cas 59 and the Privy Council in *Barker v Edger,* [1898] AC 748 and has been affirmed and put into effect on many occasions.... If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general. If, however, it appears from a consideration of the general enactment in the light of admissible circumstances that Parliament's true intention was to establish thereby a rule of

universal application, then the special provision must give way to the general."

32. The question in *Seward v. Owner of the "Vera Cruz",* (1884) 10 App Cas 59 was whether Section 7 of the Admiralty Court Act of 1861, which gave jurisdiction to that Court over "any claim for damage done by any ship" also gave jurisdiction over claims for loss of life which would otherwise come under the Fatal Accidents Act, 1846. It was held that the general words of Section 7 of the Admiralty Court Act did not exclude the applicability of the Fatal Accidents Act and therefore, the Admiralty Court had no jurisdiction to entertain a claim for damages for loss of life.

33. The adoption of the aforesaid rule in application of principle of harmonious construction has been explained by Kasliwal J. while expressing his partial dissent to the majority judgment in *St. Stephen's College v. University of Delhi,* (1992) 1 SCC 558 as follows:

> "140. …The golden rule of interpretation is that words should be read in the ordinary, natural and grammatical meaning and the principle of harmonious construction merely applies the rule that where there is a general provision of law dealing with a subject, and a special provision dealing with the same subject, the special prevails over the general. If it is not constructed in that way the result would be that the special provision would be wholly defeated. The House of Lords observed in *Warburton v. Loveland,* (1824-34) All ER Rep 589 as under:
>
> "No rule of construction can require that when the words of one part of statute convey a clear meaning … it shall be necessary to introduce another part of statute which speaks with less perspicuity, and of which the words may be capable of such construction as by possibility to diminish the efficacy of the first pa

(*Anandji Haridas and Co. (P) Ltd. v. S.P. Kasture,* (1968) 1 SCR 661, *Patna Improvement Trust v. Lakshmi Devi,* 1963 Supp (2) SCR 812, *Ethiopian Airlines v. Ganesh Narain Saboo,* (2011) 8 SCC 539, *Usmanbhai Dawoodbhai Memon v. State of Gujarat,* (1988) 2 SCC 271, *South India Corpn. (P) Ltd. v. Secy., Board of Revenue, Trivandrum,* (1964) 4 SCR 280, *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth,* (1984) 4 SCC 27)

34. In *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P.,* (1961) 3 SCR 185, this Court has clarified that not only does this rule of construction resolve the conflicts between the general provision in one statute and the special provision in another, it also finds utility in resolving a conflict between general and special provisions in the same legislative instrument too and observed that:

"9. …We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty v. Solly* (quoted in

Craies on Statute Law at p.m. 206, 6th Edn.) Romilly, M.R., mentioned the rule thus:

"The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: *De Winton v. Brecon, Churchill v. Crease, United States v. Chase* and *Carroll v. Greenwich Ins. Co.*

10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that clause 5(a) has no application in a case where the special provisions of clause 23 are applicable."

35. Lord Cooke of Thorndon pointed out, however, in *Effort Shipping Co Ltd. v. Linden Management, SA* [1998] AC 605 that the maxim is not a technical rule peculiar to English statutory interpretation, rather it "represents simple common sense and ordinary usage". Bennion, Statutory Interpretation, 5th ed. (2008), p. 1155 states that it is based, like other linguistic canons of construction, "on the rules of logic, grammar, syntax and punctuation, and the use of language as a medium of communication generally. As Lord Wilberforce observed in *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, 554, that it is still a matter of legislative intention, which the courts endeavour to extract from all available indications.

36. In *Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd.,* (1963) 3 SCR 209 and *Union of India v. India Fisheries (P) Ltd.,* AIR 1966 SC 35 this Court has observed that when there is an apparent conflict between two independent provisions of law, the special provision must prevail. In *CCE v. Jayant Oil Mills (P) Ltd.,* (1989) 3 SCC 343 this Court has accepted the aforesaid rule as "the basic rule of construction" that is to say "a more specific item should be preferred to one less so." In *Sarabjit Rick Singh v. Union of India,* (2008) 2 SCC 417 this Court has in fact followed the aforesaid precedents thus:

> "58. The Act is a special statute. It shall, therefore, prevail over the provisions of a general statute like the Code of Criminal Procedure."

37. This Court has noticed the application of the said rule in construction of taxing statutes along with the proposition that the provisions must be given the most beneficial interpretation in *CIT v. Shahzada Nand & Sons,* (1966) 3 SCR 379:

> "10. …The classic statement of Rowlatt, J., in *Cape Brandy Syndicate v. IRC,* (1921) 1 KB 64, 71 still holds the field. It reads:
>
> > "In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."
>
> To this may be added a rider: in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted. But even so, the fundamental rule of construction is the same for all statutes, whether fiscal or otherwise. "The underlying principle is that the meaning and intention of a statute must be collected from the plain

> and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just or expedient." The expressed intention must guide the court. Another rule of construction which is relevant to the present enquiry is expressed in the maxim, generalia specialibus non derogant, which means that when there is a conflict between a general and a special provision, the latter shall prevail. The said principle has been stated in Craies on Statute Law, 5th Edn., at p. 205, thus:
>
> > "The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."
>
> …When the words of a section are clear, but its scope is sought to be curtailed by construction, the approach suggested by Lord Coke in Heydon case, (1584) 3 Rep 7b, yield better results:
>
> > "To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act: to consider, according to Lord Coke: (1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason of the remedy.""
>
> (emphasis supplied)

38. In *LIC v. D.J. Bahadur,* (1981) 1 SCC 315 this Court was confronted with the question as to whether the LIC Act is a special legislation or a general l e

considering the rule in discussion, this Court observed thus:

> "49. …the legal maxim generalia specialibus non derogant is ordinarily attracted where there is a conflict between a special and a general statute and an argument of implied repeal is raised. Craies states the law correctly:
>
> "The general rule, that prior statutes are held to be repealed by implication by subsequent statutes if the two are repugnant, is said not to apply if the prior enactment is special and the subsequent enactment is general, the rule of law being, as stated by Lord Selbourne in *Sewards v. Vera Cruz,* 'that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases on the subject will be found collected in the third edition of Maxwell is generalia specialibus non derogant - i.e. general provisions will not abrogate special provisions.' When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

39. In *Ashoka Marketing Ltd. v. Punjab National Bank,* (1990) 4 SCC 406 this Court has placed reliance upon *Bennion, Statutory Interpretation* (supra) and *J.K. Cotton Spinning & Weaving Mills* case (supra), amongst others, and explaining the rationale of this rule has reiterated the law as

under:

> "52. In *U.P. State Electricity Board v. Hari Shanker Jain* this Court has observed:
>
> "In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament."
>
> 53. In *Life Insurance Corporation v. D.J. Bahadur Krishna Iyer,* J. has pointed out :
>
> "In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purpose it may be special and we cannot blur distinctions when dealing with finer points of law.""

40. In *U.P. SEB v. Hari Shankar Jain,* (1978) 4 SCC 16, this Court has concluded that if Section 79(c) of the Electricity Supply Act generally provides for the making of regulations providing for the conditions of service of the employees of the Board, it can only be regarded as a general provision which must yield to the special provisions of the Industrial Employment (Standing Orders) Act in respect of matters covered by the latter Act, and observed that:

> "9. The reason for the rule that a general provision should yield to a specific provision is this: In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume th[illegible]ot

repealed or modified the former Special Act unless it appears that the Special Act again received consideration from Parliament. Vide London and *Blackwall Railway v. Limehouse District Board of Works,* and *Thorpe v. Adams*.

41. In *Gobind Sugar Mills Ltd. v. State of Bihar,* (1999) 7 SCC 76 this Court has observed that while determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act. With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions. If it is not possible then an effort will have to be made to ascertain whether the legislature had intended to accord a special treatment vis-à-vis the general entries and a further endeavour will have to be made to find out whether the specific provision excludes the applicability of the general ones. Once we come to the conclusion that intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted.

42. Having noticed the aforesaid, it could be concluded that the rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the legislature has enacted comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and descriptable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject.

43. In the instant case, the item 1E is subject specific provision introduced by an amendment in 1996 to the Scheme. The said amendment removed "new cement industries" from

the non-eligible Annexure-B and placed it into Annexure-C amongst the eligible industries. It classified the cement units for eligibility of tax exemption into three categories: small, medium and large. The said categories are comprehensive whereby small and medium cement units have been prescribed to have maximum FCIs of Rs.60/- lakhs and Rs.5/- crores, respectively and large to be over the FCI of Rs.5/- crores. The maximum ceiling for large cement units has been purposefully left open and thereby reflects that the intention clearly is to provide for an all-inclusive provision for new cement units so as to avoid any ambiguity in determination of appropriate provision for applicability to new cement units to seek exemption.

44. It leaves no doubt that what is specific has to be seen in contradistinction with the other items/entries. The provision more specific than the other on the same subject would prevail. Here it is subject specific item and therefore as against items 1, 4, 6 and 7, which deal with units of all industries and not only cement, item 1E restricted to only cement units would be a specific and special entry and thus would override the general provision.

45. The proposition put forth by the respondent-Company that the construction which is most beneficial to the assessee must be applied and adopted fails to impress upon us its application in this case. Howsoever, it is true that the canons of construction must be applied to extract most beneficial re-conciliation of provisions. In case of fiscal statute dealing with exemption, it would require interpretation benefiting the assessee. But here the introduction of the subject specific entry vide amendment into general scheme of exemption speaks volumes in respect of intention of the legislature to restrict the benefit to cement industries as available only under Item 1E, which categorically classified them into three as per their FCI. The specific entries being mutually exclusive have been placed so systematically arranged and classifie

construction of provisions must not be divorced from the object of introduction of subject specific provision while retaining other generalized provision that now specifically exclude the new cement industries, which could otherwise fall into its ambit, lest such interpretation would be not ab absurdo (i.e., interpretation avoiding absurd results).

46. Therefore, in our considered view the respondent-Company would only be eligible for grant of exemption under Item 1E as a large new cement unit in accordance with its FCI being above Rs.5/- crores. In light of the aforesaid, we are of the considered opinion that the judgment and order passed by the High Court ought to be set aside and the appeals of the Revenue requires to be allowed.

47. In the result, the appeal is allowed and the judgment and order passed by the High Court is set aside. No order as to costs.

D.G. Appeal allowed.

ANIL @ ANTHONY ARIKSWAMY JOSEPH

v.

STATE OF MAHARASHTRA

(Criminal Appeal Nos. 1419-1420 of 2012)

FEBRUARY 20, 2014

[K.S. RADHAKRISHNAN AND VIKRAMAJIT SEN, JJ.]

PENAL CODE, 1860: ss. 302, 377 and 201 - Sodomy, buggery and bestiality - Murder - Minor aged 10 years subjected to carnal intercourse and then strangulated to death - Conviction and death sentence - On appeal, held: Evidence of prosecution witnesses in its entirety trustworthy and reliable - Sister of accused categorically stated that she had heard the cries of the victim-deceased coming from the room of accused during mid-night and she could not sleep till the cries subsided - She had no axe to grind against her own brother and was a trustworthy witness - School bag of the deceased and pant was recovered from a box placed beneath cot in the house of accused which indicated that deceased was in the company of the accused on the fateful night - DNA test also proved that anal smear matched with the DNA profile of smear stains, which also matched with the control blood sample of the accused - Consent of a passive agent was not at all a defence, he being a minor - Prosecution clearly established that, after subjecting the boy to Pederasty, he was strangulated to death - Case u/ss.302, 377 and 201 IPC clearly made out - Accused committed the crime at the age of 35 years and a fully matured person - There was no mitigating circumstance favouring him - There was nothing to show that he was under any emotional or mental stress - The offence was committed only to satisfy his lust, in a perverted way - The murder was committed in an extremely brutal, grotesque, diabolical and dastardly manner and the accused was in a dominating position and the victim was an innocent boy - Life of a boy,

the only son of his mother, was taken away which pricks not only the judicial conscience but also the conscience of the society - Incarceration of a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence - Sentence/ Sentencing.

MEDICAL JURISPRUDENCE: Deoxyribonucleic acid, or DNA - Evidentiary value of - Held: DNA is a molecule that encodes the genetic information in all living organisms - DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. - Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin - DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory - Penal Code, 1860 - Evidence.

SENTENCE/SENTENCING:

Rarest of rare case - Held: R-R Test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not - While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy of certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc. - In the instant case, offence u/s.377 was fully proved so also the offence u/s.302 - Indian society and also the International society abhor pederasty, an unnatural sex, i.e. carnal intercourse between a man and a minor boy or a girl - When the victim is a minor, consent is not a defence, irrespective of the views expressed at certain quarters on consensual sex between adults.

Reformation and rehabilitation - Determination of sentence - Duty of courts - Held: It is the duty of the Court to ascertain whether the accused would be a menace to the society and there would be no possibility of reformation and rehabilitation and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused.

CODE OF CRIMINAL PROCEDURE, 1973: s.235(2) r/ w s.354(3) - Death sentence - Held: When culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of s.354(3) for imposition of death sentence - Legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is the will of the people - Sentence/Sentencing.

The prosecution case was that the accused-appellant subjected a minor boy aged 10 years to carnal intercourse and then strangulated him to death. The trial court convicted him under Sections 302, 377 and 201 IPC and passed death sentence. The High Court dismissed the appeal and confirmed the death sentence. The instant appeals were filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1. The evidence of PW2, PW3, PW8 and PW9 in its entirety was trustworthy and reliable. The prosecution succeeded in establishing its case beyond reasonable doubt that the deceased was last seen in the company of the accused and that the findings recorded by the trial court and affirmed by the High Court called for no interference. PW1 and PW6 were examined by the prosecution to prove the recovery of the pant as well as school bag of the deceased. Schoo d

from a box which was placed beneath the cot in the house of the accused. The school bag contained books and note books which bore the name of the deceased. The pant and the school bag along with books contained therein clearly indicated that the boy was in the company of the accused on the fateful day. Consequently, the presence of the deceased in the room of the accused was clearly established and the finding recorded by the trial court as well as the High Court on that ground also called for no interference. [Paras 11, 12] [51-G-H; 52-A-D]

2. PW4, the doctor who conducted the post-mortem examination of dead body of the deceased stated that all the internal injuries corresponded to external injuries and they were ante-mortem and were ordinarily sufficient to cause death. PW4 also opined that there was possibility of carnal intercourse with the deceased, though the cause of death was head injury. As per PW4, the DNA report indicated that anal smear of the deceased gave a mixed DNA profile which matched with semen on half pant and blood of victim. PW4 was also shown another report of DNA, which was in respect of the control sample blood of the accused and stated that DNA profile of blood matched with DNA profile of semen found in the anus of the deceased. Further, he also stated that injury nos.1, 3, 4 and 5 were possible by hard and blunt object while injury no.2 was caused by sharp cutting edge and injury no.6 was caused by hard and rough object. Facts clearly indicated that the fatal injuries were caused to silence him, after satisfying lust in a barbaric manner. Attempts were made to destroy the evidence which were also proved. PW4 also categorically stated in respect of injury no.1 that it should read as anus dilated and appeared patalous, perianal margin anal mucosa appear inflamed, though no evidence of tear or foreign body. [Paras 13, 14] [52-E; 53-F-H; 54-A-B]

3. PW5, the Assistant Chemical Analyzer, Forensic Science Lab stated that Exh.1 was a DNA profile of the accused and Exh.5 anal smear was of the deceased, which gave mixed profile. She stated that she conducted two tests, one nuclear Short Tandem Repeats (STR) and Y Short Tandem Repeats (YSTR). PW5, in her report, stated that she obtained blood samples of the accused and matched the profile obtained from that blood with the profile of Exhs.1 and 5 and that the profiles were matching. The evidence of PW4 and PW5 read with evidence of PW12, PW15 and PW16 clearly showed that the DNA test was successfully conducted and that the anal smear matched with the DNA profile of semen stains which were found on the pant of the accused and were matched with the control blood sample of the accused as well as blood sample of the deceased. [Paras 15, 16] [54-C-F; 55-A-B]

4. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory. PW5 stated that since 1994 she was working as Assistant Chemical Analyzer and has analyzed thousands of samples including DNA test. She stated that she had conducted two tests, one STR and second YSTR. Both the tests were scientifically proven and the competence of the doctor who conducted the test was also not questioned. Consequently, the DNA e

safely accepted, which showed that the deceased boy was subjected to unnatural sex and offence under Section 377 was clearly made out. [paras 17, 18] [55-C-F]

5. Section 377 is mainly confined to act of sodomy, buggery and bestiality, which intends to punish a man when he indulges in a carnal intercourse against the order of nature with a man or, in the same manner, with a woman. Sodomy is termed as Pederasty when the intercourse is between a man and a young boy, that is, when the passive agent is a young boy. Modi's Medical Jurisprudence and Toxicology state that if a passive agent is not accustomed to sodomy, abrasions on the skin near the anus is likely to appear and lesions will be most marked in children while they may be almost absent in adults, when there is no resistance to the anal coitus. Galster's Medical Jurisprudence and Toxicology say that lesions like recent lacerations, bruising, inflammation of the mucous membrane could be noticed in passive agent. Article 377 postulates penetration by the penis into the anus and the merest penetration suffices to establish the offence. PW4 has clearly noticed that "Anus dilated and appears patalous, perional margin and mucosa appear inflamed". DNA test also proved that anal smear matched with the DNA profile of smear stains, which also matched with the control sample of the accused. Consent of a passive agent is not at all a defence, but, in the instant case, though a suggestion was made that the boy had not resisted, being in the company of the accused for few days, is of no consequence, he being a minor. Prosecution has clearly established that, after subjecting the boy to Pederasty, he was strangulated to death. [Para 19] [55-G-H; 56-A-D]

6. PW8, sister of the accused categorically stated that she had heard the cries of the boy coming from the room of the accused during mid-night and she could not sleep till the cries subsided. She had no axe to grind against

the accused and was a trustworthy witness. PW9 also stated that she wanted to go to the direction in which she heard the cries, however, darkness deterred her and others proceeding to the place of occurrence. Cries heard were obviously in loud voice, which indicated that the accused had indulged in such a barbaric act and ultimately killed the boy and later threw the dead body in the well situated near the premises of the old cemetery, a spot which was located behind his house. The courts below, therefore, concluded that the offence committed by the accused shows extreme depravity of mind and showed extreme perversity and, therefore, called for extreme punishment i.e. the accused be hanged by neck till death. The case under Sections 302, 377 and 201 IPC was clearly made out. In the instant case the crime test and criminal test have been fully satisfied against the accused. [Paras 20, 21] [56-E-H; 57-A and D]

7. The crimes preceded by Pederasty are extremely brutal, grotesque diabolical and revolting, which shock the moral fiber of the society, especially when the passive agent is a minor. Accused is now around 42 years of age and when he committed the crime, he was about 35 years. There is no mitigating circumstance favouring the accused. Age is not a factor favouring him. By the age of 35, a person attains sufficient maturity and can distinguish what is good or bad, and there is nothing to show that he was under any emotional or mental stress and the offence was committed only to satisfy his lust, in a perverted way. Accused is not the only son of his parents, but the boy was a minor, totally innocent and defenceless, the only son of PW7. The mother, PW7 was a house maid and the son would have looked after her in her old age and also would have been of considerable help to her. Her son was snatched in a barbaric gruesome manner only to satisfy the perverted lust of the accused. PW7, the mother had to s of

the son floating in the well. PW8, the sister of the accused and PW9, the neighbour, both ladies heard the cries of the helpless boy during mid-night but both were helpless. PW8 could not go out of her room since it was locked from outside. PW9, a lady could not go to the house of the accused due to pitched darkness. But, so far as the instant case is concerned, the offences under Section 302 and 377 were fully established and both the crime test and the criminal test were fully satisfied against the accused. [para 21 to 24] [57-E-F, G-H; 58-A-E]

Shankar Kisanrao Khade v. State of Maharashtra **(2013) 5 SCC 546;** *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684 : 1980 AIR 898;** *Machhi Singh v. State of Punjab* **(1983) 3 SCC 470 : 1983 (3) SCR 413;** *Suresh Kumar Koushal v. Naz Foundation and Others* **(2014) 1 SCC 1 : 2014 AIR 563 - relied on.**

RR Test

8. R-R Test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy of certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc. In this case offence under Section 377 IPC was fully proved so also the offence under Section 302 IPC. Indian society and also the International society abhor pederasty, an unnatural sex, i.e. carnal intercourse between a man and a minor boy or a girl. When the victim is a minor, consent is not a defence, irrespective of the views expressed at certain quarters on consensual sex between adults. [Paras 26, 29] [59-H; 60-A-B; 61-B]

Om Prakash v. State of Haryana **(1999) 3 SCC 19 : 1999 (1) SCR 794;** *State of U.P. v. Sattan* **(2009) 4 SCC 736 : 2009 (3) SCR 643;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498 : 2009 (9) SCR 90;** *Bantu v. State of U.P.* **(2008) 11 SCC 113 : 2008 (11) SCR 184;** *Shivaji v. State of Maharashtra* **(2008) 15 SCC 269 : 2008 (13) SCR 81;** *Mohd. Mannan v. State of Bihar* **(2011) 5 SCC 317 : 2011 (5) SCR 518;** *Rajendra Pralhadrao Wasnik v. State of Maharashtra* **(2012) 4 SCC 37 : 2012 (2) SCR 225;** *Haresh Mohandas Rajput v. State of Maharashtra* **(2011) 12 SCC 56 : 2011 (14) SCR 921;** *Rabindra Kumar Pal alias Dara Singh v. Republic of India* **(2011) 2 SCC 490 : 2011 (1) SCR 929;** *Surendra Koli v. State of U.P. and others* **(2011) 4 SCC 80 : 2011 (2) SCR 939;** *Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra* **(2011) 7 SCC 125 : 2011 (6) SCR 1104;** *Mahesh v. State of Madhya Pradesh* **(1987) 3 SCC 80 : 1987 (2) SCR 710;** *Sevaka Perumal v. State of T.N.* **(1991) 3 SCC 471 : 1991 (2) SCR 711;** *State of Maha. v. Mansingh* **(2005) 3 SCC 131 : 2001 (4) Suppl. SCR 298;** *Bantu v. State of M.P.* **(2001) 9 SCC 615 : 2006 (10) Supp SCR 662 - relied on.**

Reformation and Rehabilitation

9. Many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which calls for additional materials. The criminal courts, while dealing with offences like Section 302 IPC, after conviction, may, in appropriate cases, are directed to call for a r[illegible]e,

whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case. [para 31] [61-F-H; 62-A]

10. PW8 and PW9 heard the cries of the minor boy during the midnight of 12.01.2008. Injury Nos.1, 3 to 5 were inflicted by hard and blunt object, while injury no.2 was caused by sharp cutting edge and injury no.6 was caused by hard and rash object, over and above, the offence under Section 377 also stood proved. The murder was committed in an extremely brutal, grotesque, diabolical and dastardly manner and the accused was in a dominating position and the victim was an innocent boy. Accused was aged 35 years when the crime was committed that is he was a fully matured person. Life of a boy, the only son of PW7, the mother, was taken away in a gruesome and barbaric manner which pricks not only the judicial conscience but also the conscience of the society. Legislative policy is discernible from Section 235(2) read with Section 354(3) of the Cr.P.C., that when culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. Legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is the will of the people. Incarceration of a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence. [Paras 33, 34] [62-E-H; 63-A-C]

Aloke Nath Dutta v. State of West Bengal **(2007) 12 SCC 230 : 2004 (1) Suppl. SCR 918;** *Sahdeo v. State of U.P.* **(2004) 10 SCC 682 : 2007 (7) SCR 616;** *Swamy Shraddananda v. State of Karnataka* **(2007) 12 SCC 288;**

Shankar Kisanrao Khade **(supra),** *Haresh Mohandas Rajput* **(supra),** *Rajesh Kumar v. State* **(2011) 13 SCC 706;** *Amit v. State of U.P.* **(2012) 4 SCC 107 : 2012 (1) SCR 1009 - referred to.**

Case Law Reference:

2013 (5) SCC 546	relied on	Para 21
1980 AIR 898	relied on	Para 21
1983 (3) SCR 413	relied on	Para 21
2014 AIR 563	relied on	Para 22
1999 (1) SCR 794	relied on	Para 25
2009 (3) SCR 643	relied on	Para 25
2009 (9) SCR 90	relied on	Para 25
2008 (11) SCR 184	relied on	Para 26
2008 (13) SCR 81	relied on	Para 26
2011 (5) SCR 518	relied on	Para 26
2012 (2) SCR 225	relied on	Para 26
2011 (14) SCR 921	relied on	Para 27
2011 (1) SCR 929	relied on	Para 27
2011 (2) SCR 939	relied on	Para 27
2011 (6) SCR 1104	relied on	Para 27
1987 (2) SCR 710	relied on	Para 28
1991 (2) SCR 711	relied on	Para 28
2005 (3) SCC 131	relied on	Para 32
2001 (4) Suppl. SCR 298	relied on	Para 32
2006 (10) Suppl. SCR 662	relie	

2004 (1) Suppl. SCR 918	**Referred to**	**Para 32**
2007 (7) SCR 616	**Referred to**	**Para 32**
(2007) 12 SCC 288	**Referred to**	**Para 32**
(2011) 13 SCC 706	**Referred to**	**Para 32**
2012 (1) SCR 1009	**Referred to**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1419-1420 of 2012.

From the Judgment and Order dated 18.10.2011 of the High Court of Bombay, Nagpur Bench at Nagpur in Criminal Confirmation Case No. 2 of 2010 and Criminal Appeal No. 17 of 2011.

P.C. Aggarwala, Revathy Raghavan for the Appellant.

Shankar Chillage (for Asha Goopalan Nair) for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with a gruesome murder of a minor boy aged 10 years after subjecting him to carnal intercourse and then strangulating him to death.

2. The accused, Anil @ Anthony Arikswamy Joseph, was charge-sheeted with offences punishable under Sections 302, 377 and 201 of the Indian Penal Code (IPC). The Principal District and Sessions Judge, Nagpur in Sessions Trial No.167 of 2008 convicted the Appellant for the offence punishable under Section 302 IPC and sentenced him to death and also sentenced to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for one year and for the offence punishable under Section 377 IPC, he was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- and in default to suffer rigorous imprisonment for a

period of three months. The Appellant was also convicted for the offence punishable under Section 201 IPC and was sentenced to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/- and in default to suffer rigorous imprisonment for a period of three months. Substantive sentences, it was ordered, would run concurrently. Since the accused was sentenced to death, reference was sent to the High Court for confirmation of death sentence. The accused also filed Criminal Appeal No.17 of 2011.

3. The Appeal and the criminal confirmation case then came up for hearing before a Division Bench of Nagpur Bench of the Bombay High Court on 10.08.2011 and the Bench noticed that the DNA profile blood sample and semen sample were not brought before the trial court. Further, it was noticed that PW5, the Assistant Chemical Analyzer of Forensic Science Laboratory, Mumbai, had given detailed evidence in respect of the contents of Ext.35. She stated that she had occasion to compare DNA of blood sample of the accused with Ext.1 (semen stains on half pant) and Ext.5 (anal smear of the deceased) and the DNA samples were matching. PW5 submitted Ext. 38 report. Ext. 38, it was noticed, did not disclose any comparison, as stated by PW5, which was done in FSL at Mumbai. Considering the serious nature of the offence and considering the fact that the whole case against the accused was based on circumstantial evidence, the Court felt that it would be necessary to recall PW5 and record her further examination-in-chief with reference to her report in respect of the DNA profile of the accused, that too with reference to her evidence at paragraph No.3 of her examination-in-chief on 25.09.2009.

4. The Bench, therefore remitted the case to the trial court for production of additional evidence. The operative portion of the order reads as under :

(i) The prayer for production of copies of Judgments in Sessions Trial No.118 o[illegible]s

Trial No.39 of 2002 does not survive as it is not pressed.

(ii) The prosecution shall move the learned Trial Court for production of the additional evidence.

(iii) The prosecution shall recall P.W.5 and shall re-examine the said witness further with referenced to the DNA profile of blood sample of the accused and the comparison thereof with Exs.1, 4 and 5 of the report Ex.35.

(iv) The learned Trial Court shall be at liberty to allow the prosecution to produce any other documents connected with the evidence or concerning the collection of samples, carrying the same to F.S.L. and analysis thereof.

(v) The learned Trial Court shall also be at liberty to allow the prosecution to examine any other witness pertaining to or concerning with the collection of samples, carrying the same to F.S.L. and analysis thereof.

(vi) The prosecutions shall recall P.W.10 and P.W.14 and shall examine them further with reference to forwarding samples Exs.1, 4 and 5 of Ex.35 and blood and semen samples of accused-appellant.

(vii) Needless to state that the accused-appellant shall be given an opportunity to cross-examine the witnesses recalled or fresh witnesses examined following this order.

(viii) It is made clear that the learned trial Court shall be at liberty to pass any incidental order to achieve the purpose of this order, but shall be careful to see that the prosecution does not misuse this opportunity of recording of additional evidence to introduce any

other evidence, which is not subject matter of the present order.

(ix) The original record and proceedings be sent back to the learned Sessions Judge, Nagpur.

(x) The learned Sessions Judge shall comply with this order within 30 days from the date of receipt of this order and shall certify the additional evidence to this Court immediately thereof.

Application accordingly stands disposed of."

5. The Sessions Court, after recording the additional evidence and recalling and further examining the witnesses, as ordered, forwarded the same to the High Court. The appeal was then heard by a Division Bench of the High Court on 10.10.2011 along with the confirmation case and the additional evidence recorded. The High Court, after appreciating the oral and documentary evidence and arguments advanced by the counsel on either side, confirmed the death sentence noticing the brutal and grotesque manner in which the crime was committed. The High Court held that the young boy of tender age was subjected to unnatural sex for the satisfaction of the lust of the accused which, according to the High Court, falls under the category of rarest of the rare cases. The High Court, therefore, dismissed the appeal and confirmed the death sentence, against which these appeals have been preferred.

6. Shri P.C. Aggarwala, learned senior counsel appearing for the Appellant, submitted that the prosecution has failed to prove the case beyond reasonable doubt and all the circumstances put together would lead to only one inference that the accused is not guilty of the offences charged against him. Learned senior counsel also submitted that the prosecution has not succeeded in establishing the last seen theory and the evidence adduced by PW2, PW3, PW8 and PW9 would not establish that the victim

accused. Learned senior counsel also submitted that the prosecution could not establish that the articles stated to have been recovered from the house of the accused were that of the deceased. The evidence of PW1 and PW6, it was pointed out, was totally unworthy and ought to have been discarded. Learned senior counsel also submitted that the evidence in respect of DNA Profile is completely manufactured to rope in the accused and the evidence of PW10 and PW14 in that respect cannot be believed.

7. Shri Shankar Chillage, learned counsel appearing for the prosecution, on the other hand, submitted that the Courts below have correctly appreciated the evidence of PW2, PW3, PW8 and PW9 and have come to the conclusion that the victim was last seen in the company of the accused and all the principles laid down by this Court to establish the last seen theory have been completely satisfied, so far as the present case is concerned. Learned counsel also submitted that the evidences of PW1 and PW6 have been correctly appreciated by the Courts below and the prosecution has succeeded in proving that the articles recovered from the possession of the accused were that of the deceased. Learned counsel also submitted that the Courts below have correctly appreciated the evidence of PW5, the Assistant Chemical Analyser, who conducted the DNA test and deposed that she obtained the blood sample of the accused and matched the profile from the blood profile, which was sent as Ex.1 i.e. semen stain cutting from the half pant and submitted the Report Exh.38. Learned counsel submitted that the evidence of PW5 has to be appreciated in the light of the evidence of PW12, PW13, PW15 and PW16, which would clearly indicate that the DNA profile obtained from the anal smear of the deceased matched with the accused. Learned counsel submitted that the DNA profile conclusively indicates that the accused has committed the offence punishable under Section 377 IPC. Learned counsel also submitted that the High Court has rightly held that the case falls under the rarest of the rare category and correctly awarded

the death sentence.

8. PW7, Shobha Vaidya, mother of the deceased, a maid servant, was running here and there anxiously for few days to know the whereabouts of her missing son aged 10 years. The boy had gone to the school on 10.1.2008 and normally he used to return in the evening, but on that day he did not return. Since whereabouts of the boy were not known for few days, she lodged a complaint on 15.1.2008 at about 5.00 p.m. before PW10, the Sub-Inspector of Police, attached to Crime Branch, Nagpur, who was posted at Sadar Police Station. Meanwhile, PW2, Mary, a lady, residing near the house of the accused, informed PW10 that the dead body of a boy aged 9-10 years was seen floating in a well at Juna Kabrastan (old cemetery). PW10 then proceeded to the spot and with the assistance of fire brigade took the dead body from the well and sent the same to Mayo Hospital for conducting post-mortem examination. After getting the post-mortem report, PW10 lodged the report and registered the offence under Sections 377, 302 and 201 IPC.

9. PW14, Police Sub-Inspector attached to Sadar Police Station, was entrusted with the investigation. By that time, the accused was arrested on 17.1.2008 and, on his disclosure, various articles belonging to the deceased were recovered from the house of the accused and they were seized in the presence of Panchas. School bag of the deceased, which was black in colour and had pink stripes, concealed in a box was recovered. Bag was opened in the presence of panchas and it was found to contain a Bal Bharati textbook, Mathematics and English books, two note-books, all bore the name of the deceased. Further, a Barmuda pant, belonging to the accused and a jeans belonging to the deceased were recovered on 17.01.2008. The accused was referred for medical examination and the blood sample was taken on 18.01.2008. Samples of blood semen and nail clippings were taken under Ext.17. On the disclosure of the accused, the shirt w[illegible]s

concealed near a tree under a stone, was recovered on 22.01.2008. Seized articles were referred to the Chemical Analysis at Nagpur. The reports of the Analyzer are at Exts.91 and 92, while the DNA reports are at Exts.35 and 38. After completing the investigation, the police charge-sheeted the accused for offences punishable under Sections 302, 377 and 201 IPC. On the side of the prosecution, fourteen witnesses were examined and the documentary evidence were brought on record and on the side of the defence, none was examined.

10. PW2, Mary, who runs a tea stall in front of the Income Tax Office, which is near the old cemetery, was examined by the prosecution to prove that the boy was seen in the company of the accused. She stated that she knows the accused who is residing just in front of her house. She has also deposed that on 13.1.2008, the accused had come to her shop and demanded Gutka, which she did not give. Later, a boy of about 11 years was sent from the house of accused, who purchased few items from her shop and returned to the same house. PW3, a neighbour of the accused, is also residing near the old cemetery. She has also deposed that she had seen the boy with the accused on 10.01.2008 and 11.01.2008. PW8, the sister of the accused, who was also residing with the accused in his house, stated that she saw a boy aged about 10 to 12 years in the company of the accused, during the above-mentioned period and on the fateful day, that is, in the mid-night of 12.01.2008 and 13.01.2008, she heard the cries of the boy from the room of the accused. PW9, a neighbour of the accused, also noticed one boy aged 10 years accompanying the accused and that, on the midnight of 12.01.2008, she heard the cries of a small boy emanated from the side of the house of the accused.

11. We have gone through the evidence of PW2, PW3, PW8 and PW9 in its entirety and, in our view, they are trustworthy and reliable. In our view, the prosecution has succeeded in establishing its case beyond reasonable doubt

that the deceased was last seen in the company of the accused and that the findings recorded by the trial Court and affirmed by the High Court call for no interference.

12. PW1 and PW6, Panchas of Ex. 13 and Ex.40 respectively, were examined by the prosecution to prove the recovery of the pant as well as school bag of the deceased. School bag was recovered from a box which was placed beneath the cot in the house of the accused. Seizure panchanams vide Exts.15 and 19 give the details of the articles seized at the instance of the accused. The school bag contained books and note books which bore the name of the deceased. The pant and the school bag along with books contained therein would clearly indicate that the boy was in the company of the accused on the fateful day. Consequently, the presence of the deceased in the room of the accused has been clearly established and the finding recorded by the trial Court as well as the High Court on that ground also calls for no interference.

13. PW4 is the doctor who conducted the post-mortem examination of dead body of the deceased. The post-mortem report (Exh.33) indicates the following external and internal injuries on the dead body of the deceased :

"External Injuries

(1) Anus dilated and appears patalous, perional margin and mucosa appear inflamed, no evidence of tear or foreign body.

(2) Position of Limbus straight.

(3) Multiple contused abrasions (6 in numbers) present over forehead of size varying from 1.5 cm x 1.5 cm to 2 cm x 2 cm.

(4) Incised wound present ove d

oblique of size 1.5 cm x 0.5 cm x bone deep.

(5) Contused abrasion at right preauricular area of size 2 cm x 2 cm.

(6) Contused abrasion at right face, 1.5 cm below the lower eye lid of size 2 cm x 2.5 cm.

(7) Centurion present at chin of size 2 cm x 2.5 cm.

(8) Graze abrasion present at right arm, anteri medial aspect, lower 1/3rd of size 3.5 cm x 5 cm directed downward and right laterally.

Internal Injuries

(1) Right frontal region of size 4 cm x 5 cm x 0.5 cm.

(2) Right parieto-temporal region of size 5 cm x 4 cm x 0.5 cm.

(3) Left occipital region of size 4 cm x 4 cm x 0.5 cm.

Brain, party reddish tinged appearance to the right parieto-temporal region."

14. PW4 has stated that all the internal injuries correspond to external injuries and they were ante-mortem and were ordinarily sufficient to cause death. PW4 has also opined that there was possibility of carnal intercourse with the deceased, though the cause of death was head injury. PW4 also stated that he had seen the DNA report at Exh.35 and stated that the report indicates that anal smear of the deceased gave a mixed DNA profile which matches with semen on half pant and blood of victim. PW4 was also shown another report of DNA, which was in respect of the control sample blood of the accused and stated that DNA profile of blood matches with DNA profile of semen found in the anus of the deceased. Further, he has also stated that injury nos.1, 3, 4 and 5 were possible by hard and blunt object while injury no.2 was caused by sharp cutting edge

and injury no.6 was caused by hard and rough object. Facts clearly indicate that the fatal injuries were caused to silence him, after satisfying lust in a barbaric manner. Attempts were made to destroy the evidence which were also proved. PW4 also categorically stated in respect of injury no.1 that it should read as anus dilated and appears patalous, perianal margin anal mucosa appear inflamed, though no evidence of tear or foreign body.

15. PW5, the Assistant Chemical Analyzer, Forensic Science Lab, Kalina, Mumbai stated that she had received the parcels from the Regional Forensic Science Laboratory, Nagpur on 24.1.2008 and she started the analysis on the same day. She stated that Exh.1 is a DNA profile of the accused and Exh.5 anal smear is of the deceased, which gave mixed profile. Further, it is stated that the profile obtained from Exh.1 semen stains matches with the profile obtained from Exh.5 anal smear and also Exh.4 blood stains gauze collected from the deceased. She stated that she conducted two tests, one nuclear Short Tandem Repeats (STR) and Y Short Tandem Repeats (YSTR). PW5, in her report, stated that she obtained blood samples of the accused and matched the profile obtained from that blood with the profile of Exhs.1 and 5 and that the profiles were matching. PW5, as already indicated, was recalled after the matter was remitted to the trial Court for getting further evidence and she repeated that she had analyzed the blood sample of the accused for DNA profiling and it matched with the sample, which was sent as Exh.1 i.e. semen stain cutting from the half pant. She accordingly issued a report as Exh.38.

16. PW12, the Medical Officer attached to Mayo Hospital, Nagpur was examined to prove that he had received the requisition for taking blood samples, pubic hair, nails and semen of the accused under requisition at Exh.75, which was handed over to the police. PW15 and PW16 were also examined to establish the procedure followed for taking the parcel to the Chemical Analyser for D[illegible]or

collecting blood samples, etc. On going through the evidence of PW4 and PW5 read with evidence of PW12, PW15 and PW16, we are of the view that the DNA test was successfully conducted and that the anal smear matched with the DNA profile of semen stains which were found on the pant of the accused and were matched with the control blood sample of the accused as well as blood sample of the deceased.

17. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.

18. PW5, Dr. Varsha Rathod, stated that since 1994 she was working as Assistant Chemical Analyzer and has analyzed thousands of samples including DNA test. She has stated that she had conducted two tests, one STR and second YSTR. Both the tests are scientifically proven and the competence of the doctor who conducted the test is also not questioned. Consequently, the DNA test report could be safely accepted, which shows that the deceased boy was subjected to unnatural sex and offence under Section 377 has been clearly made out.

19. Section 377 is mainly confined to act of sodomy, buggery and bestiality, which intends to punish a man when he indulges in a carnal intercourse against the order of nature with a man or, in the same manner, with a woman. Sodomy is termed as Pederasty when the intercourse is between a man and a young boy, that is, when the passive agent is a young boy. Modi's Medical Jurisprudence and Toxicology state that if a passive agent is not accustomed to sodomy, abrasions on

the skin near the anus is likely to appear and lesions will be most marked in children while they may be almost absent in adults, when there is no resistance to the anal coitus. Galster's Medical Jurisprudence and Toxicology say that lesions like recent lacerations, bruising, inflammation of the mucous membrane could be noticed in passive agent. Article 377 postulates penetration by the penis into the anus and the merest penetration suffices to establish the offence. PW4 has clearly noticed that "Anus dilated and appears patalous, perional margin and mucosa appear inflamed". DNA test also proved that anal smear matched with the DNA profile of smear stains, which also matched with the control sample of the accused. Consent of a passive agent is not at all a defence, but, in the instant case, though a suggestion was made that the boy had not resisted, being in the company of the accused for few days, is of no consequence, he being a minor. Prosecution has clearly established that, after subjecting the boy to Pederasty, he was strangulated to death.

20. PW8 has categorically stated that she had heard the cries of the boy during mid-night and she could not sleep till the cries subsided. PW8 is none other than the sister of the accused. She heard the cries of the boy coming from the room of the accused. She is a trustworthy witness and has no axe to grind against the accused. PW9 has also stated that she wanted to go to the direction in which she heard the cries, however, darkness deterred her and others proceeding to the place of occurrence. Cries heard were obviously in loud voice, which indicates that the accused had indulged in such a barbaric act and ultimately killed the boy and later threw the dead body in the well situated near the premises of the old cemetery, a spot which was located behind his house. The Courts below, therefore, concluded that the offence committed by the accused shows extreme depravity of mind and shows extreme perversity and, therefore, calls for extreme punishment i.e. the accused be hanged by neck till death. We are of the opinion that the case under Sections 3

has been clearly made out. The question is only with regard to the sentence and whether the present case falls under the category of rarest of rare case, warranting capital punishment.

21. In *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, we have dealt with the various principles to be applied while awarding death sentence. In that case, we have referred to the cases wherein death penalty was awarded by this Court for murder of minor boys and girls and cases where death sentence had been commuted in the cases of murder of minor boys and girls. In *Shankar Kisanrao Khade* (supra), we have also extensively referred to the principles laid down in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 and *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 and the subsequent decisions. Applying the tests laid down in *Shankar Kisanrao Khade* (supra), we are of the view that in the instant case the crime test and criminal test have been fully satisfied against the accused. Still, we have to apply the RR test and examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community.

22. We have no doubt in our mind that such types of crimes preceded by Pederasty are extremely brutal, grotesque diabolical and revolting, which shock the moral fiber of the society, especially when the passive agent is a minor. Recently, this Court in *Suresh Kumar Koushal and Another v. Naz Foundation and Others* (2014) 1 SCC 1 has also refused to strike down Section 377, even if such acts are indulged in by consenting individuals.

23. Accused is now around 42 years of age and when he committed the crime, he was about 35 years. We have clearly found that there is no mitigating circumstance favouring the accused. Age is not a factor favouring him. By the age of 35, a person attains sufficient maturity and can distinguish what is good or bad, and there is nothing to show that he was under any emotional or mental stress and the offence was committed

only to satisfy his lust, in a perverted way. Accused is not the only son of his parents, but the boy was a minor, totally innocent and defenceless, the only son of PW7. The mother, PW7, is a house maid and the son would have looked after her in her old age and also would have been of considerable help to her. Son was snatched in a barbaric gruesome manner only to satisfy the perverted lust of the accused. PW7, the mother had to see the dead body of the son floating in the well. PW8, the sister of the accused and PW9, the neighbour, both ladies heard the cries of the helpless boy during mid-night but both were helpless. PW8 could not go out of her room since it was locked from outside. PW9, a lady could not go to the house of the accused due to pitched darkness.

24. In *Shankar Kisanrao Khade* (supra), this Court did not confirm the death sentence, even though the post-mortem spelt out the act of sodomy as the prosecution had failed to chargesheet the accused under Section 377 IPC, which was commented upon by this Court. But, so far as the present case is concerned, the offences under Section 302 and 377 have been fully established and both the crime test and the criminal test have been fully satisfied against the accused. Now, we have to apply the RR Test.

25. We may point out that apart from what has been stated in *Bachan Singh's* case (supra) and *Machhi Singh's* case (supra) this Court in various cases like *Om Prakash v. State of Haryana* (1999) 3 SCC 19, *State of U.P. v. Sattan* (2009) 4 SCC 736, *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498, held that Court must state special reasons to impose death penalty, hence, the RR Test.

RR Test

26. R-R Test, we have already held in *Shankar Kisanrao Khade'* case (supra), depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awa[illegible]e

to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy of certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc. R-R Test is found satisfied in several cases by this Court like in *Bantu v. State of U.P.* (2008) 11 SCC 113, wherein this Court affirmed the death sentence in a case where minor girl of five years was raped and murdered. This Court noticed that the victim was an innocent child and the murderer was in a dominating position, which the Court found as a vital factor justifying the award of capital punishment. *Shivaji v. State of Maharashtra* (2008) 15 SCC 269, was a case where a married person having three children, known to the family of the deceased, ravished the life of a girl aged 9 years and strangulated her to death, this Court affirmed the death sentence awarded by the *High Court. Mohd. Mannan v. State of Bihar* (2011) 5 SCC 317, was a case where a minor girl aged 7 years was kidnapped, raped and murdered by an accused aged between 42-43 years. This Court held that he would be a menace to society and would continue to be so and could not be reformed and hence confirmed the death sentence. *Rajendra Pralhadrao Wasnik v. State of Maharashtra* (2012) 4 SCC 37 was a case where a 3 year old child was raped and murdered by an accused of 31 years old. This Court noticed the brutal manner in which the crime was committed and the pain and agony undergone by the minor girl. This Court confirmed the death sentence.

27. In *Haresh Mohandas Rajput v. State of Maharashtra* (2011) 12 SCC 56, this Court opined that the death sentence, in a given case, can be awarded where the victims are innocent children and helpless women, especially when the crime is committed in a most cruel and inhuman manner which is extremely brutal, grotesque, diabolical and revolting. Reference may also be made to the Judgments of this Court in *Rabindra Kumar Pal alias Dara Singh v. Republic of India* (2011) 2 SCC

490, *Surendra Koli v. State of U.P. and others* (2011) 4 SCC 80 and *Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra* (2011) 7 SCC 125.

28. This Court in *Mahesh v. State of Madhya Pradesh* (1987) 3 SCC 80 deprecated the practice of taking a lenient view and not imposing the appropriate punishment observing that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and cruel acts. This Court further held that to give the lesser punishment for the appellants would be to render the justicing system of this country suspect and the common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon. In *Bantu* (supra), this Court placing reliance on the Judgment in *Sevaka Perumal v. State of T.N.* (1991) 3 SCC 471 observed as follows:

> "Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.
>
> Thus, it is evident that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society.
>
> The "rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act on any spur of the moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death

most appropriate punishment for such a ghastly crime."

29. We may indicate, unlike *Shankar Kisanrao Khade'* case (supra), in this case offence under Section 377 IPC has been fully proved so also the offence under Section 302 IPC. Indian society and also the International society abhor pederasty, an unnatural sex, i.e. carnal intercourse between a man and a minor boy or a girl. When the victim is a minor, consent is not a defence, irrespective of the views expressed at certain quarters on consensual sex between adults.

Reformation and Rehabilitation

30. Learned counsel for the accused submitted that the accused has no previous criminal history and would not be a menace to the society. Further, it was also pointed out that possibility of reformation or rehabilitation of the accused, who is aged 42 years, cannot be ruled out and the State has not discharged its responsibility of proving the impossibility of rehabilitation.

31. In *Bachan Singh* (supra), this Court has categorically stated, "the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society", is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in *Santosh Kumar Satishbhushan Bariyar* (supra). Many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with offences like Section 302 IPC, after

conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.

32. Learned counsel also pointed out that the accused had not kidnapped the boy, who voluntarily came and stayed with him. Learned counsel also pointed out that the entire case rests upon circumstantial evidence and generally in the absence of ocular evidence, death sentence is seldom awarded. Reference was made to few judgments of this Court in support of his contention, such as *State of Maharashtra v. Mansingh* (2005) 3 SCC 131 and *Bantu v. State of M.P.* (2001) 9 SCC 615. Learned counsel also made reference to few judgments of this Court where death sentences were commuted to life imprisonment, such as *Aloke Nath Dutta v. State of West Bengal* (2007) 12 SCC 230, *Sahdeo v. State of U.P.* (2004) 10 SCC 682, *Swamy Shraddananda v. State of Karnataka* (2007) 12 SCC 288, *Shankar Kisanrao Khade* (supra), *Haresh Mohandas Rajput* (supra), *Rajesh Kumar v. State* (2011) 13 SCC 706, *Amit v. State of U.P.* (2012) 4 SCC 107, etc.

33. PW8 and PW9 heard the cries of the minor boy during the midnight of 12.01.2008 and after going through their evidence they reverberate in our ears. Injury Nos.1, 3 to 5 were inflicted by hard and blunt object, while injury no.2 was caused by sharp cutting edge and injury no.6 was caused by hard and rash object, over and above, the offence under Section 377 also stood proved. The murder was committed in an extremely brutal, grotesque, diabolical and dastardly manner and the accused was in a dominating position and the victim was an innocent boy, the only son of his mother. Accused was aged 35 years when the crime was committed that is he was a fully matured person. Life of a boy, the only son of PW7, the mother, was taken away in a gruesome and barbaric manner which pricks not only the judicial conscience but also the conscience of the society.

34. Legislative policy is discernible from Section 235(2) read with Section 354(3) of the Cr.P.C., that when culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. Legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is the will of the people. We are of the view that incarceration of a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence. Ordered accordingly.

35. The appeals are, accordingly, disposed of.

D.G. Appeals disposed of.

THE M.D., CHENNAI METRO RAIL LTD.
v.
N. ISMAIL & ORS.
(Civil Appeal Nos. 2572-2573 of 2014)

FEBRUARY 21, 2014

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

GOVERNMENT GRANT:

Grant of land with conditions - Resumption of land when it ceased to be used for the purpose for which it was granted - Land required for Metro Rail Project - Steps taken by State Government to resume the land - Held: State Government as the owner of the land and having regard to the right retained by it while making the grant in the years 1898 and 1899 and in the larger public interest of setting up of the Chennai Metro Rail Project the lands were required by it, the same cannot be questioned by the original grantee or by the lessees whose holding was subordinate in character to the original grantee - Since based on valid orders of High Court and AG & OT the first respondent developed its Hotel business in the lands in question, while resuming the lands, State Government along with Chennai Metro is bound to compensate the first respondent for the buildings which were erected in the said land based on the valuation to be made by the appropriate authorities - First respondent directed to surrender possession of the land.

The Government of Tamil Nadu, by GO Ms. No.168 dated 21.05.2012 retrieved the land and the property in TS No.43/2 from Choultry through the Administrator General and Official Trustee ("the AG & OT) of Tamil Nadu, for the purpose of the "Chennai Metro Rail Project", a joint venture of the Central Government and the

Government of Tamil Nadu. The land in TS No. 43/2 along with other land in TS No.41 had been granted by G.O. Ms. Nos.763 and 253 dated 09.12.1898 and 17.01.1899, respectively to build a Choultry with conditions, inter alia, that the Choultry should be available for the free use of railway travelers, and "that the land shall be liable to resumption, without compensation, if it ceases to be employed for the purpose for which it is granted or is used for any other purposes, without the permission of the Government". Subsequently, all the properties held by the Choultry were vested with the AG & OT of Tamil Nadu, and the latter leased out the lands in T.S. No.41 and T.S. No.43/2 to various tenants including the first respondent, who constructed a Hotel thereon in the year 1987. Subsequently, rights on an adjacent piece of land which had been granted on lease for a period of 30 years to another lessee were also stated to have been transferred by the said lessee to the first respondent, who claimed to have put up two pucca structures and running two Star Hotels thereon. Pursuant to the issuance of the GO Ms. No.168 dated 21.05.2012, the Tehsildar issued a notice to AG & OT on 21.06.2012 for resumption of the land and handover vacant possession. Writ petitions were filed before the High Court challenging the said GO dated 21.06.2012. The single Judge of the High Court allowed the writ petitions and set aside the GO. However, the Division Bench of the High Court allowed the appeals of the appellant except those relating to properties in possession of the first respondent, which the Division Bench held stood on a different footing inasmuch as TS No. 43/2 was not part of the project land and that the first respondent had been granted a lease by the AG & OT till the year 2027, and, therefore, the impugned GO in that respect could not be sustained.

Allowing the appeals, the Court

HELD: 1.1 The reasoning of the Division Bench of the High Court that the underground Metro Station has been planned in a stretch of land on a site where certain other lands were available and, therefore, there was no necessity for taking over the lands in possession of the first respondent is patently a conclusion which was contrary to the records placed before the Division Bench and the same cannot be sustained. The conclusion of the Division Bench that the land in question namely, the one situated in TS No.43/2 was not part of the project of the Chennai Metro was a wrong assimilation of facts. The conclusion of the Division Bench having been reached without properly examining the relevant documents relating to the Chennai Metro Project, namely, the plans, the project schedule and the other averments placed before the Division Bench, the impugned order of the Division Bench cannot be sustained. [para 18] [78-G-H; 79-A-B, H; 80-A]

1.2 Indisputably the lands in Survey No.43/2 belong to the State. At the time when the lands were granted and assigned by GO Ms. Nos.763 and 253 dated 09.12.1898 and 17.01.1899 respectively, conditions were imposed to the effect that the lands would revert back to the Government when it ceased to be used for the purpose for which it was granted and that should the property at any time resumed by Government, the compensation payable should in no case exceed the cost or the then present value whichever shall be less of any building erected or other works executed in the land. [para 20] [81-E-G]

1.3 In so far as the first respondent was concerned, his lease came into existence initially on 22.12.1972, and by Order dated 10.12.2004 in Application No.915 of 2003, the lease in favour of the first respondent was extended for a further period of 25 years by enhancing the rent. The said order was also confirmed by th n

the Order dated 20.08.2009 in O.S.A. No.298 of 2004. In the circumstances, it cannot be held that the said possession with the first respondent was unlawful. However, on that basis when it comes to the question of resumption of the land by the State Government when the Government through the AG & OT thought it fit to resume the lands which was in accordance with the terms contained in the Original Grant, namely, GOS No.763 and 253 dated 09.12.1898 and 17.01.1899, respectively there would be no scope for the first respondent to contend that the appellants are not entitled for the resumption of the lands situated in Survey No.43/2. [para 21] [82-C-F]

1.4 This Court, therefore, holds that the State Government as the owner of the land and having regard to the right retained by it while making the grant in the years 1898 and 1899 and in the larger public interest of setting up of the Chennai Metro Project the lands were required by it, the same cannot be questioned by the original grantee or by the lessees whose holding was subordinate in character to the original grantee. Therefore, there is no justification in the Division Bench in having interfered with the impugned GO Ms. No.168 dated 21.05.2012 and the consequential orders of the Tehsildar dated 21.06.2012 and that of the AG & OT dated 25.06.2012 directing the first respondent to handover possession of the lands. [para 22] [82-G-H; 83-A]

1.5 Having regard to the condition contained in the initial GO Ms. Nos.763 and 253 dated 09.12.1898 and 17.01.1899 since based on valid orders of the High Court and the AG & OT the first respondent developed its Hotel business in the lands in question, while resuming the lands, the State Government along with the Chennai Metro is bound to compensate the first respondent for the buildings which were erected in the said land in Survey No.43/2 based on the valuation to be made by the

appropriate authorities. The appellants are directed to value the buildings belonging to the first respondent standing in TS No.43/2 and determine the compensation and pay the same to the first respondent. The first respondent is directed to surrender possession of the lands in TS No.43/2 in an extent of 5644 sq. ft. through the AG & OT within four weeks from the date of receipt of copy of this judgment. [para 23-25] [83-B-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2572-2573 of 2014.

From the Judgment and Order dated 12.07.2013 of the High Court of Madras in WA Nos. 89 and 90 of 2013.

WITH

Civil Appeal Nos. 2575-2578 of 2014.

L. Nageswara Rao, ASG, R. Thiagarajan, Gopal Subramanium, Pinaki Mishra, Subramonium Prasad, AAG, V. Ramajagadeesan, Govind Manoharan, Shruti Iyer, Senthil Jagadeesan, B. Balaji, Rakesh Sharma, Selvin, K. Enatoli Sema, Amit Kumar Singh, R. Rakesh Sharma, Selvin Raja, Sunil Fernandes, Raghav Chadha, Astha Sharma, Sri Ram J. Thalapathy, V. Adhimoolam, Shilpi Vinod, N. Shoba for the appearing parties.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. I.A. Nos.1-2 & I.A. Nos.1-4, applications for impleadment, filed in Special Leave Petition (C) Nos.26020-26021 of 2013 and Special Leave Petition (C) Nos.26199-26202 of 2013, are allowed. Registry to carry out necessary amendment.

2. Leave granted.

3. These appeals have been filed by the State of Tamil Nadu represented by the Managing Director of Chennai Metro Rail Ltd. and the Principal Secretary to

LD-1(1) Department. The issue concerned in these appeals relates to an extent of 5 Grounds and 275 sq.ft. of land in T.S. No.43/2 in Chennai District, Fort Tondiarpet Taluk, Block No.7 of Vepery Village. The abovesaid land along with another land in an extent of one Cawni 10 Grounds and 1871 sq.ft. in T.S. No.41 of the same Vepery Village, Fort Tondiarpet Taluk, Chennai District was granted by the Government of Tamil Nadu to one Sir Ramaswamy Mudaliar to build a Choultry for the use of persons who come by rail from different parts of the presidency and who have no homes or friends in Madras. The Government while assigning the above lands to Sir Ramaswamy Mudaliar imposed certain conditions to the effect that the Choultry should be available for the free use of railway travelers, that the buildings constructed should be approved by the Government and more importantly, "that the land shall be liable to resumption, without compensation, if it ceases to be employed for the purpose for which it is granted or is used for any other purposes, without the permission of the Government".

4. The said lands were granted and assigned in favour of Sir Ramaswamy Mudaliar by GO Ms. Nos.763 and 253 dated 09.12.1898 and 17.01.1899 respectively whereas the conditions were incorporated in the following words "(1) that the land shall revert to Government when it ceases to be used for the purpose for which it is granted and (2) that should the property be at any time resumed by Government, the compensation payable, therefore, shall in no case exceed the cost or the then present value whichever shall be less of any building erected or other works executed on the land".

5. Subsequently, under a Scheme Decree framed by the High Court of Judicature at Madras in C.S. No.90 of 1963 all the above mentioned properties held by Sir Ramaswami Mudaliar's Choultry were vested with the Administrator General and Official Trustee (hereinafter referred to as "the AG & OT) of Tamil Nadu on 18.08.1970. From then onwards the management of the Trust and the properties attached with it

were under the control of the AG & OT. As per the Scheme Decree, the AG & OT of Tamil Nadu leased out the lands in T.S. No.41 and T.S. No.43/2 to various tenants and was collecting the rent. As far as T.S. No.43/2 comprised in an extent of 5644 sq.ft. was concerned, the same was leased out to the first respondent herein under the lease deed dated 22.12.1972. According to the AG & OT, the First Respondent is in arrears and as on 31.12.2012, the arrears payable by the First Respondent works out to a sum of Rs.94,84,630/- which has been computed and determined by the High Court of Madras. It is also stated that the First Respondent has preferred Special Leave Petition(C) No.11-12 of 2010 against the said determination and claim which is pending in this Hon'ble Court.

6. According to the First Respondent, pursuant to the lease granted in his favour, which was registered as document 105 of 1974 in the Office of Sub-Registrar, West Madras, he constructed a Hotel and started the business in the year 1987. According to him, subsequently, an adjacent piece of land measuring 4141 sq. ft was granted on lease for a period of 30 years to one Smt. Vatsala again based on the Order of the High Court of Madras, which was also supported by a registered Lease Deed dated 29.04.1982 bearing Document No.1492/1984 registered in the office of the Registrar, Madras (North). The said Smt. Vatsala also stated to have transferred her lease hold right in respect of the said extent to the First Respondent which was also stated to have been approved by the Official Trustee in the proceeding dated 05.04.1989 in R.O.C. No.2390 of 1989/OT. The First Respondent claimed to have put up two pucca structures and running two Star Hotels known as 'Hotel Central Tower' and 'Hotel Howrah'. The First Respondent also claimed to have got the approval of the Municipality, State Government and other authorities and that the buildings were duly assessed for property tax and other statutory dues. By Order dated 10.12.2004 in Application No.915/2003, the lease in favour of the First Respondent was stated to have been extended for a furt s

by enhancing the rent payable by him. The First Respondent also relied upon an Order of the Division Bench of the High Court dated 20.08.2009 in support of the extension of the lease passed in O.S.A. No.298 of 2004 and connected batch cases. According to the First Respondent because of his old age and other physical ailments he entered into a partnership arrangement with the applicant in I.A. Nos.1 and 2 of 2014 in Special Leave Petition (C) No.26020-21 of 2013 under the partnership deed dated 28.03.2013.

7. Be that as it may, having regard to the unprecedented growth of population in general, as well as with particular reference to the Metropolitan City of Chennai, there was an imminent need for providing better transport facilities for the commuters and office goers, as well as business people, which persuaded the State to expand the rail transport facility in the City of Chennai. With that avowed object, the appellant in Special Leave Petition (C) No.26020-21 of 2013 came into being and the said Chennai Metro Rail Limited planned a project called 'Chennai Metro Rail Project' which envisaged construction of two corridors under Phase-1. Corridor 1 starts from Washermenpet and ends at Airport for a length of 23.1 kms. and Corridor 2 starts from Chennai Central and ends at St. Thomas Mount Station for a length of 22 kms. As per the project, the portions of Corridor 1 with a length of 14.3 kms. between Washermenpet to Saidapet and in Corridor - 2 with a length of 9.7 kms. from Chennai Central to Anna Nagar would be underground corridors and the remaining in an elevated position.

8. The Chennai Metro Rail Limited is stated to be a Special Purpose Vehicle (SPV) formed for the purpose of implementing the 'Chennai Metro Rail Project'. The Project is stated to be funded by the Government of India and the State Government by way of equal equity contribution in subordinate debt. (Government of India 20%, Government of Tamil Nadu 20.78% and the balance 59.22% being met from the loan

assistance from Japan International Co-operation agency). The Government of India is stated to have accorded sanction for the project as well as for its participation.

9. The lands concerned in these appeals are covered by the project, namely, Corridor 1, i.e. from Washermenpet to Chennai Airport. According to the appellant, in Special Leave Petition (C) No.26020-21 of 2013, the project is a time bound project with an objective to ease out phenomenal growth of traffic congestion in the City of Chennai and any delay in carrying out the project would affect the plans announced by the Government of India, as well as, the State Government, the convenience of the public of Chennai and further will lead to contractual implications such as extension of time and escalation of project costs, which in turn would cost the public exchequer several hundred crores of rupees. According to the Chennai Metro, any further delay on any account, apart from causing high amount of cost escalation, would also deprive the citizens of Chennai a safe and quick means of public transport. It is stated that the Chennai Metro in its project report has described in detail the various length of the projects and in the said statement, designed constructions of underground stations at Washermenpet, Mannadi, High Court, Chennai Central and Egmore and associated tunnels, the details of the location, the description, the access date from commencement of the works with particular reference to the number of days and the vacate date from commencement of the work with particular reference of number of days is specified after making meticulous calculations.

10. Mr. Nageswara Rao, learned Additional Solicitor General appearing for the appellants brought to our notice the work which was to be carried out in the land concerned in this appeal which has been noted in the column under locations/ drawing reference bearing No.SCC-14 and the description has been shown as entrance area. As far as access date is concerned, it is noted as 365 days from

works and the date to be vacated after completion of the work from the date of commencement is noted as 1520 days. According to learned Additional Solicitor General, for the purpose of starting the work in the land in question, as per the schedule, the Chennai Metro should have access to the land within 365 days of the commencement of the project and complete the work in that land within 1520 days from the date of such access. It was pointed out that such details have been specified in the contract agreement and that to ensure that the works are carried out without any deviation and within the time schedule, the required plans were also prepared in so far as it related to SCC-14 and was submitted with the details of lands falling under Survey No.43/2. The learned Additional Solicitor General also submitted that the said land were earmarked for erecting a mechanical plant room, electrical plant room, building services, drop-off and pick-up facilities and Airport check-in facilities. The plan which were enclosed along with the Special Leave Petition paper book between pages 164 to 167 disclose the area falling under Survey No.43/2, the various facilities to be set up in that land along with the other facilities to be provided in the lands adjacent to the said Survey No.43/2.

11. It was also the case of the Chennai Metro that since the lands in Survey No.43/2 belong to the State Government and was imminently required for the Chennai Metro Project which was out and out in public interest, the State Government came forward to allot the said lands after retrieving it from Sir Ramaswamy Mudaliar Choultry through the AG & OT and by GO Ms. No.168 dated 21.05.2012 passed orders to that effect. Before issuing the said GO, the procedure to be followed for transfer of the said lands in favour of the Chennai Metro Pvt. Limited were also carried out. As the lands belong to the State Government there was no necessity for any acquisition being involved or any payment of compensation to be made in favour of anyone except for the Buildings standing thereon. Since the State Government's participation is equal in proportion along with the Government of India and inasmuch as the development

of the project was in the interest of the public at large the GO dated 21.05.2012 came to be issued.

12. Aggrieved by the Order of the Government in GO Ms. No.168 of 21.05.2012, the First Respondent and various other persons who were in possession of the other adjacent lands, which were also covered by the abovesaid GO, approached the High Court by filing Writ Petitions. The First Respondent's Writ Petitions were Writ Petition Nos.19469/2012 and 19470/2012 wherein he sought for issuance of a writ of Certiorari to call for the records of the proceedings in GO No.168 of 21.05.2012 and the consequential proceedings of the Tehsildar dated 21.06.2012 as well as the proceedings of the AG & OT dated 25.06.2012 and for quashing the said proceedings. It is stated that pursuant to the issuance of the GO Ms. No.168 dated 21.05.2012, the Tehsildar of Fort Tondiarpet Taluk issued a notice to AG & OT on 21.06.2012 for resumption of the land and handover vacant possession. Individual notices were also stated to have been issued to all the occupants including the First Respondent asking them to vacate the premises and remove their belonging and handover vacant possession. In turn, the AG & OT by its notice 25.06.2012 called upon the First Respondent and the other tenants to vacate the premises immediately to enable the AG & OT to handover possession to Chennai Metro.

13. By Order dated 26.11.2012, the Writ Petitions filed by the First Respondent and other occupants came to be allowed by the learned Single Judge and the GO Ms. No.168 dated 21.05.2012 was set aside. Aggrieved by the Judgment of the learned Single Judge the appellants herein preferred Writ Appeals 68 to 106 of 2013. The Division Bench after a detailed discussion allowed Writ Appeal Nos. 70 to 88 and 91 to 106 of 2013 holding that the said Chennai Metro Rail Project, a joint venture of Central Government was to enhance the public transport system in Chennai and being a public project, any delay in implementation would oust the p[illegible]h

the lands were sought to be retrieved. However, Writ Appeal Nos.68, 69, 89 and 90 of 2013 which related to the lands falling under Survey No.43/2 which are in the possession of the First Respondent were concerned, according to the Division Bench the same stood on a different footing. The Division Bench in its order held as under in paragraph 28:

> "28. The map published by CMRL, showing various structures they are going to erect in the area, indicate that the area earmarked for CMRL project does not include the ease area of the writ petitioner in W.P. Nos.19469 and 19470 of 2012 (connected to W.A. Nos. 68, 69, 89 and 90 of 2013). It is also clear from the map that the entire lands required for the CMRL projects like the Underground Metro Station etc. are on the Northern side of the Poonamalle High Road, where vast extent of other vacant lands are available, including the erstwhile Hotel Picnic area. As already stated supra, pursuant to the lease deed entered into by this petitioner with AG & OT, this petitioner raised a huge construction with his own funds and doing his own business and the said lease has been extended upto the year 2027. No default of any sort on his part has been alleged by any of the parties. When the lands and building in possession and occupation of this petitioner are outside the purview of the CMRL project, as has been discussed supra, ordering handing over of the vacant possession of the said lands by this petitioner for the purpose of CMRL, is nothing but requiring him to demolish the building in his possession. At this juncture we feel it apt to hold that ordering demolition of buildings, for no legal or useful purposes, is nothing but wastage of public resources. Given the facts and circumstances of the case that the lands and building raised by this petitioner are outside the purview of the CMRL and not in violation of any law, including the building and tenancy laws, we have no doubt to hold that the lands and building in possession and enjoyment of this petitioner are entitled to be excluded from the project area. Thereafter, the order passed by the learned single Judge in W.P. Nos. 19469 of 2012 and 19470 of 2012 stands modified and both the above writ petitions stand allowed. Consequently, W.A. Nos. 68, 69, 89 and 90 stand dismissed."

14. A reading of the said paragraph disclose that in its opinion the lands required for Central Chennai Metro Rail Project for locating its underground Metro Station etc. were all noted on the northern side of the arterial road namely Poonamallee High Road, that vast extent of other vacant lands were available including the erstwhile hotel called 'the Hotel Picnic' and that in so far as the first Respondent was concerned, he was granted a lease which is to be in operation till the year 2027 and on these two grounds the Division Bench took the view that the GO Ms.168 dated 21.05.2012 cannot be justified and confirmed the order of the learned Single Judge in WP 19469 of 2012 and 19470 of 2012 and dismissed the Writ Appeal Nos.68, 69, 89 and 90 of 2013.

15. Mr. Nageswara Rao, learned Additional Solicitor General in his submission while assailing the Judgment of the Division Bench contended that the basis for setting aside the impugned GO Ms. No.168 dated 21.05.2012 by the Division Bench was that the land in question, namely, the one which fell within Survey No.43/2 was not part of the project land and that the First Respondent has been granted a lease by the AG & OT till the year 2027 and, therefore, the impugned GO cannot be sustained. The learned Additional Solicitor General by referring to the above paragraph 28 of the Division Bench submitted that the Division Bench thoroughly misled itself when it stated that the underground Metro Station has been planned in the project on the Northern side of the Poonamallee High Road where certain other lands are available which can be acquired and inasmuch as the First Respondent has got a long lease in his favour from the AG & OT, the Chennai Metro as well as the State Government was not [illegible]

impugned GO dated 21.05.2012. In so far as the lands in Survey No.43/2, the learned Additional Solicitor General took us to the plans which were part of the material papers placed before the High Court which are now annexed and found in pages 164-167 and submitted that while on the Northern side of the Poonamallee High Road the underground Metro Station has been planned, the present lands situated in Survey No.43/2 as well as the adjacent lands in Survey No.41 have been earmarked for various other important developments to be carried out as part of the project such as the setting up of mechanical plant rooms, electrical plant rooms, building services, drop-off and pick-up facilities and the Airport check-in facilities in Survey No.43/2 and ventilation shaft, entry/exit, sub way, feeder bus stand, multi-model facilities, pick-up and drop-off bay, MTC Bus bay and fireman staircase in Survey No.41 and that the entire lands in Survey No.41 and 43/2 belong to the State Government and, therefore, the Division Bench unfortunately failed to advert to the above details which were placed before it which resulted in the passing of the impugned judgment.

16. Learned Additional Solicitor General also submitted that as against the Division Bench Judgment relating to the other Writ Appeals which were allowed in favour of the Chennai Metro and State Government, Civil Appeal Nos.6065-6068 of 2013 and connected Special Leave Petitions were filed wherein this Court taking note of the submission of learned Solicitor General that the State of Tamil Nadu would issue notices inviting all the stake-holders liable to be affected by adverse orders an opportunity to respond to the reasons which weighed with the State Government to evict them from the premises in question permitted the State Government to issue such notices and after getting the response from those parties pass appropriate orders. Learned Additional Solicitor General also submitted that the said exercise was carried out by issuing notices and after receipt of the response, orders were passed for taking over of the lands from the concerned occupants and

that fresh proceedings have been initiated by those occupants which are stated to be pending consideration before the High Court.

17. Mr. Gopal Subramanium, learned Senior Counsel appearing for the First Respondent also confirmed the said statement of learned Additional Solicitor General. Mr. Gopal Subramanium, however, contended that similar orders can be passed in these appeals also to enable the First Respondent to submit his response and, thereafter, the Appellants can pass appropriate orders. The learned Senior Counsel for the First Respondent in his submission contended that in the sketch which are enclosed and kept at page 164 to 167 of the Special Leave Petition papers adjacent to the Survey No. 43/2, there were some other structures belonging to different parties and that the Appellants have excluded those lands on the footing that some heritage building was located and, therefore, the First Respondent, whose leasehold lands are located closely adjacent to those left out built-up area, in the event of an opportunity being extended to the First Respondent, he will be able to satisfy the authorities to exclude his leasehold lands also from the purview of taking over by the Chennai Metro. Mr. Gopal Subramanium also referred to an affidavit on behalf of Chennai Metro dated April, 2011 in O.S.A. No.100-101 of 2011 to contend that the averments contained therein support the stand of the First Respondent to persuade the Chennai Metro to look for some other alternate lands.

18. While considering the submissions of learned Additional Solicitor General and Mr. Gopal Subramanium, learned Senior Counsel for the First Respondent, inasmuch as we find that the reasoning of the Division Bench in having stated that the underground Metro Station has been planned in a stretch of Land on the Northern side of the Arterial Road, namely, Poonamallee High Road and that certain other lands were available in that side and, therefore, there was no necessity for taking over the lands in the [illegible] st

Respondent is patently a conclusion which was contrary to the records placed before the Division Bench and the same cannot be sustained. In other words, as rightly pointed out by learned Additional Solicitor General, the conclusion of the Division Bench that the lands concerned in these Appeals, namely, the one situated in Survey No.43/2 were not part of the project of the Chennai Metro was a wrong assimilation of facts. When it has been demonstrated before us based on the project details and the plan annexed with it, which disclose that the lands situated in Survey No.43/2 as well as Survey No.41 were all part of the projects for putting up various other ancillary units such as mechanical plant rooms, electrical plant rooms, building services, drop-off and pick-up facilities, airport check-in facilities, ventilation shafts, subway, feeder bus stand, multi-modal facilities, pick-up and drop-off bay, MTC Bus bay, fireman staircase, entry and exit points, if the taking over of the lands by the Chennai Metro is not allowed, the same would seriously prejudice and cause unnecessary hurdles in proceeding with the project. In our considered view, the failure of the Division Bench in noting the details displayed in the plan and the project which were placed before it has resulted in the passing of the impugned Order. The Division Bench failed to note that the project details pertaining to the proposed underground Metro Station and the other supporting provisions to be made such as mechanical plant rooms, electrical plant rooms, bus bay and other developments to be carried out spread over a vast extent of land both on the Northern side of the Poonamallee High Road as well as the lands situated on the Southern side of the said Road with which we are now concerned. Therefore, in the light of the above details placed before the Court which according to learned Additional Solicitor General was made available before the Division Bench also, we have no reason to reject the said submission in order to sustain the conclusion of the Division Bench. In other words, the conclusion of the Division Bench having been reached without properly examining the relevant documents relating to the Chennai Metro Project, namely, the plans, the project

schedule and the other averments placed before the Division Bench, the impugned order of the Division Bench cannot be sustained.

19. Mr. Gopal Subramanium, learned Senior Counsel appearing for the First Respondent in support of his submission that the lands situated in Survey No.43/2 were not required at all for the purpose of carrying out the Metro Project and referred to an affidavit filed before the Division Bench by the Managing Director of Chennai Metro Rail Limited. The learned Senior Counsel submitted that in the said affidavit the reference to the Metro Rail Station planned along the Poonamallee High Road has been stated and while referring to the same, a specific reference was made to the private buildings located opposite to Picnic Hotel and that acquisition of those private lands would cost dearly to the State Exchequer apart from evacuation of the tenants/owners would consume considerable length of time which would in turn cause delay in the construction of the underground Station. When we perused the said affidavit which has been extracted in the reply affidavit filed by the Managing Director of Chennai Metro in W.P. No.19469 of 2012, we find that statement came to be made when a litigation was launched at the instance of Hotel Picnic and while meeting the stand of Hotel Picnic, it was stated that the above statement came to be made. We do not find any scope to reject the stand of the Appellant with reference to the lands situated in Survey No.43/2 which had nothing to do with the construction of the underground Metro Station. Though, the various other units to be set up in the lands in Survey No.43/2 were also part of the Metro Project as has been demonstrated before us based on relevant documents, the reference to the Heritage Buildings and other private buildings situated opposite to Hotel Picnic was referred to by Chennai Metro while pointing out its inability to plan the setting up of underground Metro Station in any other land except the lands where Hotel Picnic was situated. Therefore, the said submission of the learned Senior Counsel for the First Respondent does not in any

of the First Respondent. As far as the contention of Mr. Gopal Subramanium that like in the case of other occupants wherein a direction was issued by this Court to give a show cause notice and decide the matter, the said contention cannot be countenanced in this case inasmuch as before the Division Bench of the High Court as well as before us the issue was argued on merits. In fact, the Division Bench after hearing the Appellants and the First Respondent allowed both his Writ Petitions by modifying the order of the learned Single Judge and thereby held that there was no necessity for a remand. Therefore, since we have also decided the whole controversy on merits there is no need for a remand.

20. Therefore, once we are convinced that the entitlement of the Appellant to hold the lands belonging to the State falling under Survey Nos.43/2 as well as 41 which the Appellant is able to take possession of from the State Government without payment of any compensation, the only other question to be examined is as to whether the lease granted in favour of the First Respondent by the AG & OT based on the directions of the High Court can have any implication in preventing the Appellant from taking over the lands. As noted earlier, indisputably the lands in Survey No.43/2 belong to the State. At the time when the lands were granted and assigned in favour of Sir Ramaswamy Mudaliar Trust vide GO Ms. Nos.763 and 253 dated 09.12.1898 and 17.01.1899 respectively, conditions were imposed to the effect that the lands would revert back to the Government when it ceases to be used for the purpose for which it was granted and that should the property at any time resumed by Government, the compensation payable should in no case exceed the cost or the then present value whichever shall be less of any building erected or other works executed in the land. Though, learned Additional Solicitor General sought to contend as was also contended before the High Court that by leasing out the lands to different parties the condition No.1 was violated, namely, that the land was put to different use than for what it was granted, we do not find any good grounds to

accept the same. On the other hand, we find that the Trust itself was vested with the AG & OT on 18.08.1970 pursuant to a Scheme Decree framed by the High Court in C.S. No.90 of 1963. From then onwards, the AG & OT was administering the Trust and was apparently fulfilling the purpose for which the Trust came to be created, though, by leasing out the lands to different individuals for the purpose of generating income from the lands. The AG & OT by approaching the High Court, as and when required, seem to have granted the lease of the lands to different parties based on the orders passed by the High Court.

21. In so far as the First Respondent was concerned, his lease came into existence initially on 22.12.1972, and by Order dated 10.12.2004 in Application No.915 of 2003, the lease in favour of the First Respondent was extended for a further period of 25 years by enhancing the rent. The said order was also confirmed by the Division Bench in the Order dated 20.08.2009 in O.S.A. No.298 of 2004. In the said circumstances, it cannot be held that the said possession with the First Respondent was unlawful. However, on that basis when it comes to the question of resumption of the land by the State Government when the Government through the AG & OT thought it fit to resume the lands which was in accordance with the terms contained in the Original Grant, namely, GOS No.763 and 253 dated 09.12.1898 and 17.01.1899, there would be no scope for the First Respondent to contend that the Appellants are not entitled for the resumption of the lands situated in Survey No.43/2.

22. We, therefore, hold that the State Government as the owner of the land and having regard to the right retained by it while making the grant in the years 1898 and 1899 and in the larger public interest of setting up of the Chennai Metro Project the lands were required by it, the same cannot be questioned by the Original Grantee or by the lessees whose holding was subordinate in character to the Original Grantee. Therefore, we do not find any justification in the Div[illegible]g

interfered with the impugned GO Ms. No.168 dated 21.05.2012 and the consequential orders of the Tehsildar dated 21.06.2012 and that of the AG & OT dated 25.06.2012 directing the First Respondent to handover possession of the lands.

23. Therefore, while the impugned GO and the consequential orders of the Tehsildar and AG & OT can be sustained, having regard to the condition contained in the initial GO Ms. Nos.763 and 253 dated 09.12.1898 and 17.01.1899 since based on valid orders of the High Court and the AG & OT the First Respondent developed its Hotel business in the lands in question, while resuming the lands, the State Government along with the Chennai Metro is bound to compensate the First Respondent for the buildings which were erected in the said land in Survey No.43/2 based on the valuation to be made by the appropriate Authorities.

24. Therefore, while allowing the Appeals of the State Government as well as the Chennai Metro and while setting aside the Judgment of the Division Bench, Writ Appeal Nos.68, 69, 89 and 90 of 2013 are allowed. We, however, direct the Appellants to value the buildings belonging to the First Respondent standing in Survey No.43/2 and determine the compensation and pay the same to the First Respondent. The said exercise of valuation and payment of compensation shall be effected within three months from this date.

25. In the light of our above orders, the First Respondent is directed to surrender possession of the lands in Survey No.43/2 in an extent of 5644 sq. ft. through the AG & OT within four weeks from the date of receipt of copy of this judgment. With the above directions, these appeals are allowed.

R.P. Appeals allowed.

SECRETARY TO GOVERNMENT, SCHOOL EDUCATION DEPARTMENT, CHENNAI & ORS.

v.

THIRU R. GOVINDASWAMY & ORS.

(Civil Appeal Nos. 2726-2729 of 2014)

FEBRUARY 21, 2014

[DR. B.S. CHAUHAN AND A.K. SIKRI, JJ.]

Service Law: Regularisation - Part time sweepers - Working for more than 10 years sought regularisation of their services by filing writ petitions before the High Court - Writ Petitions allowed - Held: Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment" - Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post - Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right - There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees - Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work - Nor can employees in private employment, even if serving full time, seek parity in salary with government employees - The right to claim a particular salary against the State must arise under a contract or under a statute." - However, in light of the facts and circumstances of the case, since the department has already implemented the impugned judgment and does not want to disturb the services of the respondents, the services of the respondents which stood

regularised should not be affected.

State of Karnataka & Ors. v. Umadevi & Ors. **AIR 2006 SC 1806: 2006 (3) SCR 953;** *Union of India & Ors. v. A.S. Pillai & Ors.* **(2010) 13 SCC 448;** *State of Rajasthan & Ors. v. Daya Lal & Ors.* **AIR 2011 SC 1193: 2011 (1) SCR 707 - relied on.**

Case Law Reference:

2006 (3) SCR 953	**Relied on**	**Para 4**
(2010) 13 SCC 448	**Relied on**	**Para 6**
2011 (1) SCR 707	**Relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2726-2729 of 2014.

From the Judgment and Order dated 21.11.2012 of the High Court of Madras in WA Nos. 2402, 2403, 2404 and 2405 of 2012.

WITH

C.A. Nos. 2730-2731 of 2014.

P.P. Rao, Subroamonium Prasad, AAG, M. Yogesh Kanna, A. Santha Kumaran for the Appellants.

P.R. Kovilan P., Gettha Kovilan for the Respondent.

The following Order of the Court was delivered

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgments and orders dated 21.11.2012 and 16.11.2012 in Writ Appeal Nos. 2402, 2403 2404, 2405 of 2012 and 2555, 2556 of 2012 passed by the High Court of Madras, by which the High Court has regularised the services of part-time sweepers (respondents herein).

2. Facts and circumstances giving rise to these appeals

are that:

The respondents had been appointed as part-time sweepers by appellant from 1987 till 1993 as their initial appointments had been issued to the respondents and others on 1.12.1987, 2.5.1991, 1.4.1993, 10.4.1993, 27.5.1999 and 19.1.2001. As the respondents and others had been working for more than 10 years, they filed Writ Petition Nos. 17468, 17470, 17472, 17473, 17469 and 17471 of 2012 before the High Court of Madras for seeking regularisation of their services. The said Writ Petitions were allowed by the common judgment and order dated 23.7.2012 with the direction to regularise the services of the respondents on full time basis based on the individual representation after verifying their service particulars from the date of completion of 10 years of service with time scale of pay.

Aggrieved, the appellants preferred the writ appeals which were dismissed.

Hence, these appeals.

3. Shri P.P. Rao, learned senior counsel appearing for the appellants have submitted that a direction to regularise the part-time employees itself is contrary to law and the said direction could not have been issued. It has further been submitted that as the impugned judgments and orders had been complied with and the appellants are not going to disturb any of the respondents and others, the law should be clarified on the issue so that in future the High Court may not use the impugned judgment as a precedent.

4. Per contra, Shri P.R. Kovilan P, learned counsel appearing for the respondents has submitted that as the respondents had been working as part-time sweepers for a very long time and not regularising their services would tantamount to exploitation. Therefore, no interference is called for in these appeals.

5. The issue involved here remains restricted as to whether the services of the part-time sweepers could have been directed by the High Court to be regularized. The issue is no more res integra.

In *State of Karnataka & Ors. v. Umadevi & Ors.,* AIR 2006 SC 1806, this Court held as under:

> "There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules."

6. In *Union of India & Ors. v. A.S. Pillai & Ors.,* (2010) 13 SCC 448, this Court dealt with the issue of regularisation of part-time employees and the court refused the relief on the ground that part-timers are free to get themselves engaged elsewhere and they are not restrained from working elsewhere when they are not working for the authority/employer. Being the part-time employees, they are not subject to service rules or other regulations which govern and control the regularly appointed staff of the department. Therefore, the question of giving them equal pay for equal work or considering their case for regularisation would not arise.

7. This Court in *State of Rajasthan & Ors. v. Daya Lal & Ors.,* AIR 2011 SC 1193, has considered the scope of regularisation of irregular or part-time appointments in all

possible eventualities and laid down well-settled principles relating to regularisation and parity in pay relevant in the context of the issues involved therein. The same are as under:

> "8(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.
>
> (ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, **if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation** in the absence of a legal right.
>
> (iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on th ot

possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) **Part-time employees are not entitled to seek regularisation** as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) **Part-time temporary employees in government-run institutions cannot claim parity in salary** with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute." (Emphasis added)

8. The present appeals are squarely covered by clauses (ii), (iv) and (v) of the aforesaid judgment. Therefore, the appeals are allowed. However, in light of the facts and circumstances of the case as Shri P.P. Rao, learned senior counsel has submitted that the appellants have already implemented the impugned judgments and does not want to disturb the services of the respondents, the services of the respondents which stood regularised should not be affected.

With the aforesaid observations, the appeals stand disposed of accordingly. No order as to costs.

D.G. Appeals disposed of.

SHYAMAL SAHA & ANR.
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 1490 of 2008)

FEBRUARY 24, 2014

[RANJANA PRAKASH DESAI AND MADAN B. LOKUR, JJ.]

PENAL CODE, 1860: s.302 - Murder - Allegation that the victim-deceased was taken across the river by appellants in a boat and thereafter taken to jungle and killed - Trial court found that evidence of witnesses was inconsistent and acquitted the appellant - High Court applied the last seen theory and set aside the order of acquittal - On appeal, held: Number of independent witnesses turned hostile and three important witnesses added more in their oral testimony before the court than what was stated by them before the Investigating officer during investigation - High Court believed their testimony and did not take into consideration the view of trial court based on evidence that it was doubtful if the five persons boarded the boat to cross river as alleged by prosecution - When the basic fact of the deceased having boarded a boat and crossing the river with the appellants was in doubt, the substratum of the prosecution's case virtually would fall flat and the truth of the subsequent events also becomes doubtful - High Court did not take into consideration that the chain of event must be so complete so as to leave no room for any hypothesis except that the accused was responsible for the death of the victim and it merely proceeded on last seen theory - Since the first link was missing the view taken by trial court was not only a reasonable view but also probable view of the event - Order of acquittal passed by trial court restored.

The prosecution case was that on the fateful day, the victim-deceased was with his mother PW-5 at about 5.00/ 5.30 p.m. Thereafter, he and his nephew (CW-1) aged about 10 years went for a walk on the banks of the river Ganges where they met GS. At that time, the appellants also came there and called the deceased to go across the river to see the Char (island). They boarded a boat and were joined by PW-6 and PW-11. The five of them then went across the river Ganges. When they reached the other side of the river, PW-6 and PW-11 went towards the thermal plant while the deceased and the appellants went in a different direction towards the jungle. CW-1 expressed his desire to go to the Char but the appellant no.1 asked him to return home. Thereafter, CW-1 came back to his house. The deceased did not return home. The next day, PW-1, the brother of the deceased lodged an FIR regarding disappearance of the deceased. After two days, the dead body of the deceased was found in the river tied to two iron chairs with a napkin around his neck. The appellants were charged for abducting and murdering the deceased. The trial court held that the charges were not proved and the testimony of prosecution witnesses were inconsistent and, therefore, acquitted both the appellants. The High Court set aside the acquittal. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: The issue regarding scope of interference by the High Court in an acquittal given by the trial court was discussed in *Chandrappa. It was held in *Chandrappa as follows: (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate

court on the evidence before it may reach its own conclusion, both on questions of fact and of law. (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." The principles laid down in *Chandrappa were generally reiterated but mainly reformulated in **Ganpat though without reference to *Chandrappa and by referring to decisions not considered therein. Undoubtedly, from the principles laid down, it appeared at first blush that the High Court is entitled to virtually step into the shoes of the trial court and then decide the case as a court of first instance. This is not what is intended, notwithstanding the broad language used in *Chandrappa and **Ganpat. Otherwise, the decision of the trial court would be a meaningless exercise and the Supreme Court would become a first appellate court from a decision of the High Court in a case of acquittal by the

the principles stated are broad, it is the obligation of the High Court to consider and identify the error in the decision of the trial court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the trial court only because the first two principles in *Chandrappa and **Ganpat permit it to do so and because it has the power to do so - it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the trial court. This is where the High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim (who may or may not be before it). This is also where the fifth principle laid down in Chandrappa and Ganpat would come into operation. [para 19-22] [101-D; 103-A-H; 104-A, F-G; 105-A-D]

***Chandrappa v. State of Karnataka* (2007) 4 SCC 415: 2007 (2) SCR 630; ****Ganpat v. State of Haryana* (2010) 12 SCC 59: 2010 (12) SCR 400 - relied on.**

Joginder Singh v. State of Haryana **MANU/SC/1096/2013;** *Sheo Swarup v. King Emperor* **AIR 1934 PC 227;** *Nur Mohammad v. Emperor* **AIR 1945 PC 151;** *Prandas v. State* **AIR 1954 SC 36 - referred to.**

2. In this context, the evidence of CW-1, PW-6, PW-11 and the Investigating Officer assumes significance. Disputing the testimony given by PW-6 and PW-11 in Court, the Investigating Officer stated that when they were examined under Section 161, Cr.P.C. they neither told him that they had gone to the opposite side of the river nor that appellants had gone with the deceased towards the jungle. There was also no mention of the attendance of CW-1 or the dress worn by the deceased. In other words, they did not mention any of the events said to have taken place in their presence. From this, it is quite clear that the subsequent statements made by them on oath appear to be add-ons and make believe.

This casted serious doubt on their credibility. An independent witness PW-8 who was supposed to have seen PW-6, PW-11, the deceased and the appellants board the boat to cross the river, turned hostile and denied having made any statement before the Investigating Officer. PW-7, wife of the boat owner also turned hostile and stated that their boat was, as usual, tied to the ghat and she could not say whether it was taken by any person on that date. CW-1 stated in Court that he was taken by PW-1 to the police station. However, PW-1 did not depose anything about having taken CW-1 to the police station. The Investigating Officer deposed that CW-1 was cited as a witness and that had it been known to him that CW-1 was a material witness who saw the victim together with the accused, during investigation, he would have cited him as a witness in the charge sheet. Therefore, the possibility of CW-1 having been tutored was not completely ruled out. [paras 24-26] [105-G-H; 106-A-G]

3. There was considerable padding in the testimony of the three crucial witnesses namely, PW-6, PW-11 and CW-1 and there were unexplained additions made by them. In this state of the evidence on record, the trial court was entitled to come to a conclusion that the prosecution version of the events was doubtful and that the appellants were entitled to the benefit of doubt and to be acquitted. A number of independent witnesses have turned hostile and three important witnesses had added much more in their oral testimony before the Court than what was stated before the Investigating Officer during investigations. The High Court believed the testimony of PW-6 and PW-11 and came to the conclusion that they had crossed the river along with the deceased and the appellants. However, the High Court did not take into consideration the view of the trial court, based on the evidence on record, that it was e

persons boarded the boat to cross the river as alleged by the prosecution. The High Court also did not consider the apparently incorrect testimony of CW-1 who had stated that he had gone to the police station and given his version but despite this, he was not cited as a witness. The version of CW-1 was specifically denied by the Investigating Officer. [paras 27, 28] [106-H; 107-A-E]

4. When the basic fact of the deceased having boarded a boat and crossing the river with the appellants was in doubt, the substratum of the prosecution's case virtually falls flat and the truth of the subsequent events also becomes doubtful. Unfortunately, the High Court did not seem to have looked at the evidence from the point of view of the accused who had already secured an acquittal. This is an important perspective as noted in the fourth principle of Chandrappa. The High Court was also obliged to consider (which it did not) whether the view of the trial court was a reasonable and possible view (the fifth principle of Chandrappa) or not. Merely because the High Court disagreed (without giving reasons why it did so) with the reasonable and possible view of the trial court, on a completely independent analysis of the evidence on record, is not a sound basis to set aside the order of acquittal given by the trial court. This is not to say that every fact arrived at or every reason given by the trial court must be dealt with - all that it means is that the decision of the trial court cannot be ignored or treated as non-existent. [para 29] [107-E-H; 108-A]

5. The High Court did not take into consideration that the chain of events must be so complete as to leave no room for any other hypothesis except that the accused were responsible for the death of the victim and merely proceeded on the basis of the last seen theory. The facts of this case demonstrated that the first link in the chain of circumstances was missing. It was only if this first link is established that the subsequent links may be formed

on the basis of the last seen theory. But the High Court overlooked the missing link, as it were, and directly applied the last seen theory. This was a rather unsatisfactory way of dealing with the appeal. Under the circumstances, there was really no occasion for the High Court to have overturned the view of the trial court which was not only a reasonable view but a probable view of the events. [paras 30, 31, 32] [108-B-F]

6. The significance of the evidence of the doctor who conducted the post mortem to the effect that the death took place between 65 and 70 hours before the post mortem examination was only with respect to the time of death and has no reference to the persons who may have caused the death of the deceased. The view taken by the trial court was a reasonable and probable view on the facts of the case. Consequently, there was no occasion for the High Court to set aside the acquittal of the appellants. Accordingly, their conviction and sentence is set aside. [paras 34, 35] [109-A-D]

Sharad Birdhi Chand Sarda v. State of Maharashtra **(1984) 4 SCC 116: 1997 (3) Suppl. SCR 337;** *Majenderan Langeswaran v. State (NCT of Delhi) and Anr.* **(2013) 7 SCC 192 - relied on.**

Case Law Reference:

AIR 1934 PC 227	**referred to**	**Para 19**
AIR 1945 PC 151	**referred to**	**Para 19**
2007 (2) SCR 630	**relied on**	**Para 20**
AIR 1954 SC 36	**referred to**	**Para 20**
2010 (12) SCR 400	**relied on**	**Para 21**
1997 (3) Suppl. SCR 337	**relied on**	**Para 30**
(2013) 7 SCC 192	**relie**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1490 of 2008.

From the Judgment and Order dated 11.03.2008 of the Division Bench of Calcutta High Court in G.A. No. 9 of 2000.

Rauf Rahim for the Appellants.

Soumya Chakaraborty, Anip Sachthey for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. This appeal questions the limits of interference by the High Court in an appeal against the acquittal of an accused by the Trial Court. In our opinion, the High Court ought not to have interfered in the appeal before it with the acquittal of the appellants by the Trial Court.

Facts:

2. The sequence of events, as it has unfolded from the evidence of the witnesses, is that on 19th May, 1995 a thermal plant of the Calcutta Electric Supply Company had opened across the river Ganges in Mauza Bhabanipur Char, District Hooghly, West Bengal.

3. Paritosh Saha was with his mother Bidyutprava Saha (PW-5) at about 5.00/5.30 p.m. on 19th May, 1995. Thereafter, he and his nephew Animesh Saha (CW-1) aged about 10 years went for a walk on the banks of the river Ganges where they met Gopal Saha, with whom they struck a conversation. At that time, the appellants Shyamal Saha and Prosanta @ Kalu Kabiraj also came there and called Paritosh to go across the river to see the Char (island). Animesh also expressed his desire to go to the Char but Shyamal asked him to return home.

4. When the three of them (Paritosh, Shyamal and Prosanta) were about to board Asit Sarkar's boat, they were joined by Dipak Saha (PW-6) and Panchu Sarkar (PW-11). The

five of them then went across the river Ganges and, according to Animesh, when they reached the other side of the river, Dipak and Panchu went towards the thermal plant while Paritosh, Shyamal and Prosanta went in a different direction towards the jungle. Thereafter, Animesh came back to his house.

5. According to Bidyutprava Saha, at about 8.00 or 8.30 p.m. Shyamal and Prosanta came to her house and asked the whereabouts of Paritosh.

6. According to Paritosh's brother Amaresh Saha (PW-1) at about 10.00 p.m. Shyamal and Prosanta came to his house and enquired about Paritosh.

7. Early next morning on 20th May, 1995 Bidyutprava Saha noticed that Paritosh had not eaten his dinner which she had kept for him. She mentioned this to Amaresh and also informed him that Shyamal and Prosanta had come and met her the previous evening at about 8.00 or 8.30 p.m. During the course of this conversation, Animesh revealed to his father Amaresh that he had seen Paritosh cross the river Ganges the previous evening in a boat along with Shyamal and Prosanta.

8. On receiving this information Amaresh enquired from Shyamal and Prosanta the whereabouts of Paritosh but they informed him that they had seen him across the river with some boys. Later in the day, Amaresh was informed by Dipak and Panchu that they had crossed the river along with Paritosh, Shyamal and Prosanta. After crossing the river, Dipak and Panchu had gone to see the thermal plant and the others had gone in another direction towards the jungle. Dipak and Panchu pleaded ignorance of the subsequent movements of Paritosh.

9. Later in the evening at about 7.30 p.m. Amaresh Saha lodged a First Information Report regarding the disappearance of Paritosh.

10. Sometime in the morning of 21st May, 1995 the corpse of Paritosh was found in the river tied to a

napkin around his neck. The police were informed about the recovery of the dead body and an inquest was carried out and the iron chairs and napkin were seized in the presence of some witnesses. It was noticed that a part of Paritosh's skin was burnt perhaps due to pouring of acid.

11. On these broad facts, investigations were carried out and Shyamal and Prosanta were charged with having abducted Paritosh and thereafter having murdered him.

Decision of the Trial Court:

12. In its judgment and order dated 29th July, 1998 the Trial Court held that neither the charge of abduction nor the charge of murder was proved against Shyamal and Prosanta and therefore they were acquitted.[1] As far as the charge of abduction is concerned, that is not in issue before us and need not detain us any further.

13. The acquittal by the Trial Court was primarily in view of the absence of consistency in the testimony of Amaresh, Bidyutprava Saha, Animesh, Dipak and Panchu. For example, it was observed that if Animesh had in fact informed Amaresh and Bidyutprava Saha that he had gone to the banks of the river with Paritosh, it would have been reflected in their testimony. Similarly, Bidyutprava Saha did not say anything about Paritosh going to the river although she saw him at about 5.00 or 5.30 p.m. on 19th May, 1995. The Investigating Officer, Sub-Inspector Debabrata Dubey (PW-16) had yet another version of the events. His testimony indicated that many of the facts stated in the oral testimony of the witnesses were not put across to him at any time, suggesting considerable padding and embellishments in their testimony. As such, it was not possible to lend credence to the testimony of the prosecution witnesses and the accused were entitled to the benefit of doubt. Additionally, the Trial Court noted that it was a case of

1. Session Trial Case No. 21 of 1997 deided by the Additional Sessions Judge, Hooghly.

circumstantial evidence and also that there was no motive for Shyamal and Prosanta to have murdered Paritosh.

Decision of the High Court:

14. Feeling aggrieved by their acquittal, the State preferred an appeal before the Calcutta High Court against Shyamal and Prosanta. The appeal was allowed by a judgment and order dated 11th March, 2008.[2] The decision of the Trial Court was reversed and they were convicted for the murder of Paritosh and sentenced to imprisonment for life and a fine of Rs.5000/- each and in default of payment to undergo rigorous imprisonment of one year each.

15. According to the High Court, the case of the prosecution hinged, essentially, on the evidence of Dipak and Panchu, as well as of Animesh. The High Court considered their evidence and held that all five (Dipak, Panchu, Paritosh, Shyamal and Prosanta) crossed the river in a boat in the evening at about 5.30 p.m. on 19th May, 1995. This was supported by the testimony of Animesh who also wanted to go along with all of them but was prohibited from doing so by Shyamal.

16. It was also held, on the basis of the post mortem report given by Dr. P.G. Bhattacharya (PW-15) and his testimony that Paritosh died soon after 5.30 p.m. on 19th May, 1995. The High Court came to this conclusion on the basis of the doctor's statement that the death took place between 65 and 70 hours before he conducted the post mortem examination. Since the post mortem examination was conducted at about 12.00 noon on 22nd May, 1995 working backwards, it appeared that Paritosh died soon after 5.30 p.m. on 19th May, 1995.

17. Finally, the High Court held that Paritosh was last seen with Shyamal and Prosanta and therefore they had to explain

2. State of West Bengal v. Shyamal Saha and another, 112 CWN 505=MANU/WB/0881/2008.

the events that had occurred after they were last seen together. In the absence of any explanation offered by them, the last seen theory would apply and it must be held that Shyamal and Prosanta had murdered Paritosh.

Discussion on the law:

18. Aggrieved by their conviction and sentence, Shyamal and Prosanta have preferred this appeal. The primary submission made on their behalf was to the effect that the High Court ought not to have interfered in the acquittal by the Trial Court particularly, in a case of circumstantial evidence. It was also submitted that the evidence on record points to the fact that they were made scapegoats by the prosecution. Of course, this was opposed by learned counsel for the State.

19. The crucial issue for consideration, therefore, relates to interference by the High Court in an acquittal given by the Trial Court. Recently, in *Joginder Singh v. State of Haryana*[3] it was held, after referring to *Sheo Swarup v. King Emperor*[4] that

> "Before we proceed to consider the rivalised contentions raised at the bar and independently scrutinize the relevant evidence brought on record, it is fruitful to recapitulate the law enunciated by this Court pertaining to an appeal against acquittal. In *Sheo Swarup* (supra), it has been stated that the High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result."

3. MANU/SC/1096/2013.

4. AIR 1934 PC 227.

Unfortunately, the paraphrasing of the concerned passage from *Sheo Swarup* gave us an impression that the High Court can reverse an acquittal by a lower court only in limited circumstances. Therefore, we referred to the passage in Sheo Swarup and find that what was stated was as follows:

> "There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has "obstinately blundered," or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice," or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result."

The legal position was reiterated in *Nur Mohammad v. Emperor*[5] after citing *Sheo Swarup* and it was held:

> "Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed."

We are mentioning this only to dispel the possibility of anyone else getting an impression similar to the one that we got, though nothing much turns on this as far as this case is concerned.

20. The entire case law on the subject was discussed in *Chandrappa v. State of Karnataka*[6] beginning with perhaps the first case decided by this Court on the subject being *Prandas*

5. AIR 1945 PC 151.

6. (2007) 4 SCC 415.

v. State.[7] It was held in *Chandrappa* as follows:

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. The principles laid down in Chandrappa were generally reiterated but mainly reformulated in *Ganpat v. State of Haryana*[8] though without reference to Chandrappa and by

7. AIR 1954 SC 36.
8. (2010) 12 SCC 59.

referring to decisions not considered therein. The reformulation of the principles in Ganpat is as follows:

"(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide *Madan Lal v. State of J&K*[9], *Ghurey Lal v. State of U.P.*[10], *Chandra Mohan Tiwari v. State of M.P.*[11] and *Jaswant Singh v. State of Haryana*[12].)"

22. Undoubtedly, we are suffering from an overdose of precedents but be that as it may, from the principles laid down, it appears at first blush that the High Court is entitled to virtually step into the shoes of the Trial Court hearing submissions of learned counsel and then decide the case as a court of first

9. (1997) 7 SCC 677.
10. (2008) 10 SCCC 450.
11. (1992) 2 SCC 105.
12. (2000) 4 SCC 484.

instance. Perhaps this is not what is intended, notwithstanding the broad language used in *Chandrappa* and *Ganpat*. Otherwise, the decision of the Trial Court would be a meaningless exercise and this Court would become a first appellate court from a decision of the High Court in a case of acquittal by the Trial Court. Realistically speaking, although the principles stated are broad, it is the obligation of the High Court to consider and identify the error in the decision of the Trial Court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the Trial Court only because the first two principles in *Chandrappa* and *Ganpat* permit it to do so and because it has the power to do so - it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the Trial Court. This is where the High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim (who may or may not be before it). This is also where the fifth principle laid down in *Chandrappa* and *Ganpat* comes into operation.

Discussion on facts:

23. Looked at from this perspective, it was submitted by learned counsel for the State that there cannot be two reasonable views of the events that took place. It was submitted that there was no doubt that Paritosh crossed the river Ganges with Shyamal and Prosanta and they went to a secluded and uninhabited place across the river. This was witnessed by Dipak, Panchu and Animesh. Paritosh then went missing and his corpse was found a couple of days later. It was submitted that on these facts there can be only one conclusion, namely that Shyamal and Prosanta caused the death of Paritosh.

24. In this context, the evidence of Dipak, Panchu, Animesh and the Investigating Officer assumes significance. Disputing the testimony given by Dipak and Panchu in Court, the Investigating Officer stated that when they were examined under Section 161 of the Criminal Procedure Code they neither told

him that they had gone to the opposite side of the river nor that Shyamal and Prosanta had gone with Paritosh towards the jungle. There was also no mention of the attendance of Animesh or the dress worn by Paritosh. In other words, they did not mention any of the events said to have taken place in their presence on the evening of 19th May, 1995. From this, it is quite clear that the subsequent statements made by them on oath appear to be add-ons and make believe. This casts serious doubt on their credibility.

25. An independent witness Swapan Kabiraj (PW-8) who is supposed to have seen Dipak, Panchu, Paritosh, Shyamal and Prosanta board the boat to cross the river, turned hostile and denied having made any statement before the Investigating Officer. Snehalata Sarkar (PW-7), wife of the boat owner Asit Sarkar also turned hostile and stated that their boat was, as usual, tied to the ghat and she could not say whether it was taken by any person on that date.

26. However, what is even more important is that Animesh stated in Court that on the morning of 20th May, 1995 he had told his father Amaresh and Bidyutprava Saha that he had seen the abovementioned five persons cross the river in a boat the previous evening. He also stated that he was taken by Amaresh to the police station and he had even mentioned this to the police. However, Amaresh does not depose anything about having taken Animesh to the police station. The Investigating Officer deposed that Animesh had not been cited as a witness and "had it been known to me that Animesh is a material witness who saw the victim together with the accused, during investigation, he would have been cited as a witness in the charge sheet". Therefore, the possibility of Animesh having been tutored cannot be completely ruled out.

27. It is clear that there is considerable padding in the testimony of the three crucial witnesses namely, Dipak, Panchu and Animesh and there are unexplained additions made by them. In this state of the evidence on rec s

entitled to come to a conclusion that the prosecution version of the events was doubtful and that Shyamal and Prosanta were entitled to the benefit of doubt and to be acquitted. We also find from the record that a number of independent witnesses have turned hostile and, as mentioned above, three important witnesses have added much more in their oral testimony before the Court than what was stated before the Investigating Officer during investigations.

28. The High Court believed the testimony of Dipak and Panchu and came to the conclusion that they had crossed the river along with Paritosh, Shyamal and Prosanta. However, the High Court did not take into consideration the view of the Trial Court, based on the evidence on record, that it was doubtful if the five persons mentioned above boarded the boat belonging to Asit Sarkar to cross the river as alleged by the prosecution. The High Court also did not consider the apparently incorrect testimony of Animesh who had stated that he had gone to the police station and given his version but despite this, he was not cited as a witness. The version of Animesh was specifically denied by the Investigating Officer.

29. When the basic fact of Paritosh having boarded a boat and crossing the river with Shyamal and Prosanta is in doubt, the substratum of the prosecution's case virtually falls flat and the truth of the subsequent events also becomes doubtful. Unfortunately, the High Court does not seem to have looked at the evidence from the point of view of the accused who had already secured an acquittal. This is an important perspective as noted in the fourth principle of Chandrappa. The High Court was also obliged to consider (which it did not) whether the view of the Trial Court is a reasonable and possible view (the fifth principle of Chandrappa) or not. Merely because the High Court disagreed (without giving reasons why it did so) with the reasonable and possible view of the Trial Court, on a completely independent analysis of the evidence on record, is not a sound basis to set aside the order of acquittal given by the Trial Court.

This is not to say that every fact arrived at or every reason given by the Trial Court must be dealt with - all that it means is that the decision of the Trial Court cannot be ignored or treated as non-existent.

30. What is also important in this case is that it is one of circumstantial evidence. Following the principles laid down in several decisions of this Court beginning with *Sharad Birdhi Chand Sarda v. State of Maharashtra*[13] it is clear that the chain of events must be so complete as to leave no room for any other hypothesis except that the accused were responsible for the death of the victim. This principle has been followed and reiterated in a large number of decisions over the last 30 years and one of the more recent decisions in this regard is *Majenderan Langeswaran v. State (NCT of Delhi) and Another*[14]. The High Court did not take this into consideration and merely proceeded on the basis of the last seen theory.

31. The facts of this case demonstrate that the first link in the chain of circumstances is missing. It is only if this first link is established that the subsequent links may be formed on the basis of the last seen theory. But the High Court overlooked the missing link, as it were, and directly applied the last seen theory. In our opinion, this was a rather unsatisfactory way of dealing with the appeal.

32. Under the circumstances, we are unable to agree with learned counsel for the State and are of the opinion that there was really no occasion for the High Court to have overturned the view of the Trial Court which was not only a reasonable view but a probable view of the events.

33. Learned counsel for Shyamal and Prosanta raised some issues such as the failure of the prosecution to examine Gopal Saha and Asit Sarkar. He also submitted that there was no motive for Shyamal and Prosanta to murder Paritosh. In the

13. (1984) 4 SCC 116.

14. (2013) 7 SCC 192.

view that we have taken, it is not necessary to deal with these submissions.

34. Learned counsel for the State relied on the evidence of Dr. Bhattacharya to submit that Paritosh died between 65 and 70 hours before the post mortem examination was conducted. As observed by High Court, this placed Paritosh's death soon after 5.30 p.m. on 19th May, 1995. The significance of this is only with respect to the time of death and has no reference to the persons who may have caused the death of Paritosh. The evidence of Dr. Bhattacharya, therefore, does not take the case of the State any further.

Conclusion:

35. The view taken by the Trial Court was a reasonable and probable view on the facts of the case. Consequently, there was no occasion for the High Court to set aside the acquittal of Shyamal and Prosanta. Accordingly, their conviction and sentence handed down by the High Court is set aside. Their appeal against their conviction and sentence is allowed.

D.G. Appeal allowed.

GOHIL JESANGBHAI RAYSANGBHAI & ORS.
v.
STATE OF GUJARAT & ANR.
(Civil Appeal No. 4123 of 2012)

FEBRUARY 25, 2014

[SURINDER SINGH NIJJAR AND H.L. GOKHALE, JJ.]

GUJARAT TENANCY AND AGRICULTURAL LANDS ACT, 1948:

s. 43 r/w Government Resolution dated 4.7.2008 - Restriction on transfer of agricultural land for non-agricultural purposes - Transfer of land with previous sanction of Collector and in consideration of such amount as State Government may determine - Amount determined on the basis of rates called 'Jantri' on prior sanction to be obtained from Collector - Single Judge and Division Bench of High Court upholding the provision - Held: There is no reason to interfere with impugned judgments of High Court - Application u/s s.43 cannot be kept pending indefinitely and, therefore, Collector is expected to decide such applications as far as possible within 90 days from its receipt, on the lines of the judgment in Patel Raghav Natha -- State Government has reduced the levy from 80 to 40 per cent which is obviously quite reasonable - Application u/s 43 speaks of previous sanction -- Therefore, Jantri rate to be applied will be on the date of the sanction by Collector, and not on the date of the application made by the party - Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950.

The instant appeals raised the questions with respect to the validity of s. 43 of the Gujarat Tenancy and Agricultural Lands Act, 1948 and Gujarat Government Resolution dated 4.7.2008, which placed restriction on transfer of agricultural lands by tenants for non-

agricultural purposes. It was contended that 80% of the Jantri rates fixed for the lands, as premium was violative of their rights under Art. 300A of the Constitution. The appeals also challenged the minimum valuation of land as per the rates contained in the "Jantri" prevalent since 20.12.2006.

Dismissing the appeals, the Court

HELD: 1.1 The Gujarat Tenancy and Agricultural Lands Act, 1948 was passed as a part of the agrarian reform. The Act as such does not permit transfer of agricultural land for non-agricultural purpose, and the same is barred u/s 63 thereof. That Section permits such a transfer only in certain contingencies as provided thereunder. Section 43 appears in Part III of Chapter III of the Act. Chapter III provides for special rights and privileges of tenants, and contains provisions for distribution of land for personal cultivation. Part III, thereof, provides for restrictions upon holding of land in excess of ceiling area. Section 43 has to be seen in this context. [para 6] [130-G-H; 131-A-B]

1.2 The principal part of s. 43 lays down that the land which is purchased by a tenant under the various Sections referred to in s. 43 shall not be transferred in any manner except as permitted in s.43. The original s.43 did not contain any such exception. The Gujarat (Amendment) Act No. XVI of 1960 introduced the words "on payment of such amount as the State Government may by general or special order determine" in s. 43. A Division Bench of the Gujarat High Court in Shashikant Mohanlal, upholding the constitutionality of the Section, held that the amount as introduced under the Amendment was the charge which the State was seeking, for permitting the transfer since the occupancy right as such was not transferable as of right. In the case of Patel Ambalal Gokalbhai, this Court held that the amendment of 1960 was protected

under the 9th Schedule to the Constitution and, therefore, immune from any challenge. Subsequently, by Amendment Act No. XXX of 1977, the words "in consideration of payment of such amount..." came to be substituted in place of the words "on payment of such amount..." Thus, the Section permits such a transfer by the tenant after the appropriate amount, as determined by the State Government by a general or special order, is paid by way of consideration, and only after a previous sanction is obtained from the Collector for effecting the transfer. Thus, the State Government has to lay down by general or special order the payment which is required to be made for such a transfer. If the agriculturist is seeking such a transfer, he has to make the necessary payment, and the transfer will be permitted only after a prior sanction is obtained from the Collector. The transfer is however not by way of a right. [para 7-8] [131-B-H; 132-A-B]

Shashikant Mohanlal Vs. State of Gujarat reported **in AIR 1970 Gujarat 204 - approved.**

Patel Ambalal Gokalbhai vs. State of Gujarat, **1982 (3) SCC 316 - referred to.**

1.3 As far as the determination of the amount is concerned, the State Government decided to adopt the approach of valuation based on Jantri, i.e. the list of rates containing the minimum valuation of land as per the Government Resolution dated 20.12.2006. It is for this purpose that the Resolution dated 4.7.2008 was passed. As per paragraph 4 of the Resolution, the premium is required to be recovered on the basis of the Jantri, and all the powers concerning the transfers in the entire District are vested in the Collector. The Jantri contains the rates which are fixed for the purpose of valuation of the land for levying the stamp duty under the Bombay Stamp Act. Those rates in the Jantri

virtue of the Resolution for the purpose of permitting the transfers. [para 9] [132-C-F]

1.4 The amount which is being charged is a premium for granting the sanction. This is because under this welfare statute the lands have been permitted to be purchased by the tenants at a much lesser price. The tenant is supposed to cultivate the land personally. It is not to be used for non-agricultural purpose. A benefit is acquired by the tenant under the scheme of the statute and, therefore, he must suffer the restrictions which are also imposed under the same statute. The idea in insisting upon the premium is also to make such transfers to non-agricultural purpose unattractive. The intention of the statute is reflected in s. 43, and, therefore, the courts should not depart therefrom while interpreting the provision. [para 20] [141-H; 142-A-C]

Shashikant Mohanlal Vs. State of Gujarat **reported in AIR 1970 Gujarat 204 - approved.**

2.1 The Section speaks of previous sanction. Therefore, the Jantri rate to be applied will be on the date of the sanction by the Collector, and not on the date of the application made by the party. [para 21] [142-D-F]

Union of India vs. Mahajan Industries Ltd, **2005 (10) SCC 203 - cited.**

2.2 The application u/s 43 cannot be kept pending indefinitely and, therefore, the Collector is expected to decide such applications as far as possible within 90 days from its receipt, on the lines of the judgment of this Court in Patel Raghav Natha. In the event of further delay, the Collector is expected to record the reasons for such delay. [para 24] [143-D-F]

State of Gujarat vs. Patel Raghav Natha **1970 (1) SCR 335 =1969 (2) SCC 187 - relied on.**

K.B. Nagur, M.D. (Ayurvedic) vs. Union of India, **2012 (1) SCR 1023 = 2012 (4) SCC 483;** *Delhi Airtech Services Pvt. Ltd. vs. State of Uttar Pradesh,* **2012 (12) SCR 191 = 2011 (9) SCC 354 -cited.**

2.3 As far as the levy of 80 per cent of the amount is concerned, it has been pointed out that after the impugned judgment, the State Government has reduced the levy to 40 per cent which is obviously quite reasonable. [para 23] [143-C]

Nagesh Bisto Desai vs. Khando Tirmal Desai **AIR 1982 SC 887 - cited.**

2.4 Therefore, there is no reason to interfere with the impugned judgment rendered by the Division Bench, approving the decisions rendered by the single Judges in the writ petitions. [para 25] [143-F-G]

Case Law Reference:

AIR 1970 Gujarat 204	**approved**	**para 7**
1982 (3) SCC 316	**referred to**	**para 8**
AIR 1982 SC 887	**cited**	**para 12**
2005 (10) SCC 203	**cited**	**para 13**
1970 (1) SCR 335	**relied on**	**para 13**
2012 (1) SCR 1023	**cited**	**para 14**
2012 (12) SCR 191	**cited**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4123 of 2012.

From the Judgment and Order dated 03.05.2011 of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 1127 of 2008 in Special Civil Application No. 7648 of 2008.

WITH

Civil Appeal No. 4124, 4125, 4126, 4127, 4129, 4130, 4131, 4132, 4133, 4134 and 4135 of 2012.

Rohinton Nariman, SG, Pravin H. Parekh, Himansoo Desai, Mohit D. Ram, Subhasnee Chatterjee, Meenakshi Arora, Vasen A., Huzefa Ahmadi, Pradhuman Gohil, Vikash Singh, S. Hari Haran, Taruna Singh, Charu Mathur, Bharat S. Patel, Ranjana B. Patel, D.N. Ray, Lokesh K. Choudhary, Sumita Ray, K.K. Trivedi, Priank Adhyaru (for Rameshwar Prasad Goyal), Purvish Jitendra Malkan, Preetesh Kapoor, Hemantika Wahi, Jesal, Shamik Sanjanwala, Kailash Pandey, K.V. Sreekumar, Brajesh Kumar for the appearing parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. All these Civil Appeals raise the questions with respect to the validity of Section 43 of Bombay Tenancy and Agricultural Lands Act, 1948 as applicable to the State of Gujarat, now known in the State of Gujarat as Gujarat Tenancy and Agricultural Lands Act, 1948 ("Tenancy Act" for short). This section places certain restrictions on the transfer of land purchased or sold under the said Act. These appeals raise the questions also with respect to the validity of resolution dated 4.7.2008 passed by the Government of Gujarat to give effect to this section, and which resolution fixes the rates of premium to be paid to the State Government for converting, transferring, and for changing the use of land from agricultural to non-agricultural purposes. Thirdly, these appeals seek to challenge the minimum valuation of land as per the rates contained in the list called as "Jantri" prevalent since 20.12.2006.

2. The Tenancy Act was passed way-back in the year 1948, as a beneficial legislation and as a part of agrarian reform. This section has been amended twice thereafter, first in 1960 and then in 1977. The aforesaid challenge was first taken in the High Court of Gujarat by filing various Special Civil

Applications (i.e. Writ Petitions) bearing Spl. C.A. No.12661 of 1994 and others which came to be dismissed. Thereafter the Letter Patent Appeals bearing Nos.1127 of 2008 and others were filed against the judgments rendered by Single Judges in these different Special Civil Applications. The judgment rendered by a Division Bench dated 3.5.2011 in a group of these Letter Patent Appeals and Special Civil Applications once again repelled the challenge. This common judgment has led to this group of 12 Civil Appeals. The issues raised in these Civil Appeals are by and large similar, though there are some additional points in some of these Civil Appeals depending upon the facts of each of those cases.

3. Mr. Huzefa Ahmadi and Mr. P.H. Parekh, both senior counsel, and Mr. Bharat Patel, learned counsel, have amongst others appeared for the appellants. Mr. Rohinton Nariman, senior counsel and Ms. Hemantika Wahi have appeared for the State of Gujarat and its officers to defend the impugned judgment.

4. The above referred Section 43 of the Tenancy Act reads as follows:-

> ***"43. Restriction on transfers of land purchased or sold under this Act.-*** *(1) No land or any interest therein purchased by a tenant under section 17B, 32, 32F, 32-I, 32-O, 32U, 43-ID or 88E or sold to any person under section 32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred, by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest, there shall be partitioned without the previous sanction of the Collector.*
>
> *Provided that no previous sanction of the Collector shall be required, if the partition of th* e

members of the family who have direct blood relation or among the legal heirs of the tenant:

Provided further that the partition of the land as aforesaid shall not be valid if it is made in contravention of the provisions of any other law for the time being in force;

Provided also that such members of the family or the legal heirs shall hold the land, after the partition, on the same terms, conditions, restrictions as were applicable to such land or interest thereat therein purchased by the tenant or the person.

(1A) The sanction under sub-section (1) shall be given by the Collector in such circumstances and subject to such conditions, as may be prescribed by the State Government.

(1AA) Notwithstanding anything contained in sub-section (1), it shall be lawful for such tenant or a person to mortgage or create a charge on his interests in the land in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loans Act, 1884, the Agriculturists' Loan Act, 1884, or the Bombay Non-Agriculturists' Loans Act, 1928, as in force in the State of Gujarat, or in favour of a bank or co-operative society, and without prejudice to any other remedy open to the State Government, bank or co-operative society, as the case may be, in the event of his making default in payment of such loan in accordance with the terms on which such loan was granted, it shall be lawful for the State Government, bank or co-operative society, as the case may be, to cause his interest in the land to be attached and sold and the proceeds to be applied in payment of such loan.

Explanation, - For the purposes of this sub-section, "bank" means -

(a) the State Bank of India constituted under the State

Bank of India Act, 1955;

(b) any subsidiary bank as defined in clause (k) of section 2 of the State Bank of India (Subsidiary Banks) Act, 1959;

(c) any corresponding new bank as defined in clause (d) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970;

(d) the Agricultural Refinance and Development Corporation, established under the Agricultural Refinance and Development Corporation Act, 1963.

(1B) Nothing in sub-section (1) or (1AA) shall apply to land purchased under section 32, 32F or 64 by a permanent tenant thereof, if prior to the purchase, the permanent tenant, by usage, custom, agreement or decree or order of a court, held a transferable right in the tenancy of the land.

(2) Any transfer or partition, or any agreement of transfer, or any land or any interest therein in contravention of sub-section (1) shall be invalid."

5. The English version (as incorporated in the impugned judgment) of **Gujarat Government Resolution dated 4.7.2008** to give effect to this section, and which resolution lays down the rates of premium reads as follows:-

"Regarding brining simplification in the procedure of converting the land of new tenure under new and impartible tenure and under the restricted tenure of Tenancy Act into old tenure for the agricultural or Non-agricultural purpose.

Government of Gujarat
Revenue Department
Resolution No.NSJ-102006-571-J (Part-2)
Sachivalaya Gandhinagar.
Dated 04/07/20

Preamble:-

The prior permission of the Collector shall be required to be obtained after making payment of the consideration prescribed by the State Government, by issuing special or general order for transferring any land purchased by the tenants, under Sections- 17-kh, 32, 32-chh, 32-t, 32-d, 32-bh & 43-1-gh or Section 88-ch or any land sold to any person under Sections 32-g or 64, as per section-43 (1) of Bombay Tenancy & Agricultural Lands Act 1948 or its interest, sale, gift, transfer, mortgage, lease or transfer of name or executing written present for transfer or any interest. Without obtaining prior permission of the Collector, partition of any such land or any interest therein can not be made. According to Section 43(1-A), the Collector is required to grant permission as per the circumstances prescribed by the Government and as per Section 73-kh of Bombay Land Revenue Code, 1879, by virtue of this Act or by virtue of any condition connected with type of tenure, without prior permission of State Government, the Collector or any officer authorized by the State Government, any land holding can not be transferred in the name of another person or its partition can not be made. On making payment of the amount prescribed by the State Government by a special or general order, such permission can be granted.

The prior permission of the Collector/Government is required to be obtained for transfer, change of purpose or partition of the rented land (including the land allotted to the Ex-armymen), and the land granted or re-granted under different tenure and under Inami Abolition Act allotted for the agricultural purpose vide different resolutions of the Government and land reserved for cattle. The State Government has implemented the policy in respect of converting such land in old tenure so that there may be simplification in transfer of land known

as new tenure and in other transaction.

According to the resolution No.JMN/3997/83/A dated 15/01/98 of the department, at the time of granting such land wherein the interest of Government is included for non-agricultural purpose, the procedure of the assessment of the value of the land is being conducted through the Committee at District Level and Sate Level. Much time is consumed in this procedure of assessment of value at the various stages and the time limit is not prescribed for assessment of value. Considering all these facts, the State Government had decided to adopt the approach valuation based on Jantri vide Resolution dated 20/12/2006 No.NSHJ/102006/571/J. The time of public shall be saved by its acceptance and uniformity in respect of valuation in the entire State shall be maintained. Thus, it was under consideration of the Government to bring simplification by applying the procedure of valuation based on jantri by making change in existing valuation procedure and by putting into force one resolution in this regard instead of different resolutions.

-:: *R E S O L U T I O N* ::-

On the basis of the letter No.STP/102008/174/H.1 dated 31/03/2008 of the Revenue Department, for the purpose of Stamp duty, a new Jantri has been put into force by issuing the Circular No. Stamp/ Technical/07/08/1512 dated 31/03/2008 with effect from 01/04/2008 by the Superintendent of Stamps, Gandhinagar. After studying and careful consideration, the Government has held that the valuation of the land of new and impartible tenure and of restricted tenure type of Tenancy Act is to be done as per the rate of Jantri (as per Annual Statements of rates-2006 and as per the amendments made from time to time).

By consolidating all resolutions/circulars existing instructions in respect of valuation, it has been decided to follow the following procedure.

1. The new policy of the rates of premium for converting and transfer/ for change of purpose of land of new and impartible and restricted tenure land from agricultural to agricultural purpose or non-agricultural purpose, shall be as under.

Sr. No.	Purpose	Area	Tenure	Rate of premium	Transfer at which type of tenure
1	2	3	4	5	6
1	From Agricultural to the purpose of agricultural old tenure	The entire rural area of the State except following Urban Areas, East, area under ULC, Mahanagar Palika area, Urban Develop-ment Authority area, Municipality area, Notified area, cantonment area	After 15 years	Zero	It shall be transferred for the purpose of agricultural at old tenure, but premium shall be liable to be paid for non-agricultural purpose.
2	From Agricultural to the purpose of agricultural old tenure	The entire rural area of the State except following Urban Areas, East, area under ULC, Mahanagar Palika area, Urban Develop-ment Authority area, Municipality area, Notified area, cantonment area	After 15 years	50%	It shall be transferred for the purpose of agricultural at old tenure, but premium is liable to be paid for non-agricultural purpose
3	For Non-agricultural purpose	The area of the entire State	After 15 years	80%	The land shall be considered of old tenure after sale/ transfer or change of purpose

The aforesaid policy shall be equally applied in the entire State except the exception of the following (A) and (B).

(A) At the time of transfer, when the land of rural area of new and impartible tenure or restricted type of tenure is allotted as a gift or present to the Educational or Charitable institutes for non-agricultural purpose, 50% amount shall be recovered as premium.

(B) The following rates shall be a d

holding under Kutch Inami Abolition Act and new and impartible tenure.

Sr. No.	Purpose	Area	Tenure	Rate of premium	Transfer at which type of tenure
1	2	3	4	5	6
1	From Agricultural to the purpose of agricultural old tenure	Rural Area	After 15 years	Zero	It shall be transferred for the purpose of agricultural at old tenure, but premium is liable to be paid for non-agricultural purpose
2	From Agricultural to the purpose of agricultural old tenure	Urban Area	After 15 years	20 (twenty) times amount of assessment	It shall be transferred for the purpose of agricultural at old tenure, but premium is liable to be paid for non-agricultural purpose
3	For Non-agricultural purpose	The urban and rural areas	After 15 years	50%	The land shall be considered under old tenure after sale/ transfer or change of purpose.

2. The procedure of converting the land of new tenure into old tenure for the purpose of agricultural to agricultural (for the purpose of Sr.No. 1 & B(1) of the aforesaid para No.1).

(A) If such lands of New Tenure and Restricted tenure under Tenancy Act have been in continuous possession for 15 year or more than it since its grant to the last date of every month, are liable to be converted into old tenure for agricultural purpose, after eliminating the entry "New & Impartible Tenure" and noting "liable for premium only for non-agricultural purpose" on its place, the Mamalatdar of concerned Taluka on his own motion shall issue such orders within 15 days and shall have to inform the concerned holder in writing. At the same time, it shall be the responsibility of the Mamalatdar to get the mutation entry of the said order entered into the Right of Record and to get it certified as per rules.

(B) In the cases also wherein, the land is required to be converted from agricultural to agricultural purpose into old tenure by recovering 50% premium or 20 times amount of assessment, the Mamalatdar shall have to issue orders as stated above in 2(A) after recovering the premium. In the case wherein 50% premium is required to be recovered in Urban Area for agricultural to agricultural purpose, the procedure as mentioned in paragraph No.3 shall have to be adopted.

(C) It shall be the responsibility of the Prant Officer to see that the entry of such orders and its mutation entry are made in record without fail. The Prant Officer shall have to forward the certificate to the effect that any such entry is not remained to be entered in the

till the date 25th of every month.

(D) On finalization of the certified mutation entry as per the aforesaid Sr.No.2 (A), the details to the effect that "liable for premium only for non-agricultural purpose" shall have to be mentioned certainly in bold letters in column of tenure and other rights of Village Form No.7/12.

(E) If breach of tenure is committed in the land, the procedure for breach of tenure shall be initiated towards such land instead of converting them into old tenure.

(F) Moreover at the time of granting such permission if there is any encumbrance upon the land, then the abovementioned concerned officer shall have to issue orders accordingly by granting permission of transfer in old tenure including encumbrance.

(G) In the context of lacuna in respect of the order issued for converting the land of new tenure including Tenancy Act into old tenure for agricultural purpose or the mutation in that regard, the competent authorities shall have to conduct the revision proceedings as per the standing instructions issued by the Government.

(H) The above mentioned procedure shall have to be reviewed in the meeting of Revenue officers held by the Collector every month.

(I) In the case of breach of tenure, for this purpose, 15 (fifteen) years shall have to be reckoned from the date of order of regnant issued lastly.

3. Procedure of converting from New Tenure to Old Tenure for Non-agricultural purpose.

(A) On receipt of application in prescribed form as per Appendix -I by Collector, application shall have to be forwarded to Mamlatdar office within 7 days (Seven) for

scrutiny as per check list. On receipt of such application after scrutiny, Mamlatdar shall have to submit the report to Prant officer within 20 (twenty) days after making all types of scrutiny and site inspection and the Prant officer shall have to forward the report to Collector after verification within 10 days.

(B) After receiving report of Mamlatdar through Prant Officer, after verifying all record, Collector shall have to take decision within 30 (thirty) days and the said decision shall have to be informed to concerned person. The calculation of the amount of premium shall have to be made as per the rate of Jantri prevailing on the date of decision.

(C) If premium is to be paid as per decision of the Collector, then on getting such information the concerned person shall have to pay the amount of premium within 21 (twenty one) days.

(D) After depositing amount of such premium, the Collector shall have to pass order in this regards within 3 (three) days.

(E) If amount of premium is not paid within twenty one days, then assuming that concerned person is not interested in getting permission and chapter should be filed. However, in some cases, if concerned person submits an application then and if Collector considers the reasons just, then as per the merits of the case, by the reasons to be recorded in writing, instead of 21 (twenty one) days, the Collector can extend till one year from date of intimation of decision. But if during this period there is change in price of Jantri then premium shall have to be recovered accordingly. After one year applicant shall have to submit an application afresh.

(F) When the permission is required to be granted to the charitable institutes for non-agri

recovery, such institution is required to have been registered under Public Trust Act. In this regard Certificate of registration before Competent Authority/Charity Commissioner shall have to be produced with file and audited accounts of last three years. If the purpose of applicant's institution is only for "No profit No loss" basis, for charitable activities like Charitable hospital, dispensary, cattle house, Library, Elder house, Orphan House etc. then such institution shall have to be considered as Charitable Institution.

(G) The check list regarding chapters to be given for prior permission at the Collector level and departmental level shall have to be prepared as per Schedule-2 of herewith. The Collector can call for check list and necessary information if he deems fit.

4. Delegation of Powers:-

(A) Now premium is required to be recovered on the basis of Jantri, all powers of all area of district shall be vested with Collector.

(B) Instead of forwarding of the present the chapter regarding valuation of more than Rs.50/- lacs to Government, the chapters regarding valuation of more than Rs.1 crore shall have to be forwarded to Government for prior permission.

(C) As per above 4(B), the permission shall have to be granted by making verification of record at department level entirely in respect of the chapter received by the department and by obtaining the consent of the government.

5. Regarding considering rates of Jantri:

(A) When sale is required to be made from agriculture to agriculture purpose, the valuation shall be made by

considering rate of agriculture Jantri prevailing in Urban and Rural area.

(B) In rural area, when the land is used for non-agriculture purpose, valuation shall be made by considering rates of Jantri for that purpose.

(C) In urban area, for non-agriculture purpose, valuation shall be made after considering rates of Janri of developed land.

(D) When non-agriculture use is made for educational, social, charity or other purpose, then valuation shall be made in rural area, by considering rate of Jantri for residential purpose and in Urban area, by considering rate of Jantri of the development land.

(E) The Collector shall have to consider rate of Jantri which are applicable to zone, ward or block where the land is situated. The rate of Jantri of other zone, ward or block shall not be considered.

(F) When "rate of developed land" is not mentioned in Jantri of the area, valuation shall be made by considering the purpose and rate of prevailing Jantri of the said area.

6. Procedure for disposal of pending chapters:-

(a) In the pending chapters in respect of fixing premium at district level and state level, in all chapters wherein the decision is required to be taken after 1/4/2008, the calculation of the premium shall be made on the basis of the rate as per Jantri.

(b) The chapters which have not been placed in the District Valuation Committee, such chapters pending at District level, shall not be placed in the District Valuation Committee, but their valuation shall be made as per Jantri. The chapters which have been se n

Planner for valuation, shall be called back and calculation of the premium shall be made on the basis of rate as per Jantri.

(c) The chapters decided by the District Valuation Committee, shall also be disposed again at the Collector level by deciding the premium on the basis of the rate of Jantri.

(d) The chapters pending at the state level, shall not be sent back to the district or shall not be produced in the Valuation Committee of State level, but permission shall be given by taking consent of the Government and considering the rate of Jantri.

(e) The pending chapters which have been valuated in the office of the Chief Town Planner and which have not been valuated, shall be received back and permission shall be given after taking consent of the Government and applying the price of Jantri.

(f) The chapters sent back from the state level to the district level for compliance, shall not be sent back in the department, but as per above instruction, the Collector shall have to dispose the chapters by deciding the price on the basis of Jantri.

(g) In the cases where the chapters have been received at the State level and necessity arises for compliance on the basis of the record, the chapters of the amount upto Rs.1/- (one) crore, shall be disposed in accordance with rules by returning the chapter and by making complete verification at the Collector level as per the check list and by returning the chapters be returned.

(h) In the chapters remained pending at the district and the state level also, in all cases wherein the permission order is required to be issued after 1-04-2008 also, the orders

shall have to be issued by deciding the premium as per Jantri.

7. In the cases of land allotted under gifting of land (bhoodan) and under The Gujarat Agriculture Land Ceiling Act, 1960, any provision of this resolution shall not be applied.

8. On implementation of the aforesaid procedure, the resolutions/circulars mentioned in appendix-3 in toto and the resolutions/circulars mentioned in appendix-4 partly are superseded only for the part in mentioned in column-4 of the Appendix-4.

In this manner, on account of superseding the resolution entirely or partly, the orders issued before 01/04/2008 shall not be affected under the provisions/instructions of these resolutions/circulars.

9. On the basis of the policy framed vide resolution dtd. 20/12/2006 of the department for bringing in force the procedure of valuation based on new Jantri with effect from dtd. 01/04/2008, this issue with the concurrence of finance department vide their note dtd. 15/05/2008 and 27/06/2008 on this department file of even number.

By order and in the name of Governor of Gujarat,
[Anish Mankad]
Joint Secretary, Revenue Department,
State of Gujarat."

The consequent requirements under Section 43 read with aforesaid resolution dated 4.7.2008

6. As we have noted earlier the Tenancy Act was passed as a part of the agrarian reform. The Act as such does not permit transfer of agricultural land for non-agricultural purpose, and the same is barred under Section 63 of the Act. That section permits such a transfer only in certain contingencies as provided under that Section. Section

concerned in the present matter and which appears in Part III of Chapter III of the Act. Chapter III provides for Special rights and privileges of tenants, and contains provisions for distribution of land for personal cultivation. Part III, thereof, provides for restrictions upon holding of land in excess of ceiling area. Section 43 has to be seen in this context.

7. The principal part of Section 43 lays down that the land which is purchased by a tenant under the various Sections referred to in Section 43 shall not be transferred in any manner except as permitted in Section 43. The original Section 43 did not contain any such exception. The Gujarat (Amendment) Act No. XVI of 1960 introduced the words "on payment of such amount as the State Government may by general or special order determine" in Section 43. The constitutionality of the section was examined by a Division Bench of the Gujarat High Court in *Shashikant Mohanlal Vs. State of Gujarat* reported in AIR 1970 Gujarat 204. The Court held that the State is theoretically the owner of all the land, and occupants hold these lands under the State. It was argued before the said Division Bench that this section does not lay down any guidelines. However, the High Court held that the amount as introduced under the Amendment was the charge which the State was seeking, for permitting the transfer since the occupancy right as such was not transferable as of right.

8. The validity of the above amendment of 1960 came up for consideration before the Supreme Court in the case of *Patel Ambalal Gokalbhai Vs. State of Gujarat* reported in 1982 (3) SCC 316. This Court held that the Amendment was protected under the 9th Schedule to the Constitution, and therefore immune from any challenge. Subsequently, by Amendment Act No. XXX of 1977, the words "in consideration of payment of such amount…" came to be substituted in place of the words "on payment of such amount…" Thus, the section now permits such a transfer by the tenant after the appropriate amount as determined by the State Government by a general or special

order is paid by way of consideration, and only after a previous sanction is obtained from the Collector for effecting the transfer. Thus, the State Government has to lay down by general or special order the payment which is required to be made for such a transfer. If the agriculturist is seeking such a transfer, he has to make the necessary payment, and the transfer will be permitted only after a prior sanction is obtained from the Collector. The transfer is however not by way of a right.

9. As far as the determination of this amount is concerned, the same was earlier entrusted to the District Level Committee or the State Level Committee as per the Government Resolution dated 15.1.1998. However, the Government found that much time used to be consumed for determination of this price at different stages. Besides, uniformity had to be brought in with respect to determination of valuation in particular areas. Therefore, the State Government decided to adopt the approach of valuation based on Jantri, i.e. the list of rates containing the minimum valuation of land as per the Government Resolution dated 20.12.2006. It is for this purpose that the aforesaid resolution dated 4.7.2008 was passed. As can be seen from paragraph 4 of this Resolution, now the premium is required to be recovered on the basis of the Jantri, and all the powers concerning the transfers in the entire District are vested in the Collector. The Jantri contains the rates which are fixed for the purpose of valuation of the land for levying the stamp duty under the Bombay Stamp Act. Those rates in the Jantri are incorporated by virtue of this Resolution for the purpose of permitting these transfers.

Submissions of the appellants

10. The Resolution provides that the transfer shall be permissible only after 15 years of possession of the land by the tenant. The main grievance of the appellants is that for transfer of such lands in the entire State (except Kutch) from agricultural to non-agricultural purposes, the premium payable shall be 80 per cent of the price receiv[illegible]s

as determined as per the Jantri rates. Thus, whatever may be the price mentioned in the document of transfer, the valuation of the land will be done as per the rates in the Jantri, and 80 per cent of such amount will be payable to the State for permitting such a transfer. The contention of the appellants is that the requirement of the payment of consideration at such a high rate amounts practically to expropriation, and is violative of Article 300A of the Constitution of India, which lays down that no person shall be deprived of his property save by authority of law. Such high premium is arbitrary, unreasonable and unconscionable. It is also pointed out that the applications for transfer are not decided quickly enough. They are kept pending for a long time, whereby, the agriculturists seeking to transfer the land suffers.

11. If we take two of the twelve cases which are before us, we can see the submissions advanced on behalf of the appellants in a factual matrix. In Civil Appeal No.4129/2012 the appellant Savitaben represented by Mr. Ahmedi is an agriculturist in Surat. She made an application for conversion for non-agricultural purpose on 16.4.2003. She is having a land admeasuring about 4,875 sq. mts. at plot No. 65 in revenue survey no. 90. Another application in the same survey no. was decided on 4.7.2005 at the rate of premium of Rs. 700 per sq. mts. The above referred Resolution came to be passed on 4.7.2008. Her application though made earlier, was not decided until then. It was decided thereafter, and she was asked to pay the premium at the rate of Rs.12000 sq. mts by order dated 7.8.2008 passed by the Collector on the basis of circle rates. The case of one Kashiben, represented by Mr. Bharat Patel, is similar. She is the appellant in Civil Appeal No.4130/2012, and is having her property at Vadodara. It is her submission that because of the application of this Resolution, exorbitant amount is being sought. The application is not being decided in reasonable time. The land is being wasted and is being used by other people for dumping garbage.

12. It was submitted on behalf of most of the appellants that the land was in the possession and cultivation of their family from their forefather's time, and they had a stake in the land. It was submitted by them that they had paid the price to purchase the land under Section 32G of the Tenancy Act. The land having been purchased for a price, it is not a largess given by the State. Reliance was placed on paragraph 43 and 44 of the judgment in *Nagesh Bisto Desai Vs. Khando Tirmal Desai* reported in AIR 1982 SC 887 to submit that the purpose of prior permission was only to protect the tenant from selling the land at a throw away price, and not for the State to profiteer. It was then submitted that the amount to be charged under Section 43 was at the highest in the nature of a fee and not a tax and, therefore, it has to be proportionate. The Jantri rates were being applied in an arbitrary manner, and the premium at 80 per cent was unconscionable. (It must however be noted that it was pointed out on behalf of the Government that after the judgment of the High Court, the premium has been reduced to 40 per cent.) It was also submitted that Rule 25C of the rules framed under the Act gives guidelines, and when read with that Rule, Government cannot charge any dis-proportionate amount under Section 43 of the Act.

13. It was submitted that it is the date of the application which should be considered as the material date for deciding the valuation of the property, and not the date of the decision on the application by the Collector. Besides, the decision on the application cannot be indefinitely delayed. Reliance was placed on paragraph 8, 11 and 12 of the judgment of this Court in *Union of India Vs. Mahajan Industries Ltd.* reported in 2005 (10) SCC 203 to submit that date of application is the material date. Reliance was also placed on the judgment of this Court in *State of Gujarat Vs. Patel Raghav Natha* reported in 1969 (2) SCC 187 (para 11 and 12) to submit that the decisions in revenue matters must be taken within reasonable time. In the facts of that case it was held that it must be arrived at within 90 days.

14. On the concept of reasonableness, reliance was placed on paragraph 38 of the judgment in *K.B. Nagur, M.D. (Ayurvedic) Vs. Union of India* reported in 2012 (4) SCC 483. It was held therein that when no specific time limit is provided for taking the decision, the concept of reasonable time comes in. It was submitted that good governance required a timely decision and for that judgment of this Court reported in *Delhi Airtech Services Pvt. Ltd. Vs. State of Uttar Pradesh* reported in 2011 (9) SCC 354 relied upon. (It was also submitted that Section 43 should be read alongwith Section 69 of the Act.) The period for decision making should at the highest be 90 days from the date of application.

Reply on behalf of the respondents

15. Mr. Nariman, learned senior counsel appearing for the respondents submitted that essentially the amount which was being charged under Section 43 (as it stands now) was by way of consideration for the permission to transfer the agricultural land for non agricultural purpose. This amount which was being charged was a premium to be paid to the State, and this is because the land theoretically belongs to the State, and all the cultivators are holding the land under the State. The kind of authority which the tenant acquired after making the necessary payment for purchase of the land under the statute was to cultivate the land himself. The land was not to be put to non agricultural use, or else the tenant would lose the land under the provision of the statute, and it would be given to those who needed it for personal cultivation. In his submission, the premium was therefore justified. He informed us that after the impugned judgment of the High Court, the premium has been brought down to 40%. In his submission, the Jantri rate had to be applied on the date of sanction as the Section provided for a prior sanction. He, however, accepted that the decision on the application for conversion to non-agricultural purpose has to be in reasonable time.

Consideration of the submissions

16. We may at this stage refer to the judgment of the Division Bench of the Gujarat High Court in *Shashikant Mohanlal* (Supra) by P.N.Bhagwati, CJ as he then was in the High Court. With respect to this co-relation between Sections 32 to 32R of this statute and Section 43, the Division Bench observed as follows:-

> *"7. The Act as originally enacted in 1948 was intended to regulate the relationship of landlord and tenant with a view to giving protection to the tenant against exploitation by the landlord but in 1956 a major amendment was made in the Act introducing a radical measure of agrarian reform. The Legislature decided that the tiller of the soil should be brought into direct contact with the State and the intermediary landlord should be eliminated and with that end in view, the Legislature introduced a fasciculus of sections from Section 32 to S. 32-R and S. 43. These sections came into force on 13th December 1956 and they provided for the tenant becoming deemed purchaser of the land held by him as tenant. Section 32 said that on 1st April 1957 every tenant shall, subject to certain exceptions which are not material for the purpose of the present petitions, be deemed to have purchased from him landlord, free from all encumbrances subsisting thereon on the said day, land held by him as tenant provided he was cultivating the same personally. If the landlord bona fide required the land either for cultivating personality or for any non-agricultural purpose, he could after giving notice and making an application for possession as provided in Section 31, sub-section (2), terminate the tenancy of the tenant subject to the conditions set out in Sections 31-A to 31-D but if he did not take steps for terminating the tenancy of the tenant within the time prescribed in Section 31, the tenant became the [illegible] of*

the land on 1st April 1957. If the landlord gave notice and made an application for possession within the time prescribed in Section 31, the tenant would not become the deemed purchaser of the land on 1st April 1957 but he would have to await the decision of the application for possession and if the application for possession was finally rejected, he would be the deemed purchaser of the land on the date on which, the final order of rejection was passed. Now if the tenant becomes deemed purchaser of the land, there would be no difficulty, for the intermediary landlord would then be eliminated and direct relationship would be established between the State and the tiller of the soil. But what is to happen if the tenant expresses his unwillingness to become deemed purchaser of the land? The Legislature said that in such a case the tenant cannot be permitted to continue as a tenant he would have to go out of the land. If the tenant is permitted to continue as a tenant, the object and purpose of the enactment of the legislation, namely, to eliminate the middleman, would be defeated. The Legislature therefore, provided in Section32-P that if the tenant expresses his unwillingness to become deemed purchaser of the land and the purchase consequently becomes ineffective, the Collector shall give a direction providing that the tenancy in respect of the land shall be terminated and the tenant summarily evicted. The land would then be surrendered to the landlord subject to the provisions of Section 15 and if the entire land or any portion thereof cannot be surrendered in accordance with the provisions of Section 15, the entire land or such portion thereof, as the case may be, shall be disposed of by sale according to the priority list. The priority list consists of persons who would personally cultivate the land and the sale of the land to them would ensure that the tiller of the soil becomes the owner of it and there is no intermediary or middleman to share the profits of his cultivation. Since the tenant is made the deemed

purchaser of the land in order to effectuate the policy of agrarian reform to eliminate the intermediary landlord and to establish direct relationship between the State and the tiller of the soil so that soils of his cultivation are not shared by an intermediary or middleman who does not put in any labour, the Legislature insisted that the tenant must personally cultivate the land of which he is made the deemed purchaser. The tenant, said the Legislature, would continue to remain owner of the land only so long as he personally cultivated it; he must make use of the land for the purpose of which it was given to him as owner. If the tenant failed to cultivate the land personally either by keeping it fallow or by putting it to non-agricultural use, he would lose the land under Section 32B and the land would be given away to others for personal cultivation in accordance with the provisions of Section 84-C."

17. As far as the right of the State to charge the premium is concerned the Division Bench observed as follows in paragraph 11 thereof:-

"11. As the section stands there can be no doubt that it is implicit in the language used in the section that the payment contemplated is payment to the State Government. It must be remembered that the State is theoretically the owner of all land; all occupants hold under the State. If an occupant is not entitled to trnasfer his land without the permisson of the State, the state can very well say that the permission to transfer the land would be granted only if he pays a premium to the State as the sovereign owner of the land. As a matter of fact, such a provision is to be found in Section 73-B of the Bombay Land Revenue Code, 1879. That section which was introduced in the Code with retrospective effect by Gujarat Act 35 of 1965 provides that where any occupancy, by virtue of any conditions annexed to the tenure by or under the Code is not transferable or partible without the previous sanction of the State Gov[illegible]or

or any other officer authorised by the State Government, such sanction shall not be given except on payment to the State Government of such sum as the State Government may by general or special order determine. The Legislature has also similarly provided in Section 43 that if the tenant who is otherwise under an inhibition to transfer, wnats to transfer the land, he shall do so only on payment of such amount as the State Government may by general or special order determine. That is the charge which the State makes for permitting transfer where the occupancy is not transferable as of right. It is no doubt true that the words "to the State Government" are not to be found after the word "payment" in Section 43 but that does not make any difference. These words were perhaps not explicity used by the Legislature as the Legislature might have felt that even without these words the meaning of the section was reasonably clear……"

18. The above decision has not been interfered with by this Court in any manner. A similar provision has been made in Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950. Section 4 of this Act reads as follows:-

4. (1) A watan land resumed under the provisions of this Act shall [subject to the provisions of Section 4A] be regranted to the holder of the watan to which it appertained, on payment of the occupancy price equal to twelve times of the amount of the full assessment of such land within [five years] from the date of the coming into force of this Act and the holder shall be deemed to be an occupant within the meaning of the Code in respect of such land and shall primarily be liable to pay land revenue to the State Government in accordance with the provisions of the Code and the rules made thereunder; all the provisions of the Code and rules relating to unalienated land shall, subject to the provisions of this Act, apply to the said land:

Provided that in respect of the watan land which has not been assigned towards the emoluments of the officiator, occupancy price equal to six times of the amount of the full assessment of such land shall be paid by the older of the land for its regrant:

Provided further that if the holder fails to pay the occupancy price within the period of [five years] as provided in this section, he shall be deemed to be unauthorisedly occupying the land and shall be liable to be summarily ejected in accordance with the provisions of the Code.

(2) The occupancy of the land regranted under sub-section (1) shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may by general or special order determine.

(3) Nothing in [sub-sections (1) and (2)] shall apply to any land-

(a) the commutation settlement in respect of which provides expressly that the land appertaining to the watan shall be alienable without the sanction of the State Government; or

(b) which has been validly alienated with the sanction of the State Government under section 5 of the Watan Act.

Explanation-For the purpose of this section the expression "holder" shall include-

(i) all persons who on the appointed day are the watandars of the same watan to which the land appertained, and

(ii) in the case of a watan the commutation settlement in respect of which permits the transfer of the land appertaining thereto, a person in w… of

such land for the time being vests.

(emphasis supplied)

19. This Section 4 came up for consideration before a bench of three Judges of this Court in *Nagesh Bisto Desai* (supra), and in paragraph 43 this Court approved the scheme of the Section under which the transfer is subject to the sanction of the Collector, and on payment of requisite amount. This paragraph reads as follows:-

> *43. It still remains to ascertain the impact of Sub-section (2) of Section 4 of Act No. 60 of 1950 and Sub-section (3) of Section 7 of Act No. 22 of 1955, and the question is whether the occupancy of the land regranted under Sub-section (1) of Section 4 of the former Act and Sub-section (2) of Section 7 of the latter Act is still impressed with the character of being impartible property. All that these provisions lay down is that the occupancy of the land regranted under Sub-section (1) of Section 4 of the former Act shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may, by general or special order, determine. It is quite plain upon the terms of these provisions that they impose restrictions in the matter of making alienations. On regrant of the land, the holder is deemed to be an occupant and therefore the holding changes its intrinsic character and becomes Ryotwari and is like any other property which is capable of being transferred or partitioned by metes and bounds subject, of course, to the sanction of the Collector and on payment of the requisite amount.*

20. These two judgments answer the submission of the appellants that the amount which is being charged is not a tax but a fee. It is neither. It is a premium for granting the sanction. This is because under this welfare statute these lands have

been permitted to be purchased by the tenants at a much lesser price. As held in *Shashikant Mohanlal* (supra), the tenant is supposed to cultivate the land personally. It is not to be used for non agricultural purpose. A benefit is acquired by the tenant under the scheme of the statute, and therefore, he must suffer the restrictions which are also imposed under the same statute. The idea in insisting upon the premium is also to make such transfers to non-agricultural purpose unattractive. The intention of the statute is reflected in Section 43, and if that is the intention of the Legislature there is no reason why the Courts should depart therefrom while interpreting the provision.

21. It was submitted by the appellants that assuming that the valuation of the land is permitted to be done as per the Jantri rates, it must be so done on the basis of the rates as prevalent on the date of the application. The resultant injustice was highlighted in the case of Savitaben in Civil Appeal No. 4129/2012. The fact however, remains that the Section speaks of previous sanction. As noted earlier, Section 4(2) of the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950 also speaks about the previous sanction. Thus, this is the theme which runs through all such welfare agricultural enactments, and a similar provision in the said Act has been left undisturbed by the bench of three Judges of this Court. Therefore, the Jantri rate to be applied will be on the date of the sanction by the Collector, and not on the date of the application made by the party.

22. Rule 25C of the Rules framed under the Bombay Tenancy and Agricultural Lands Act, 1948, was relied upon by the appellants. It speaks about the circumstances in which, and conditions subject to which sanction shall be given by the Collector under Section 43 for transfer. The rule was relied upon by the appellants to submit that Government cannot charge any disproportionate amount under Section 43. The rule however, does not create any such restrictions on the provisions under Section 43. In fact, the rule makes it clear that transfer of an agricultural land for non-agricultural pu[illegible]s

only sub-clause (e) thereof under which such a transferor will have to make his case which is when a transfer is sought for a bonafide purpose. Even so, this does not absolve one from taking any prior sanction. It will only mean that if the application is bonafide, normally the transfer will be sanctioned, because as such there is no right to insist on a transfer for non-agricultural purpose.

23. As far as the levy of the 80 per cent of the amount is concerned, it was submitted that it was unconscionable, and it would mean expropriation, and will be hit by Article 300A of the Constitution. Once we see the scheme of these provisions, in our view, no such submission can be entertained. In any case Mr. Nariman has pointed out that after the impugned judgment, the State Government has reduced the levy to 40 per cent which is obviously quite reasonable.

24. The last point which requires consideration is with respect to the period for considering the application, and granting the sanction. There is some merit in the submission of the appellants in this behalf. Such application cannot be kept pending indefinitely, and therefore we would expect the Collector to decide such applications as far as possible within 90 days from the receipt of the application, on the lines of the judgment of this Court in *Patel Raghav Natha* (supra). In the event the application is not being decided within 90 days, we expect the Collector to record the reasons why the decision is getting belated.

25. For the reasons stated above we do not find any reason to interfere in the impugned judgment rendered by the Division Bench, approving the decisions rendered by the Single Judges in the Writ Petitions. All appeals are, therefore, dismissed with no order as to costs.

R.P. Appeals dismissed.

NESAR AHMED & ANR.
v.
STATE OF JHARKHAND & ORS.
(Writ petition (Civil) No. 59 of 2010)

FEBRUARY 25, 2014

[SURINDER SINGH NIJJAR AND A.K. SIKRI, JJ.]

SERVICE LAW:

Appoitment - Trained teachers in State of Jharkhand - Filing writ petitions in Supreme Court - Seeking directions to respondent-authorities to appointment them as Assistant Teachers in Government Schools in order of seniority irrespective of their being overage, in terms of judgment in Ram Vinay Kumar's case as followed in State of Bihar - Held: State of Jharkhand has framed its own rules for recruitment to posts of Assistant/primary teachers - Further, in terms of High Court order, the rules were amended and appointments were made by following the recruitment rules scrupulously -- Therefore, it would not be permissible to petitioners to compare their case with their counterparts in Bihar --In such circumstances, Court would not be inclined to grant any relief to petitioners in the petitions filed under Art. 32 of the Constitution, more so when it is found that respondent/State of Jharkhand has taken steps in conformity with the statutory recruitment rules framed under proviso to Art. 309 of the Constitution - Constitution of India, 1950 - Arts. 32 and 309.

The petitioners in the instant writ petitions, having acquired the requisite training and thus called as 'trained teachers', prayed for directions to respondents nos. 1 to 3, inter alia, to appoint them and similarly circumstanced trained teachers, as Assistant Teachers in the Government Schools of the State of Jharkhand, in order of seniority, irrespective of their being over age. They

claimed that they were entitled to appointments in terms of the directions of the Patna High Court in the writ petition decided in the case of *Ram Vinay Kumar & Ors*[1].

Dismissing the petitions, the Court

HELD: 1.1 The judgment in *Ram Vinay Kumar's* case was rendered by this Court for unified Bihar. This judgment, after the bifurcation of the State into two, has been implemented in the State of Bihar irrespective of the fact that those trained teachers in State of Bihar had become overage, they have been given the appointments. The position which prevails in the State of Jharkhand, can be summarised as below:

(i) After the constitution of the formation of the State of Jharkhand it has framed its own Rules for recruitment to the post of Assistant/ primary teachers.

(ii) As per these Rules the appointment is to be made only from amongst the trained teachers.

(iii) In the recruitment processes undertaken, the State has made the appointments strictly in accordance with the Rules and after following the due selection procedure from amongst the trained teachers.

(iv) In the Rules which were framed initially, one time age relaxation was provided with the provision that there would not be any upper age limit. However, that Rule was challenged before the High Court and High Court struck down the said Rule as un-constitutional. Complying with the directions contained in the said judgment, Rules were amended and the amended Rules provide for relaxation upto 5 years.

1. *Ram Vinay Kumar & Ors. v. Sate of Bihar and Ors. (*1998) 9 SCC 227.

(v) When Selection process commenced in the year 2002 -2003 by issuing advertisement these very teachers (namely the petitioners) through their associations etc. filed writ petitions claiming complete age relaxation instead of relaxation only upto 5 years of age. However, these writ petitions were dismissed by the High Court by judgment dated 29.9.2003. This judgment has also attained finality. [para 12 and 19] [155-C-D; 159-F-H; 160-A-D]

Ram Vinay Kumar & Ors. v. State of Bihar and Ors. **(1998) 9 SCC 227-referred to.**

1.2 In the circumstances, no relief can be given to the petitioners. In fact, what the petitioners are demanding was sought to be given by the State in the form of un-amended Rule 4 by providing one time relaxation in upper age limit. However, that Rule has been struck down as un-constitutional. Giving the relief claimed in these writ petitions would amount to negating the judgment of the High Court though it has become final. Moreover, recruitments were made in the year 2003 wherein many such teachers participated. For last 10 years, the respondent is making the appointments of trained teachers and it is not the case of the petitioners that untrained teachers are appointed. Appointments are made by following the Recruitment Rules scrupulously. [para 20] [160-E-G]

1.3 Further, the petitioners in the instant writ petitions did not even disclose the facts pertaining to the two rounds of litigation in the High Court culminating into decision dated 29.9.2003 (reported as 2003(1) JLJR 322). Only after the second recruitment process which was held in year 2008, the instant writ petitions were filed in the year 2010 or thereafter. [para 20] [160-G-H; 161-A]

1.4 Therefore, it would not be e

petitioners to compare their case with their counterparts in Bihar. In such circumstances, this Court would not be inclined to grant any relief to the petitioners in these petitions filed under Art. 32 of the Constitution, more so when it is found that the respondent/ State of Jharkhand has taken steps in conformity with the statutory recruitment rules framed under proviso to Art. 309 of the Constitution. [para 21] [161-B-D]

Case Law Reference:

(1998) 9 SCC 227 referred to para 3

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 59 of 2010.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 173 of 2010.

W.P. (C) No. 39 of 2011.

Nagendra Rai, R.P. Bhatt, Amarendra Sharan, Shantanu Sagar, Smarhar Singh, Prerna Singh (for T. Mahipal), Nisha Bagchi, Pooja Sharma, Sujeeta Srivastava (for Anjali Jha) Dushyant Parashar, Santosh Kumar, Tapesh Kumar Singh, Mohd. Waquas, Chandan Kumar (for Gopal Singh), Rakesh U. Upadhyay, Amar Deep Sharma, Prashant Bhushan, Govindjee, Dinesh Kr. Tiwary, Chandan Kr., Salik Ram, V.S. Mishra, Raghvendra Tiwari (for Santosh Kr. Tripathi), Pranav Kumar (for S.K. Sabharwal), Rajan K. Chourasia, Amit Pawan, Devvrat, Rajeev Kr. Singh for the appearing parties.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. All the petitioners, in these three Writ Petitions filed under Article 32 of the Constitution of India, are similarly situated. After getting the requisite training they have

acquired the nomenclature of 'trained teachers'. They seek an appointments in the schools run by the Respondent-State of Jharkhand as assistant teachers. Some IAs filed by several similarly situated teachers for impleadment and seeking the same relief. It is for this reason that these petitions were conjointly heard.

2. The exact prayer, contained in Writ Petition (Civil) No. 173 of 2010, would give a glimpse of the nature of the case set up by these petitioners and the precise relief which these petitioners pray for. This prayer reads as under:

> "It is, therefore, respectfully prayed that Your Lordships may graciously be pleased to:
>
> i) Issue a writ, order or direction directing the respondents more particularly Respondent Nos. 1 to 3 to appoint the petitioners and similarly circumstanced Trained Teachers in order of seniority.
>
> ii) Issue a writ, order or direction directing the respondents and more particularly the State of Jharkhand (Respondent Nos. 1 to 3) to protect fundamental right of Primary Education to the children of State of Jharkhand by appointing the Trained Teachers available in the Jharkhand State on the sanctioned vacant posts of Assistant Teachers.
>
> iii) Pass such other or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interests of justice.

The background in which these petitions have come to be filed is somewhat detailed one with che[illegible]d

with previous litigation benefit whereof the petitioners are seeking. However, we would endeavour to traverse through these events in as simple a manner as possible.

3. As is well known, the State of Jharkhand was created in the year 2000. Before that it was a part of the State of Bihar. All these petitioners belong to undivided Bihar vintage. They claim that they are qualified and trained teachers who acquired requisite qualification and underwent necessary training and thus became eligible to be considered for appointment as primary teachers in the schools run by the State Government as per the provisions of the Extant Rules on the subject. However, even when the Government was legally bound to appoint only the trained teachers, on the basis of an advertisement issued on 6.10.1991 by the Government of Bihar for filling up of 25,000 posts of Assistant Teachers, the State recruited 17,281 untrained teachers out of total appointments of 19,272 Assistant Teachers made in the said recruitment process. This selection was challenged by some persons by filing writ petition in the High Court of Judicature at Patna which was decided on 26.9.1996. The High Court did not quash the appointments already made, though at the same time it held that the State would not force a person to confine his application to a particular district. Against this order, Special Leave Petition No. 23187 of 1996 was preferred before this Court. In those proceedings an affidavit dated 14.8.1997 was filed by the Deputy Superintendent of Education, Bihar Government agreeing to appoint trained teacher against existing vacancies. Having regard to the averments made in the said affidavit, SLP was disposed of vide order dated 5.9.1997. This case is known as *Ram Vinay Kumar & Ors. v. State of Bihar and Ors.* (1998) 9 SCC 227. The exact directions regarding appointment to the post of Assistant Teachers which were given by this Court are the following:

> "(i) The Commission shall conduct a special selection for the purpose of appointment of these unfilled posts from amongst applicants who had submitted their applications.
>
> (ii) The selection shall be confined to applicants possessing teacher's training/ qualification obtained from government/ private teacher's training institutions.
>
> (iii) The selection shall be made by holding a preliminary test and a written examination of the candidates who qualify in the preliminary test.
>
> (iv) In case the number of persons found suitable for appointment in such special selection exceeds the number of posts for which recruitment was to be made on the basis of advertisement dated 6.10.1991, the surplus number of candidates who have been found suitable for the appointment would be justified against posts to be filled on the basis of subsequent selection.
>
> (v) The special selection which is to be conducted in pursuance of these directions shall be completed by the Commission by 31.1.1997."

4. In nut-shell, the direction was to conduct a special selection for filling up of the unfilled posts from amongst the applicants who had already submitted their applications pursuant to the advertisement issued and it was to be confined to those applicants who were possessing teachers training/ qualification obtained from Government/ private teachers' training institution i.e. from amongst the trained teachers. As per the petitioners as on 30.9.1993 there were about 45,000 vacancies in as much as against total post of 2,09,981, number of teachers working were 1,54,751. Furthermore, in next three years about 18,431 teachers were expected to retire. Therefore, projected vacancies were approximately 63,000. On the creation of the State of Jharkhand in terms of Bihar Reorganisation Act, 2000 proportionate vacancies i.e. one-third came to the share of State of Jharkhand which would mean that 21,000 vacancies were available o[illegible]is

State was created.

5. It is stated by the petitioners that for almost 7 years from the date of directions given in *Ram Vinay Kumar's* Case, no action was taken. It forced certain sections of trained teachers to approach the Patna High Court by way of several Writ Petitions. All these Writ Petitions were heard together with leading case known as *Nand Kishore Ojha & Ors. v. State of Bihar and Ors.* (CWJC 13246/2003). These Writ Petitions were allowed by the Patna High Court vide judgment dated 1.7.2004. In the said judgment it was inter alia noted that there were number of unfilled vacancies because of which primary schools were lying empty. The High Court deprecated the inaction on the part of the Government of Bihar in not implementing the judgment of this Court in *Ram Vinay Kumar's* Case, on one pretext or the other, thereby creating a human rights problem in denying a young generation its right to basic education. According to the High Court, the solution was simple viz. to follow the judgment of this Court in *Ram Vinay Kumar's* case from where the circumstances has been left out. The High Court also calculated the number of existing vacancies in the manner already pointed out above. On this basis direction was given to carry out the selection process as per the mandate of this Court contained in the case of *Ram Vinay Kumar*.

6. The State of Bihar challenged the aforesaid judgment of High Court by filing Special Leave Petitions in this Court. However, thereafter affidavit dated 18.1.2006 was filed by the Commissioner-cum-Secretary, Education Department, Government of Bihar alongwith an application for withdrawal of those Special Leave Petitions. In the affidavit an undertaking was given that only trained teachers were appointed as Assistant teachers in the State of Bihar. Further owing to the reason that the number of available teachers in the State of Bihar were less than the available sanctioned post and no test for selection was required. On the basis of this affidavit, orders dated 23.1.2006 were passed permitting the Government to

withdraw the Special Leave Petitions.

7. When the undertaking given in the said affidavit was not implemented immediately thereafter, some persons filed Contempt Petition No. 207 of 2006 in this Court which was disposed of by orders dated 19.3.2007 with a direction to the State of Bihar to implement its undertaking.

Operative part of the said order reads as under:

"In paragraph 17 of the said affidavit in reply dated 7.2.2007, it is stated that priority has been given to trained teachers in appointment and only if trained teachers are not available in sufficient numbers, the case of untrained teachers are considered by the concerned by the Panchayati Raj Institute (PRI) to achieve the constitutional goal of free and compulsory education for children from age 6-14, and in this regard the State of Bihar and other answering respondents are complying with the orders of the High Court and also of this Court. A rejoinder has also been filed by the petitioner disputing the statements made by the State of Bihar in the affidavit dated 7.2.2007.

In view of the categorical statement now made that the priority will be given to the trained teachers in appointment and also the clarification made in paragraphs 19 to 222 of aforesaid affidavit dated 7.2.2007, we direct the State of Bihar to implement the undertaking given by the State of Bihar earlier and also now by the present affidavit dated 7.2.2007 in letter and spirit by appointing the trained teachers on priority basis.

The Contempt Petition is disposed of accordingly."

8. Still this undertaking was not complied with which led to filing of another Contempt Petition No. 297 of 2007 titled *Nand Kishore Ojha v. Anjani Kumar Singh* in which following interim orders dated 9.12.2009 were p

"Accordingly, without issuing a Rule of Contempt, we direct that the 34,540 vacancies shown as available in the advertisement published in December, 2003, be filled up from amongst the trained teachers who are available, in order of seniority. As indicated above, this is to be done on a one-time basis and must not be taken as the regular practice to be followed.

Let the Contempt Petition be adjourned for a further period of six weeks to enable the State Government to implement this order and to submit a report on the next date as to the result of the discussions held between the petitioner and the concerned authorities."

9. Thereafter, the State of Bihar filled up the vacant post of Assistant Teachers in terms of its undertaking thereby recruiting from amongst the trained teachers who had applied earlier, pursuant to the advertisement given in the year 1991. Many had become over aged in the meantime, and age relaxation was given in their cases.

10. What is narrated above is the history of litigation in the State of Bihar. In so far as State of Jharkhand is concerned (respondent herein), as already pointed out above, approximately 21,000 vacant post were transferred to this State. The respondent advertised these vacancies in the year 2002 by giving relaxation in age by 5 years only. Because of this reason many trained teachers, in which category of the petitioners include, could not be appointed as Assistant Teachers, being overage. The petitioners, in this backdrop, contend that they are entitled to the benefit of Ram Vinay Kumar's judgment of this Court rendered much before the creation of the Jharkhand State and applied to the erstwhile unified Bihar and the judgment be implemented in their case as well as it has happened qua the trained teachers in State of Bihar in the manner explained above. We may point out at this stage that respondent State is making appointment only from amongst trained teachers. The problem, however, has

arisen because fo the reason that these petitioners have become over aged and wanted total age relaxation. To put it, succinctly they are claiming parity with their counterparts in the State of Bihar and submitting that when those teachers were appointed by giving age relaxation, there is no reason to deprive the petitioners from the same treatment which would, otherwise, be discriminatory and violative of Article 14 of the Constitution.

11. The petitioners have pointed out that the respondent-State had set up a Committee in the year 2001 for implementation of the judgment and even the said Committee in its report dated 31.5.2001 recommended that all vacancies in the State of Jharkhand be filled with trained teachers within two months. The operative portion of the said recommendation reads as under:

"Since the Government at its own level have imparted teacher training to the thousands and the trained teachers were in the hope for the two decades that they will be appointed as a teacher. It is totally unjustified and in-human that the Government appoints untrained persons and thereby ruined the future of trained teachers. Therefore, the committee here by recommends that all the vacancies in the State of Jharkhand be fulfill with trained teachers within 2 months. If number of trained teachers exceeds the number of vacancies, then the vacancies be fulfilled on the basis of seniority of the trained teachers i.e. in the order of their getting training. Thereafter, the trained teachers remained unemployed be appointed against subsequent vacancies. In the appointment process the rule of age limit be diluted because for the two decades the trained teachers are waiting appointments and due to this reason they crossed their age limit without any fault on their part. The other untrained persons may be employed only after accommodating all trained teachers. The Government should take policy decision for the f[illegible]t

trained teachers to impart training to the persons after getting them selected by the Commission. However, the committee is of the view that appointment of trained teachers would not burden state treasury, whereas imparting training to the persons after getting them selected on salary cannot said to be a reasonable course. Hon'ble Supreme Court of India and expert committee has also directed to appoint the trained teachers."

12. The aforesaid arguments of the petitioner may appear to be attractive in first blush. After all, judgment in Ram Vinay Kumar's case was rendered by this Court for unified Bihar. This judgment, after the bifurcation of the State into two, has been implemented in the State of Bihar irrespective of the fact that those trained teachers in State of Bihar had become overage, they have been given the appointments. Therefore, the same treatment could have been accorded to the petitioners as well who are similarly situated and by quirk of fate became the residents/ domiciles of State of Jharkhand. However, these observations would be valid when we see only one side of the coin. It is equally necessary to take notice of the developments which happened in State of Jharkhand, after its creation. In order to find out as to whether those events would in any way alter the situation thereby making it to be a different case.

13. Mr. Amarendra Sharan, learned Senior Counsel appearing for the State submitted that after the creation of Respondent-State, it framed its own rules known as Jharkhand Primary School Appointment Rules, 2002 (in short 'Rules 2002). These Rules, inter alia, prescribed teachers eligibility test and the passing of this test is a principle condition for appointment. Rule 4 of the said Rules provided a lower and upper age limit for appearing in the examination to be held as part of the selection process of teachers. But a concession was given by the said Rule to the effect that there will be no such limitation on the upper age for the first examination to be held. This was on the basis that for a number of years, no examination had

been held or selection made and all those who had acquired Teachers' Training should have an opportunity to appear in the first examination. It was intended to be a one time concession. It meant that even a person who would attain the age of superannuation within six months of being selected or appointed, could appear in the examination. Manifest intention of this Rule was to give benefit to persons like the petitioners herein. Rule 8 thereof provided that the knowledge level for the written examination for selection would be the middle level examination.

14. Inspite of this step taken by the State, the legal events were destined to take difficult course altogether. It so happened that the non-fixation of an upper age limit for candidates and fixing the knowledge at middle level academic standard was challenged before the High Court in W.P. (C) No. 5170 of 2002 and W.P. (C) No. 6135 of 2002. These Writ Petitions were allowed and the High Court struck down the unbridled concessions given regarding the upper age limit and the fixation of middle level as the standard for the written test to be conducted. The High Court declared these provisions void on the ground the non-prescription of an upper age limit and the fixation of middle level examination knowledge for the candidates are arbitrary, suffer from non-application of mind and not based on any intelligible differentia having nexus with the object sought to be achieved. The High Court thus found both those provisions violative of Article 14 of the Constitution of India, though the said Article was not specifically referred to. The court also declared that the said two stipulations were against the public interest. For want of further challenge, this decision of the Division Bench became final. The Legislature, thereupon, amended Rule 4(d) and Rule 8(d). The amended Rules provided a lower and an upper age limit and for the first examination provided for relaxation of age by five years. By Rule 8(d), it enhanced the standard of examination of Primary Teachers Training Examination. In August 2002, first advertisement was issued for making re y

supplementary/ second advertisement dated 21.4.2003 on the basis of these amend Rules. Even the amend Rules 4(d) & 8(d) were challenged in numerous Writ Petitions, which came to be filed in the Jharkhand High Court with lead matter in W.P. (C) No. 2566 of 2003 titled *Jharkhand Rajye Berojgar Prathmik Prashikshit Sikshak Sangh & Ors. v. State of Jharkhand & Ors.* The reliefs sought for in that Writ Petition were the following:

> (i) For quashing the Rule 4(d) and 8(d) of the Jharkhand Primary School Appointment Rules 2002 and the amended Rules of 2003 as notified through notification dated 1.7.2002 and the notification through 6.3.2003 (as contained in Annexure-1 & 2 of the writ application)
>
> (ii) For directing the respondents to hold selection of primary schools teacher by taking examination/ selection test of matriculation and its equivalent standard.
>
> (iii) For accommodation of all the trained teachers by the respondents up to a reasonable age by giving them opportunity of employment and their appointment as Primary School Teachers to be appointed by the State Government by relaxing the age of a reasonable extent.
>
> (iv) For lifting the one chance bar for appointment of primary school teachers from the category of trained teacher candidates.
>
> (v) For any other appropriate relief (s) to which the petitioners are found entitled in law and equity."

15. In essence, the petitioners challenged amended Rule 4(d) and Rule 8(d) of the Rules, 2002 claiming that these provisions were not only unconstitutional but in violation of the directions given in the earlier judgment. It was specifically pleaded that there could not have been upper age limit for appointment of trained teacher. Though the applications were

invited from only trained teachers but age relaxation upto 5 years only was given. This was challenged as arbitrary, malafide and against public interest. In this Writ Petition interim orders dated 13.5.2003 were passed by the High Court allowing the petitioners to appear on the examination, which was scheduled to be held on 27.5.2003.

16. Interestingly, one PIL was also filed in the form of W.P. (PIL) No. 2769 of 2003 wherein the petitioner had claimed that no concession was required to be given to these persons, in terms of age relaxation or otherwise and the recruitment be made strictly in accordance with the extant Rules.

17. All these Writ Petitions were heard together and disposed of by passing orders dated 29.9.2003. In the said judgment various other issues regarding composition of State Public Service Commission were touched and considered as well. We are eschewing discussion on those aspects as that is not relevant for our purpose. In so far as the Writ Petitions which were filed certain trained teachers and their associations (to which category the present petitioners fall and most of these petitioners were party to those Writ Petitions) they were dismissed by the High Court with the following observations:

> "In one of the writ petitions, this court issued a direction that the three writ petitioners in that writ petition, would be permitted provisionally to take the examination or to writ the examination even if they did not fulfil the age requirement or age qualification, subject to the result of the writ petition. It appears that some unruly elements on the strength of that order forced some of the officers or the authorities to issue them hall tickets to appear in the examination even though they were over aged and did not qualify as per the amended rule issued pursuant to the earlier decision of the Division Bench. It is made clear that those who did not possess the requisite age qualification as per the amended Rule 4(d) of t[illegible]y

have written the examinations, would not be considered for recommendation, selection or appointment by the Commission or by the Government appearance of those who did not possess the requisite qualifications or the age qualifi9cation, will be ignored by all those concerned with the process of selection and appointment.

In the result, the writ petitions, other than W.P. (PIL) No. 2769 of 2003 are dismissed. W.P. (PIL) No. 2769 of 2003 is partly allowed with the directions to the State of State of Jharkhand and the State Public Service Commission not to proceed with the recommendatory process until the full State Public Service Commission as envisaged by the Jharkhand Public Service Commission (Conditions of Service) Regulations, 2000 comes into existence. It is made clear that the steps so far taken and the examinations conducted will be treated as valid. There will be no order as to costs."

18. The High Court thus refused to extend the benefit of total age relaxation but limited it upto 5 years, as envisaged in the Rule. No further challenge was laid to that judgment allowing it to attain finality. Appointments were made in accordance with the Rules, 2002. Thereafter another advertisement was issued in the year 2008 further and further appointments were made on the basis thereof.

19. From the above, the position which prevails in the State of Jharkhand, can be summarised as below:

(i) After the constitution of the formation of the State of Jharkhand it has framed its own Rules for recruitment to the post of Assistant/ primary teachers.

(ii) As per these Rules the appointment is to be made only from amongst the trained teachers.

(iii) In the recruitment processes undertaken up to now, the

state has made the appointments strictly in accordance with the Rules and after following the due selection procedure from amongst the trained teachers.

(iv) In the Rules which were framed initially, one time age relaxation was provided with the provision that there would not be any upper age limit. However, that Rule was challenged before the High Court and High Court struck down the said Rule as un-constitutional. Complying with the directions contained in the said judgment Rules were amended and the amended Rules provide for relaxation upto 5 years.

(v) When Selection process commenced in the year 2002 -2003 by issuing advertisement these very teachers (namely the petitioners) through their associations etc. filed writ petitions claiming complete age relaxation instead of relaxation only upto 5 years of age. However, these writ petitions were dismissed by the High Court vide judgment dated 29.9.2003. This judgment has also attained finality.

20. In this scenario it would be difficult to give any relief to the petitioners herein. In fact, what the petitioners are demanding now was sought to be given by the State in the form of un-amended Rule 4 by providing one time relaxation in upper age limit. However, that Rule has been struck down as un-constitutional. Giving the relief claimed in these writ petitions would amount to negating the judgment of the High Court though it has become final. Moreover, recruitments were made in the year 2003 wherein many such teachers participated. For last 10 years, the respondent is making the appointments of trained teachers and it is not the case of the petitioners that untrained teachers are appointed. Appointment are made by following the Recruitment Rules scrupulously. The Petitioners in these writ petition did not even disclose the facts pertaining to the two rounds of litigation in the High Court culminating into decision dated 29.9.2003 (reported as 2003(1) JLJR 322).

Only after the second recruitment process which was held in year 2008, present writ petitions were filed in the year 2010 or thereafter.

21. Having regard to the above it would not be permissible to the petitioners to compare their case with their counterparts in Bihar. As far as the counterparts in the State of Bihar are concerned they had filed writ petitions well in time i.e. way back in the year 2003 in Patna High Court wherein those persons succeeded. The Patna High Court allowed those writ petitions vide judgment dated 1.7.2004 directing the State of Bihar to implement the judgment in *Ram Vinay Kumar's* Case. In such circumstances this Court would not be inclined to grant any relief to the petitioners in these petitions filed under Article 32 of the Constitution, more so when it is found that the respondent/ State of Jharkhand has taken steps in conformity with the statutory recruitment rules framed under proviso to Article 309 of the Constitution.

22. Finding no merits in these writ petitions, same are dismissed. All pending I.As also stand dismissed.

R.P. Petitions dismissed.

M/S. LARSEN & TOUBRO LTD.

v.

M/S. MOHAN LAL HARBANS LAL BHAYANA

(Civil Appeal No. 7586 of 2009)

FEBRUARY 25, 2014

[SURINDER SINGH NIJJAR AND A.K. SIKRI, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996:

s.11(6) - Application before High Court for appointment of arbitrator - Agreement between employer SCOPE and appellant contractor - Clause 25 of agreement bearing arbitration clause - Appellant engaging respondent sub-contractor - Application by respondent for appointment of arbitrator - Allowed by High Court - Held: SCOPE being Principal/Employer of appellant, the liability for honouring the claim of respondent was that of SCOPE and appellant was not supposed to make any payment from its coffers - Further, by virtue of first supplementary agreement, the modalities of settling the dispute between parties underwent a significant change - It was unambiguously provided that in view of arbitration between appellant and SCOPE, pertaining to claims of respondent as well, even if the disputes between the appellant and the respondent were deemed to have been settled and were not referable to arbitration again between these two parties Order of High Court is set aside - In view of subsequent developments after the decision of the High Court, when the final bill is almost at the stage of finalization, the only aspect that can be taken care of at this stage is to hasten the process of arbitration, in case after the passing of the final bill by SCOPE, some claims of respondent still survive -- Directions issued accordingly to balance the equities.

In the instant appeal, the appellant challenged the

order of the High Court passed on an application preferred by the respondent u/s 11(6) of the Arbitration and Conciliation Act, 1996 appointing an arbitrator on behalf of the appellant on the ground that in spite of notice by the respondent in this behalf, the appellant had failed to nominate its arbitrator in terms of Clause 25 of the agreement entered into between the parties. Since the respondent had already nominated its arbitrator, further direction was given that the two arbitrators (one nominated by the respondent and one appointed by the High Court for the appellant), would appoint an Umpire in consonance with the said Clause 25. The stand of the appellant was that Clause 25 was modified by three supplementary agreements and resultantly there was no question of arbitration between the appellant and the respondent in view of the modifications. The appellant claimed that by agreement dated 29.2.1988 entered into between the Standing Conference of Public Enterprises (SCOPE) and the appellant, SCOPE awarded certain construction works to the appellant. This agreement also permitted the appellant to sub-contract. Accordingly, the appellant entered into an agreement dated 3.3.1988 with the respondent. Clause 2 of this agreement dated 3.3.1988 pertained to the payments which were to be made by the appellant to the respondent and the amount under this sub contract was payable to the respondent by the appellant only on receipt of corresponding receipts from SCOPE. Further, as per Clause 6, the respondent was to perform the work awarded to it to the satisfaction of SCOPE. It was further the case of the appellant that the appellant and the respondent entered into a supplementary agreement dated 31.1.1990 and the modalities of settling the disputes between the parties through arbitrator also underwent a significant change, as was clear from Clause (viii) of the first supplementary agreement.

Allowing the appeal, the Court

HELD: 1.1 In essence, the parties understood that as the Principal/Employer was SCOPE, for whom the work was to be performed by virtue of main agreement dated 29.2.1988 entered into between the parties, and the sub contract between the appellant and respondent was on back to back basis, any work done by the respondent was for the benefit of SCOPE and, ultimately, liability for honoring the claims of the respondents was that of SCOPE and the appellant was not supposed to make any payment from its coffers. The parties even acted on the basis of said understanding initially. [para 5-6] [169-F-G]

1.2 Clause (viii) of the first supplementary agreement acknowledges the fact that for the work done by the respondent under the sub-contract, there could be two kinds of situations. There could be a situation where there would be disputes and differences between the appellant and the respondent for the works done by the respondent. This could be regarding the workmanship or the amounts payable for the work done etc. There could also be a situation where SCOPE is not satisfied with the workmanship or may raise dispute about the quantum of bills etc. resulting into denial of payment or short payment to the appellant for the work undertaken by the respondent under the sub-contract, and in terms of Clause (viii) in the first supplementary agreement, such disputes will be deemed to have been raised jointly between the respondent and appellant on the one side and SCOPE on the other side. For this reason, this Clause further provided that the appellant was to refer such disputes to SCOPE for settlement by negotiation failing which the appellant would refer the disputes for arbitration (as per mechanism provided in the Clause between the appellant and SCOPE). In order to lodge these claims suitably and properly, [illegible] s

supposed to assist and cooperate the appellant. Such assistance was expected in successfully pursuing arbitration as well. It is for this reason that this Clause unambiguously further provided that in view of the arbitration between the appellant and SCOPE, pertaining to the claims of the respondent as well, even if the disputes between the appellant and the respondent were deemed to have been settled and were not referable to arbitration again between these two parties. [para 6-7] [171-B-H; 172-A-C]

1.3 On reading Clause 25 in the original agreement pertaining to the process of arbitration along with the modified mechanism agreed to between the parties in the first supplementary agreement, the parties for making the change is clearly discernable. Further, by yet another supplementary agreement dated 8.12.1993, between the appellant and the respondent, it was further agreed whatever claims are received by the appellant from the SCOPE, they shall be shared between the appellant and respondent in the ratio of 67:33. The understanding between the parties that for any claims of the respondent, both the parties were to join together and raise claims against SCOPE was reinforced by Clause 6 in the said agreement which again provided an underlined message that in so far as the appellant and the respondent are concerned, they shall not resort to any arbitration between themselves on this account. [para 8-10] [172-C-D; 173-A-B and D-E]

1.4 The High Court is not correct in holding that Clause 25 of the original agreement in unamended form holds the field. In fact, even the respondent knew fully well that the said clause had been drastically altered by supplementary agreements. It is for this reason that in the prayer (a) of the application u/s 11 of the Act filed by the respondent, it has itself acknowledged this change by mentioning that arbitrator be appointed in terms of Clause

25 of the contract agreement dated 3.3. 1988 "as modified by supplementary agreements dated 31st January 1990 and 6th February 1995". What, however, is lost sight of by the respondent in the process, is that the modification in Clause 25 did not permit the respondent to move this kind of application for appointment of arbitrator between the parties, at that stage. The order of the High Court is set aside. [para 16] [177-D-F]

1.5 When the High Court had passed the impugned orders, the claim had not been made with SCOPE. However, the said position has undergone substantial change thereafter. In view of the subsequent developments, when the final bill is almost at the stage of finalization the only aspect that can be taken care of at this stage is to hasten the process of arbitration, in case after the passing of the final bill by SCOPE, some claims of the respondent still survive. Directions issued accordingly to balance the equities. [para 18-21] [178-D-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7586 of 2009.

From the Judgment and Order dated 27.04.2007 of the High Court of Delhi at New Delhi in A.A. No. 264 of 2004.

Ashok H. Desai, S. Guru Krishna Kumar, S. Guru Krishna Kumar, Parthiv K. Goswami, Diksha Rai, Yashvardhan Singh for the Appellant.

Priya Kumar, Sangita Bhayana, Amlan Kumar Ghosh for the Respondent.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. On an application preferred by the respondent herein under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), the High Court has appointed/nominated an Arbitrator on behalf of the appellant herein on the ground that

respondent in this behalf, the appellant had failed to nominate its Arbitrator in terms of Clause 25 of the Agreement entered into between the parties. Since the respondent had already nominated its Arbitrator, further direction is given that the two Arbitrators (one nominated by respondent and one appointed by the Court for the appellant), shall appoint an Umpire in consonance with the said Clause 25. This order is impugned by the appellant primarily on the ground that Clause 25 was modified by three supplementary agreements whereby the entire edifice of the said arbitration clause stood adhered and on a conjoint reading of original Clause 25 with modification effected by the supplementary agreements, there was no question of arbitration between the appellant and the respondent at this stage. To appreciate this contention, one will have to traverse through the relevant clauses of the main contract as well as supplementary agreements. Thus, we would like to state along with the events, as they occurred, in chorology. In fact, as we proceed to unfurl the events with our comments thereon, there and then we shall be getting answer as well to the issue involved.

2. An agreement dated 29.2.1988 was entered into between the Standing Conference of Public Enterprises (SCOPE) and the appellant namely Larsen & Toubro (L&T Ltd.). This agreement was for construction of Twin Tower Office Complex at Laxmi Nagar District Centre, Delhi which was awarded by the SCOPE to the appellant. Original contract value for this work was stipulated at Rs.27.48 Crores. Works comprised of the Civil Works and also subsidiary works, that could be ordered from time to time by SCOPE/Architect. This agreement also permitted the appellant to sub-contract. Accordingly, the appellant entered into an agreement dated 3.3.1988 with the respondent. While retaining the civil works with itself, the appellant awarded finishing works including brickworks, wood works, flooring, furnishing, aluminum works and other miscellaneous works including waterproofing etc. to the respondent. It was a pass through contract on a back to

back basis. The value of sub contract was stated as Rs.12.08 crores. Clause 2 of this agreement dated 3.3.1988 pertains to the payments which were to be made by the appellant to the respondent. As can be seen from the reading of this Clause, as reproduced below, amount under this sub contract was payable to the respondent by the appellant only on receipt of corresponding receipts from SCOPE:

> "Clause 2 - L&T shall pay "MHB" the said contract amount or such other sum as shall become payable only as and when the said payments are received by "L&T" from SCOPE at the time and in the manner hereinafter specified in the terms and conditions of this Contract."

3. Another important stipulation in this sub contract was Clause 6, as per which the respondent was to perform the work awarded to it to the satisfaction of SCOPE, namely the Principal. It reads as under:

> "Clause 6 - All obligations in respect of ancillary works undertaken by MHB shall be performed by MHB itself and will not jeopardize the interest and contract of L&T with SCOPE. Satisfaction of SCOPE, their representatives and Architects shall form the basis of this agreement."

4. Clause 25 of the agreement between the appellant and the respondent provides for arbitration for settlement of disputes. Relevant part of this Clause reads as under:

> "Clause 25 - Except where otherwise provided in the contract, all questions, disputes, certificates excluding "excepted matters" relating to this contract shall be referred to a Sole Arbitrator in case claims are upto and including Rs.10 lakhs to be appointed by the General Manager (Civil), L&T and for claiming over Rs.10 lakhs by panel of 3 Arbitrators of who one will be appointed by General Manager (Civil), L&T the other by BHR and an umpire appointed in advance jointly by the

> .....No award of the arbitration/umpire shall be binding on L&T unless MHB had furnished complete opportunity to L&T to file a similar claim on SCOPE and only upon L&T receiving any payment from SCOPE under the award which L&T may get in its favour on the subject matter of work."

5. The position which prevailed up to this stage was that for the works undertaken by the respondent, it could receive the payments only when such payments were made by SCOPE to the appellant. Further, all questions and disputes between the appellant and the respondent were to be referred to a sole arbitrator where the claim was up to Rs.10 lakhs and three arbitrators for claims beyond 10 lakhs. The arbitrator(s) was not supposed to deal with "excepted matters", so stated in the certificates. However, even if the award of the arbitrator/umpire was in favour of the respondent, respondent could not receive payment under the said award unless such a payment was received by the appellant from SCOPE under the award. In that event, the respondent was to provide an opportunity to the appellant to raise those claims with SCOPE. On receiving the payments from SCOPE either under the arbitration award between SCOPE and the appellant or otherwise, the appellant was supposed to honour the award passed in favour of the respondent. In essence, the parties understood that as the Principal/Employer was SCOPE, for whom the work was to be performed by virtue of main agreement dated 29.2.1988 entered into between parties and the sub contract between the appellant and respondent was on back to back basis, any work done by the respondent was for the benefit of SCOPE and ultimately liability for honoring the claims of the respondents was that of SCOPE and the appellant was not supposed to make any payment from its coffers.

6. The parties even acted on the basis of aforesaid understanding initially. There were certain claims of the respondent and the appellant in turn raised those claims with

SCOPE. A settlement was reached between the appellant and SCOPE with respect to those claims whereby the appellant was given a sum of Rs.2.15 crores by SCOPE. The appellant and the respondent entered into an agreement dated 31.1.1990 for apportioning the aforesaid amount, whereby a sum of RS.77.40 lacs was paid to the respondent towards full and final settlement of claims/ price escalation on works due to hindrance caused in execution of work and to complete the balance work. At the same time, another important understanding was also reached between the parties. While making this apportionment, the modalities of settling the disputes between the parties through arbitrator also underwent a significant change. This is clear from Clause (viii) of the first supplementary agreement which reads as under:

> "The Agreement provides that all disputes between the parties shall be settled through arbitration. It is now expressly agreed that any dispute or difference which MHB might have with L&T under the agreement or SCOPE might have with L&T under the main contract between then relating to the part of work that is to be executed by MHB, shall be deemed disputes jointly between MHB and L&T and SCOPE under the main contract and L&T will refer all such disputes to SCOPE for settlement by negotiation. If SCOPE does not settle the same by negotiation, then L&T will refer the said disputes for arbitration with SCOPE a/ on with any other disputes which L&T might have with SCOPE in terms of the arbitration clause provided in the main contract. MHB shall in such an event, help prepare claims and statement of case relating to their scope of work and render all assistance and cooperation as may be required in successfully pursuing arbitration. MHB shall bear proportionately cost of arbitration relating to their scope of work. The award of the arbitration on all such matters in dispute claims and counter claims relating to the MHB's scope of works shall be binding on both MHB and L&T and all such disputes betwee ll

be deemed to have been settled accordingly and shall not be referable to arbitration again between MHB and L&T under the agreement."

7. This clause acknowledges the fact that for the work done by the respondent under the sub contract, there could be two kinds of situations. There could be a situation where there would be disputes and differences between the appellant and the respondent for the works done by the respondent. This could be regarding the workmanship or the amounts payable for the work done etc. There could also be a situation where SCOPE is not satisfied with the workmanship or may raise dispute about the quantum of bills etc. resulting into denial of payment or short payment to the appellant for the work undertaken by the respondent under the sub contract. The Clause (viii) in the first supplementary agreement provided that such disputes will be deemed to have been raised jointly between the respondent and appellant on the one side and SCOPE on the other side. For this reason, this Clause further provided that appellant was to refer such disputes to SCOPE for settlement by negotiation failing which arbitration (as per mechanism provided in the Clause between the appellant and SCOPE). In order to lodge these claims suitably and properly, the respondent was supposed to assist and cooperate the appellant. Such an assistance was expected in successfully pursuing arbitration as well. Reason for such a collaborative effort, with synergy between the two parties synergize, was too obvious. Since the respondent has undertaken the work, its inputs could immensely help the appellant in prosecuting the claims efficaciously and potently. Further, by participating the respondent would have satisfaction that its interest is appropriately taken care of. It was even supposed to bear proportionate cost of arbitration. It was, thus, clear intention that the claims of the respondent were to be taken up by the appellant and raise with SCOPE and in the event SCOPE disputing those claims, get those claims adjudicated through arbitration. In that sense, both the appellant and respondent were on one side as co-claimants. However,

since the respondent is not a party to the main agreement dated 29.9.1988 which is entered into between the appellant and SCOPE, the respondent was supposed to give the assistance and cooperate in the manner provided in this Clause. It is for this reason that this Clause unambiguously further provided that in view of the arbitration between the appellant and SCOPE, pertaining to the claims of the respondent as well, even if the disputes between the appellant and the respondent were deemed to have been settled and were not referable to arbitration again between these two parties.

8. On reading Clause 25 in the original agreement pertaining to the process of arbitration along with the modified mechanism agreed to between the parties in the aforesaid first supplementary agreement, the parties for making the change is clearly discernable. As per the original clause, the disputes between the appellant and the respondent were to be referred to the arbitral tribunal. After the rendition of award by the arbitral tribunal, money was still not payable under the award to the respondent. Instead, in order to recover those moneys from SCOPE, it was for the appellant to file a similar claim on SCOPE and on receiving the payment from SCOPE under the award, the appellant was to give the money to the respondent as per the award between the appellant and the respondent. It amounted to indulging in double exercise, viz. (1) an arbitration between the parties herein and thereafter another arbitration relating to subject matter between the appellant and SCOPE. (2) In order to rationalize and eliminate the dual exercise, the parties agreed that instead of resorting to arbitration between themselves, both would join together and prefer those claims with SCOPE. This modified process of arbitration, as envisaged in the first supplementary agreement, was much more rationale which appealed to reason.

9. The next event which took place cemented the aforesaid mechanism between the parties. It ap e

further claims of the respondent which were raised by the appellant with SCOPE. SCOPE agreed to make payments and to apportion those payments between the appellant and the respondent, these two parties entered into another supplementary agreement dated 8.12.1993. The recital to this agreement is of paramount importance for our purposes. It records:

> "L&T has, therefore, invoked the arbitration clause under L&T's contract with SCOPE and referred all the claims including those relating to MHB on 29.5.1992 to arbitration, which is now pending."

10. The parties acted as per modified understanding. It was further agreed whatever claims are received by the appellant from the SCOPE, they shall be shared between the appellant and respondent in the ratio of 67:33. The understanding between the parties that for any claims of the respondent, both the parties were to join together and raise claims against SCOPE was reinforced by Clause 6 in the said agreement which again provided an underlined message that in so far as the appellant and the respondent are concerned, they shall not resort to any arbitration between themselves on this account. For better appreciation, we reproduce Clause 6 herein below, of the second supplementary agreement, dated 8.12.1993:

> "That L&T and MHB shall not undertake any other arbitration as between them in respect of the claims referred to pending arbitration, except to share the proceeds or liabilities as stated above by way of accord and satisfaction."

11. In the aforesaid arbitration, two Member Arbitral Tribunal awarded a sum of Rs.15.02 crores approximately (which was subsequently reduced to Rs.13.23 crores by mutual negotiation) and as per the second supplementary agreement, that amount was shared between the appellant and the

respondent whereby appellant paid a sum of Rs.4.58 crores to the respondent. So much so, when the amount of Rs.15.02 crores, as awarded by the Arbitral Tribunal against SCOPE and in favour of the appellant was reduced to 13.23 crores, this arrangement was endoresed by the respondent as well by entering into third supplementary agreement dated 6.2.1995. The significance of this agreement, for the purpose of present case, is Clauses 5 and 16 thereof. Therefore, we reproduce hereinunder both these Clauses:

> "Clause 5 - Any claim arising after the date covered by the said award, shall as far as possible settled mutually by negotiation. It is mutually agreed by the parties that any such disputes, shall be identified but shall not be referred to arbitration on the owner (SCOPE herein) until the completion of the project. This would facilitate concentration of the concerted efforts of the parties for timely completion of the project. The reference of disputes, if any, to arbitration after completion of the project shall be in accordance with the terms of first supplementary agreement dated 31.01.1990. Any further arbitration if referred to the owner after completion of the work, the Award arising out of this arbitration shall be share in promotion of the claims referred to the works of each of the parties herein.
>
> Clause 16 - The parties further agrees amend and modify clause 25 of the General Conditions of Contract dated 3.3.1988 which deals with settlement of Disputes by Arbitration to the limited extent that in the event of any fresh reference of disputes to arbitration, the Arbitrator or arbitrators as the case may be shall be bound to give speaking award. This Clause 25 is subject to the terms of the first supplementary agreement dated 31.01.1990 which modified the agreement dated 03.03.1988."

12. Following aspects emerge from the reading of these two Clauses:

(a) The parties herein agreed to settle the claims between themselves through negotiations, in the first instance.

(b) Even if there were disputes between the appellant and the respondent they were only to be identified but could not be referred to arbitration with SCOPE until completion of the project.

(c) Even on the completion of the project, the mechanism of raising the disputes had to remain the same as was agreed to earlier in the first supplementary agreement dated 31.1.1990 viz. appellant had to raise the claims with SCOPE in cooperation with the respondent and there was not to be any inter-se arbitration between these parties.

(d) Clause 25 as contained in the original agreement dated 3.3.1988 between the appellant and the respondent pertaining to the arbitration was specifically made subject to the logistic provided in the first supplementary agreement dated 31.1.1990 making it abundantly clear that Clause 25 stood modified by the supplementary agreement.

13. Some further claims, out of the aforesaid contract arose and the appellant submitted those claims to SCOPE in October, 2000 which were up to date in November 2000. These were made jointly by these parties on SCOPE in August 2001. They were up dated again in December 2002 and January 2003 in concert with each other.

14. Now the stage came which led to present proceedings. While the things stood at the aforesaid level, the respondent decided to close the contract sometime in the year 2002. We are not required to go into the nitty gritty of this event viz. as to whether the respondent abandoned the site or it had completed the project. Suffice it is to note that the respondent

raised many claims with the appellant and also served legal notice dated 31.1.2004 in this behalf. It nominated its arbitrator and called upon the respondent to appoint its arbitrator for settling the disputes between them. The appellant replied by denying the contents of the legal notice. This denial of the appellant prompted the respondent to file the application under Section 11 of the Act seeking a direction to the appellant to appoint its arbitrator. The exact prayer made in this application was as under:

"(a) Appoint an Arbitrator on behalf of the Respondent in terms of Clause 25 of the Contract Agreement dated 3rd of March 1988 between the parties as modified by Supplementary Agreement dated 31st January 1990 and 6th February 1995.

(b) Direct the Arbitrators appointed by the applicant and that appoint on behalf of the respondent to appoint an umpire in terms of Clause 25 of the Contract Agreement dated 3rd March, 1988."

15. It is in this application, as mentioned above, impugned orders are passed by the High Court holding that Clause 25 still survived and the arbitral tribunal can be constituted for adjudication of the disputes between the appellant and the respondent. The High Court has further held that though the respondent had nominated its arbitrator, since the appellant had failed to do so in spite of notice, the appellant lost its right to nominate its own arbitrator. For this reason, it is the High Court which has appointed/nominated an arbitrator for the appellant with direction that two arbitrators may appoint presiding arbitrator.

16. While narrating the aforesaid events, we have also commented on the effects of the three supplementary agreements and impact thereof on Clause 25. It is too obvious, from the reading of the relevant clause in the supplementary agreements, that there could not have

between the appellant and respondent, at this stage. Clause 25 of the original agreement has undergone material change. The modalities of raising arbitration are completely novated. As per the modified understanding between the parties, which is so eloquently recorded in writing, in the first instance, the claims of the respondent are to be taken up by the appellant with SCOPE. For pressing those claims and in order to ensure their proper adjudication, the respondent is supposed to assist and cooperate with the appellant in pursuing the arbitration. In that sense, at this stage, the appellant and respondent are on one side who have to put up a joint fight with SCOPE. It is only after the award is rendered in the arbitration between the appellant and SCOPE and something remains, which may qualify as a dispute between the appellant and the respondent, that there can be an arbitration in respect of those disputes between these two parties. We are, therefore, of the opinion that the High Court is not correct in holding that Clause 25 of the original agreement in unamended form holds the field. In fact, even the respondent knew fully well that said clause had been drastically altered by supplementary agreements. It is for this reason that in the prayer (a) of the application under Section 11 of the Act filed by the respondent, it has itself acknowledged this change by mentioning that arbitrator be appointed in terms of Clause 25 of the contract agreement dated 3rd March 1988 "as modified by supplementary agreements dated 31st January 1990 and 6th February 1995". What, however, is lost sight of by the respondent in the process, is that the modification in Clause 25 did not permit the respondent to move this kind of application for appointment of arbitrator between the parties, at that stage.

17. Fully realizing the sequittor of the modified clause, Ms. Priya Kumar, learned Advocate appearing for the respondent tried to paint a different story alleging non-cooperation of the appellant. She was vociferous in her submission in depicting blameworthy conduct of the appellant in not raising the claims preferred by the respondent, with SCOPE and submitted that

such a conduct of the appellant was reprehensible which could not make the respondent wait for indefinite period. She highlighted the fact that though the works were completed in the year 2002, when even the constructed complex was inaugurated and the respondent had preferred the claims with the appellant with request to take up those claims with SCOPE way back in October, 2002. But nothing has moved forward. She further submitted that till date even the arbitral tribunal has not been constituted and the respondent can not be made to suffer by waiting endlessly.

18. This argument may be convincing in so far as equities are concerned. However, merely thereby the legal position which is contractually defined between the parties by way of written agreements does not alter. It would be necessary to record here that when the High Court had passed the impugned orders, the claim had not been made with SCOPE. That may be one of the reasons for the High Court to pass the impugned order. However, the said position has undergone substantial change thereafter. Even after the filing of the Special Leave Petition against the impugned order and grant of leave in the matter, in November 2009, there have been joint meetings of the appellant and the respondent with the officials of SCOPE. Few such meetings took place in April 2012. Pursuant to those meetings, SCOPE had called upon the appellant to complete the residual work rectification so that SCOPE was in a position to settle the final bills, Thereafter in June 2012, after detailed discussion on various issues concerning the project, SCOPE asked the appellant to submit revised final bill. Accordingly, bill dated 16th June, 2012 was prepared by the appellant in consultation with the representatives of the respondent and submitted to SCOPE.

19. After the submission of the revised final bill, SCOPE has been in the process of scrutinizing the same including the claims. In this regard, several round of meetings held with SCOPE. Many of these meetings with S[illegible]d

after the submission of the revised final bill were attended by the representative of the respondent along with the appellant. In December 2013, again SCOPE called upon the appellant to hold a meeting to discuss on the pending issues.

Meanwhile the appellant L&T has been continuing to extend the Bank Guarantee which was submitted to SCOPE.

20. In such a scenario, when the final bill is almost at the stage of finalization the only aspect that can be taken care of at this stage is to hasten the process of arbitration, in case after the passing of the final bill by SCOPE, some claims of the respondent still survive.

21. Accordingly while allowing this appeal and setting aside the order of the High Court, we would like to give the following directions, in order to balance the equities:

(1) It shall be ensured by the appellant that final bill is settled by SCOPE within two months from the date of receiving the copy of this order. For this purpose, this order shall be brought to the notice of SCOPE as well so that SCOPE acts swiftly for settling the bill.

(2) In case there are certain claims of the respondent which are not agreed to while passing the final bill and disputes remain, those will be taken up by the appellant with SCOPE immediately thereafter by invoking arbitration between the appellant and SCOPE as per the arbitration agreement between the appellant and SCOPE. In raising such disputes the appellant and the respondent shall act in unison as per the understanding arrived at between them vide supplementary agreements. In that event, arbitral tribunal shall be constituted within 2 months thereof.

(3) In case the appellant is satisfied with the final bill and chooses not to raise the claims with SCOPE but the respondent feels that their claims are legitimate then it

would be treated as dispute between the appellant and the respondent. In that event, arbitral tribunal shall be constituted as per Clause 25 of the agreement dated 3.3.1998 between the parties within a period of two months of that event.

(4) In either of the aforesaid arbitrations, the arbitral tribunal shall endeavour to render its award within six months from the date of the constitution of the arbitral tribunal.

22. The appeal is allowed and disposed of in the aforesaid terms.

R.P. Appeal allowed.

AAYUSH BUILDWELL PVT. LTD.

v.

HARYANA URBAN DEVELOPMENT AUTHORITY & ORS.

(Civil Appeal No. 2833-2834 of 2014)

FEBRUARY 25, 2014

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

Urban Development:

Allotment of institutional plots - Discrepancies in allotment process - High Court setting aside the allotments made - Held: Appellant was an unsuccessful party in the initial allotment, which was set aside by High Court, but it did not give any right to appellant to claim allotment as a matter of right - Therefore, when no right arises to an applicant in a vitiated/cancelled allotment procedure, a subsequent claim for allotment depends upon factual circumstances of each case - The right of appellant has not been crystallized -- Appellant has to comply with the process followed by HUDA for allotment of plots.

The appellant, pursuant to an advertisement issued by the respondent-Haryana Urban Development Authority, applied for a half an acre freehold institutional plot and submitted a demand draft for earnest money of Rs. 27,75,000/- along with the project report. The respondent-authority conducted interviews of 371 applicants including the appellant. By letter dated 22-9-2006, the earnest money of the appellant was refunded without giving any reasons therefor. The allotments made were challenged before the High Court. The High Court identified certain discrepancies in the allotment process, and set aside the allotments made to the private respondents. The SLPs were disposed of by the

Supreme Court on 29.4.2011 and on the statement of the Additional Solicitor General, respondent no. 1 was directed to allot a plot to Delhi Assam Roadways Corporation Ltd.

In the instant appeal the question for consideration before the Court was: whether on the basis of a comparative analysis, the appellant was eligible to have allotment of a plot in its favour, and further while setting aside the process for allotment of plots, could the Court direct the process afresh allowing the ineligible candidates/parties to participate in the said fresh process.

Disposing of the appeals, the Court

HELD: 1.1 The appellant was an unsuccessful party in the initial allotment. It is not disputed that the earnest money deposited by it was also refunded. The initial allotment was also set aside by High Court by judgment dated 13.3.2008, but the same did not give any right to the appellant to claim allotment as a matter of right. Therefore, when no right arises to an applicant in a vitiated/cancelled allotment procedure, a subsequent claim for allotment may or may not succeed, depends upon the factual circumstances of each case. [para 7-8] [189-F-G; 190-E]

Manjul Srivastava vs. Government of Uttar Pradesh **2008 (12) SCR 903 = 2008 (8) SCC 652;** *Haryana State Agricultural Marketing Board vs. Sadhu Ram,* **2008 (6) SCR 43 = (2008) 16 SCC 405 -- relied on.**

A. Jithendernath v. Jubilee Hills Coop. House Building Society **2006 Suppl. 1 SCR 702 = (2006) 10 SCC 96;** *Industrial Assistance Group, Goverment of Haryana & Anr. vs. Ashutosh Ahluwalia & Anr.* **(2001) 4 SCC 359;** *U.G. Hospitals (P) Ltd. v. State of Haryana* **(2011) 14 SCC 354 - referred to.**

1.2 In SLP [C] Nos.10818-23 of 2008 - Haryana Urban Development Authority etc. vs. Delhi Assam Roadways Corporation Ltd. & Ors. where this Court issued a direction to the Authority to allot a plot to Delhi Assam Roadways Corporation Ltd. since the Additional Solicitor General, on instructions, conceded to the effect that half an acre plot shall be made available to Delhi Assam Roadways Corporation Ltd., the said order was passed on concession granted on behalf of HUDA. But the respondent did not agree to concede it to that extent in the instant case. Accordingly, there is a distinction in the situation. [para 10] [191-E-H; 192-A]

1.3 The right of the appellant has not been crystallised. No right can be conferred on the appellant, granting allotment as has been prayed. The appellant has to comply with the process followed by HUDA to allot plots in favour of the allottees and, if the appellant, on its taking steps, fulfils all the criteria laid down by HUDA in the process of allotment, HUDA shall consider its case for such allotment. [para 11] [192-B-C]

Case Law Reference:

(2008) 8 SCC 658	**relied on**	**para 8**
2008 (6) SCR 43	**relied on**	**para 8**
2006 (1) Suppl. SCR 702	**referred to**	**para 9**
(2001) 4 SCC 359	**referred to**	**para 9**
(2011) 14 SCC 354	**referred to**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2833-2834 of 2014.

From the Judgment and Order dated 13.03.2008 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 9962 of 2007, dated 30.03.2009 in RA No. 132 of 2008 in

C.W.P. No. 9962 of 2007.

V.K. Bali, Aditya Soni, Shree Pal Singh for the Appellant.

Anubha Agarwal, Amboj Agarwal, Dr. Monika Gusain for the Respondent.

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J. 1. Leave granted.

2. These appeals have been filed by the present appellant -- Aayush Buildwell Pvt. Ltd. -- against the final order dated March 13, 2008 passed by the High Court of Punjab and Haryana in CWP No.9962 of 2007 which was disposed in terms of judgment passed in CWP No. 7790 of 2007 titled *"Delhi Roadways Corporation Ltd. vs. The Haryana Urban Development Authority & Ors."* and the order dated March 30, 2009 dismissing the review petition being Review Application No. 132 of 2008 in CWP No. 11501 of 2007.

3. The question which came up before this Court, as pressed by the appellant, is whether on the basis of a comparative analysis, the appellant was eligible to have allotment of a plot in its favour, and further while setting aside the process for allotment of plots, can it direct the process afresh allowing the ineligible candidates/parties to participate in the said fresh process.

4. The facts of the case briefly are as follows :-

4.1. In January/February 2006, the respondent-authority (Haryana Urban Development Authority) issued an advertisement for allotment of freehold institutional plots for Corporate Offices, R&D Centres, Corporate Towers and Staff Training Institutes in Sectors 18, 32 and 44 of Gurgaon. The appellant obtained the brochure and duly applied for a half an acre plot in accordance with the said advertisement. The earnest money of Rs. 27,75,000/- by v ft

and the project report of the appellant were duly submitted.

4.2. The respondent-authority duly conducted interviews of 371 applicants and on June 9, 2006, the appellant duly appeared in an interview for such allotment before the authority in terms of letter dated June 1, 2006. By letter dated September 22, 2006, the earnest money of the appellant was refunded without giving any reasons therefor.

4.3. The allotments made were challenged before the High Court in CWP No. 17138 of 2006 by M/s. Sigma Corporation India Ltd., notice was issued on October 31, 2006 and interim stay was granted. Subsequently, said CWP No.17138 of 2006 was allowed to be withdrawn by an order dated October 3, 2007 in an application being Civil Misc. No.15033 of 2007 in CWP No.17138 of 2006.

4.4. It appears that Delhi Assam Roadways Corporation Ltd., an applicant for such allotment, which had filed CWP No. 7790 of 2007, also filed an application under the Right to Information Act, 2005 in respect of the allotments made by the said authority. Since no reply was received within the time prescribed under the Act, the said applicant moved the Central Information Commission on March 14, 2007 and subsequently, by letter dated May 7, 2007, the respondent-authority provided the requisite information, admitting that no report/comments were given by the Committee regarding the individual application for such allotment. The appellant found discrepancies in the allotment and duly asked for the information under the RTI Act, with regard to the profiles of the companies which were allotted plots in Sector 32 of Gurgaon.

4.5. Being aggrieved by the action on the part of the respondent-authority, the appellant filed CWP No. 9962 of 2007 before the High Court. The said CWP was disposed of by order dated March 13, 2008 along with the writ petitions in terms of a common order passed in CWP No. 7790 of 2007 in *Delhi Roadways Corporation Ltd. vs. The Haryana Urban*

Development Authority & Ors.

4.6. The High Court in its judgement dated March 13, 2008, observed that no pre-determined criteria was published nor terms and conditions which were to apply to the allotments were made known to the applicants, and that the guidelines framed by the Committee regarding the allotments were also not kept in mind and no reasons have been highlighted for adopting the allotment method over the method of sale by auction. Thereby, the Court held that :

> "We are further of the view that the so called selection committee failed to advert to the comparative merits of the applicants and it has not been pointed out as to why the allottee was selected from amongst those applicants who have been left out".

4.7. The Court perused the comparative table submitted by the petitioner in CWP No. 7790 of 2007 and identified the discrepancies in the allotment process, thereby holding that the "respondents have adopted the pick and choose method". The Court further held that :

> "...in the absence of any declared pre-determined criteria element of arbitrariness has crept in which has resulted in flagrant violation of Article 14 of the Constitution".

4.8. On these grounds the High Court set aside the allotments made to the private respondents in Sectors 18, 32 and 44 of Gurgaon. Furthermore, the Court gave the Government and respondent no. 1 two options 'A' and 'B' along with a set of directions each regarding the allotment; and either of the options had to be followed.

4.9. Being aggrieved, one of the private respondents filed Review Application No. 418 of 2008 in CWP No. 9962 of 2006 before the High Court for recalling of its order dated March 13, 2008. The High Court by a common judgment dated March 20,

2009 dismissed both Review Application No. 418 of 2008 and the earlier filed review application being R.A. No. 132 of 2008 in CWP No. 11501 of 2007.

4.10. Delhi Assam Roadways Corporation Ltd. as well as the respondent-Authority- Haryana Urban Development Authority and 28 other allottees filed special leave petitions against the orders of the High Court before this Court. All the petitions were tagged together under SLP [C] Nos.10818-10823 of 2008 and were disposed by this Court on 29th April, 2011 when the following order was passed :

"Delay condoned.

Learned Additional Solicitor General, on instructions, submits that the petitioner, namely, Haryana Urban Development Authority shall be making available half an acre of plot, as far as possible, Plot No.55-P, Sector-44 (Institutional), Gurgaon to the first respondent in SLP© 10818-10823 of 2008, namely, Delhi Assam Roadways Corporation Ltd.

In the circumstances, there shall be a direction directing the Authority to allot the said plot, as expeditiously as possible, preferably within four weeks from today. The allotment shall be made on the same terms and conditions on which the other respondents had been earlier allotted.

Obviously, no further dispute, as such, survives so far as the allotments made in favour of other respondents are concerned.

In such view of the matter, no further orders, as such, are required to be passed and the order of the High Court shall stand modified to the extent.

It is made clear that allotments already made in favour of the other respondents is not interfered with.

The impleadment application in SLP (C) No.10818-10823 of 2008 is allowed.

The special leave petitions are, accordingly, disposed of."

4.11. It appears from the facts that the appellant filed SLP [C] Nos.672-673/2011 before this Court raising the question which has been mentioned hereinabove, and on January 7, 2011 notice was issued on the SLP as well as the application for condonation of delay. It further appears that by an order dated March 8, 2011 on the basis of the application filed by the appellant, it was ordered in Chambers :

"At the risk and peril of the petitioner, respondent Nos.2-32 are deleted from the array of parties. Amended cause title shall be filed within two weeks from today."

5. Thereafter, the matter did appear before the Court for hearing and the respondents duly filed their counter in the matter. In the counter affidavit it appears that the respondent duly pointed out that the appellant duly participated in the process of allotment and had been unsuccessful, hence, filed the present appeals to the limited extent that the impugned order while allowing the writ petition, did not direct allotment of a plot in favour of the appellant because the appellant's claim was more meritorious. It is stated that allotment of a plot in favour of the appellant could not be made by the High Court and, furthermore, without explaining the inordinate delay, the appeal has been filed by the appellant. It is further pointed out that the appellant was a party in the case of Haryana Urban Development Authority vs. Delhi Assam Roadways Corporation & Ors. being SLP [C] Nos.10818-10823 of 2008. It is pointed out that since the appellant was a contesting party before this Court wherein a batch of petitions had been decided, the appellant cannot challenge the same again by way of the present appeals. It is further pointed out that the impugned order of the High Court did not direct all ur

of the appellant, neither alleges that the criteria adopted for allotment of plots was arbitrary nor challenges the criteria but merely seeks the benefit of allotment of a plot despite being unsuccessful. This Court by the final order dated April 29, 2011 clarified that the allotments already made in favour of other respondents should not be interfered with. It is further stated that the appellant is now estopped from contending/contesting the claim since the claim is barred by res judicata. Since challenge to the impugned order of the High Court has already been decided by this Court, the appellant cannot challenge the same.

6. It is submitted that the appellant was not found eligible for allotment as per the Selection Committee and hence no plot was allotted to it. The appellant without challenging the process of allotment is merely seeking a direction for allotment of plot in its favour which cannot be acceded to. In these circumstances, the learned senior counsel appearing on behalf of the respondent authority, HUDA, submitted that no order can be passed on these petitions on the ground of res judicata, and further the appellant did not challenge the process of allotment. In reply, it was stated that the appellant was a party in the earlier SLP [C] Nos. 10818-10823 of 2008 as respondent No.26. According to the appellant, no notice was received in the same.

7. We have heard learned counsel for the parties at length. It appears to us that the appellant was an unsuccessful party in the initial allotment. It is also not disputed that the earnest money deposited by it was also refunded. The initial allotment was also set aside by judgment dated March 13, 2008 but the same did not give any right to the appellant to claim allotment as a matter of right.

8. This Court in *Manjul Srivastava vs. Government of Uttar Pradesh* [(2008) 8 SCC 658], while disallowing a claim for allotment made on the basis that there was a "plot reserved", held that "the appellant could not have acquired any legal right for allotment of a plot until and unless she could be found to be successful in the draw of lots." In *Haryana State Agricultural*

Marketing Board vs. Sadhu Ram [(2008) 16 SCC 405], this Court in a matter where the allotment by way of auction was cancelled on the ground that the reserve price was not met, held regarding the claim of allotment by the highest bidder that:

> "It is, therefore, difficult to accept the views expressed by the High Court that since reserve price was not known to the respondents and they were found to be the highest bidders in the said auction, they have acquired a right to get the allotment of alternative plots and the appellants had no authority to reject the highest offers given by the respondents or to cancel the auction itself. Since the entire auction was cancelled, we do not find any justification how the High Court could pass an order directing allotment of the alternative plots on the same terms and conditions when, after cancellation, the second auction was held in which the price fetched was much higher than the offers made by the respondents."

Therefore, when no right arises to an applicant in a vitiated/ cancelled allotment procedure, a subsequent claim for allotment may or may not succeed, depends upon the factual circumstances of each case.

9. We have also noticed that in *A. Jithendernath v. Jubilee Hills Coop. House Building Society* [(2006) 10 SCC 96, at page 114], while deciding a dispute regarding allotment, this Court held that :

> "Even in exercise of its jurisdiction under Article 142 of the Constitution while making an attempt to do complete justice to the parties this Court cannot pass an order which could cause injustice to others and in particular to those who are not before it."

We have noticed that in *Industrial Assistance Group, Goverment of Haryana & Anr. vs. Ashutosh Ahluwalia & Anr.* [(2001) 4 SCC 359], the respondent was [illegible]er

the allotment process was cancelled on the basis that plots allotted could only be sold by open auction. Subsequently, the allotment to the respondent was cancelled and the earnest money was returned. The Court was of the opinion that he can be allotted a plot under the new policy, however, as in his case the allotment process was complete, he was not asked for the difference in rates as paid by the earlier allottees. In *U.G. Hospitals (P) Ltd. v. State of Haryana* [(2011) 14 SCC 354], there was an irregular allotment of a plot for construction and the appellant filed a writ challenging the same after a delay of one and half years. Apart from the appellant, there were other applicants for the allotment of land as well, however, all barring the appellant and another person had withdrawn their applications. Since the other applicant was allotted a plot, this Court held that as there was a delay, it would not interfere with the earlier allotment. However, as the appellant was willing to accept another plot, the Court directed the Authority to consider the request of the appellant on such terms as it deems fit, as per its rules and regulations in accordance with law.

10. We have noticed that in SLP [C] Nos.10818-23 of 2008 - Haryana Urban Development Authority etc. vs. Delhi Assam Roadways Corporation Ltd. & Ors. where this Court issued a direction directing the Authority to allot Plot No.55-P, Sector 44 (Institutional), Gurgaon to Delhi Assam Roadways Corporation Ltd. within four weeks from the date of the order, i.e., 29th April, 2011. It appears that the said order was passed by this Court since the learned Additional Solicitor General, on instructions, who appeared on behalf of HUDA, conceded to the effect that half an acre of plot No.55-P, Sector 44 (Institutional), as far as possible, shall be made available to Delhi Assam Roadways Corporation Ltd.. The said order was passed on concession granted on behalf of HUDA. But it appears that in view of the facts and circumstances of this case and the submissions made on behalf of respondents, the respondent did not agree to concede it to that extent in this case. Accordingly, in our opinion, there is a distinction in the

situation in passing the said order and the present order so passed by us.

11. Accordingly, in this factual matrix and the law laid down by this Court, we hold that the right of the appellant has not been crystallised. No right can be conferred on the appellant, granting allotment as has been prayed before us. In our opinion, the appellant has to comply with the process followed by HUDA to allot plots in favour of the allottees and, accordingly, we direct that if the appellant fulfils all the criteria laid down by HUDA in the process of allotment, HUDA shall consider its case for such allotment. In these facts and circumstances we direct that steps be taken by the appellant in accordance with the process of HUDA and if the criteria is being fulfilled by the appellant, HUDA shall take necessary steps in the matter for allotment in accordance with the provisions of law.

12. In light of the above, the appeals are disposed of accordingly.

R.P. Appeals disposed of.

NAND KUMAR
v.
STATE OF BIHAR & ORS.
(Civil Appeal No. 2835 of 2014)

FEBRUARY 25, 2014

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

Service law: Regularisation - Daily wagers even if appointed for a long time are not entitled to be absorbed and regularised.

Bihar Agriculture Produce Market (Repeal) Act, 2006: s.6 - 'all officers and employees' - Whether include daily wagers - Held: Daily wagers are not included within the meaning of 'all officers and employees' as used in s.6(i) of the Repeal Act - Daily wagers cannot be treated as permanent Government employees - s.6(i) makes it clear that after the repeal of the Agriculture Produce Act, 1960, all officers and employees of the Board are to continue in employment and they shall continue to be paid what they were getting earlier as salary and allowance till such time the State Government takes an official decision as per the further provisions of s.6 - The scheme of alternative appointment framed for regular employees of abolished organisation cannot, therefore, confer a similar entitlement on the daily wagers of abolished organisation to such alternative employment.

s.6(ii) - Power of the Committee of Secretaries - Held: Is to prepare a scheme of absorption as well as of retirement, compulsory retirement or voluntary retirement and other service conditions of officers and employees of the Board - The scheme prepared by the Committee of Secretaries is only in the nature of recommendation and the State has the power either to accept, modify or amend the same before

granting its official approval.

The questions which have arisen for consideration in the instant appeals were whether the appellants-daily wagers appointed for a long time were entitled to be absorbed and regularised and should not be relieved by virtue of Section 6 of the Bihar Agriculture Produce Market (Repeal) Act, 2006; and whether the daily wagers were included within the meaning of 'all officers and employees' as used in Section 6(i) of the Repeal Act.

Dismissing the appeals, the Court

HELD: 1. The appellants were never appointed through a proper procedure. They all served as daily wagers. Therefore, it was within their knowledge all the consequences of appointment being temporary, they cannot have even a right to invoke the theory of legitimate expectation for being confirmed in the post. Section 6 of the Bihar Agriculture Produce Market (Repeal) Act, 2006 makes it clear that the employees of the Board and the appellants cannot be said to be of the same status and cannot enjoy the benefit given under Section 6(i) of the Repeal Act, 2006. Therefore, the daily wagers would not come within the meaning of "all officers and employees" as specifically stated in Section 6 of the Repeal Act. [Para 19] [208-C-F]

State of Karnataka & Ors. v. M.L. Kesari & Ors. **2010 (9) SCC 247: 2010 (9) SCR 543 - held inapplicable.**

2. The status of the appellants was continuing to be as daily wagers. They cannot be treated as permanent Government employees. They all worked as employees of the Board. No steps were followed by the Board to safeguard the service of these appellants. Section 6(i) makes it clear that after the repeal of the Agriculture Produce Act, 1960, all officers and em d

are to continue in employment and they shall continue to be paid what they were getting earlier as salary and allowance till such time the State Government takes an official decision as per the further provisions of Section 6. Such provision certainly allows continuance of the officers and employees of the Board to continue in employment in the same status. The status of the daily wage employees and regular employees of the Board is eminent from the said provision. It cannot be said that the daily wage employees can enjoy or acquire the same status as that of the regular employees. So far as the power of the Committee of Secretaries constituted in terms of section 6(ii) of the Repeal Act is concerned, it is to prepare a scheme of absorption as well as of retirement, compulsory retirement or voluntary retirement and other service conditions of officers and employees of the Board. The scheme which was prepared by the Committee of Secretaries is only in the nature of recommendation and the State has the power either to accept, modify or amend the same before granting its official approval. Therefore, after the sanction is granted by the Government in respect of the said scheme, it would gain the status of statutory scheme framed under the said Act and would be enforced within the time to be indicated in section 6(iii) of the Repeal Act, 2006. Therefore, in the light of the said provision, the Committee of Secretaries cannot be faulted in treating the daily wage employees on a different footing and deciding for removal of their services. [Paras 20, 21] [209-A-H; 210-A-C]

3. The daily wagers are not appointees in the strict sense of the term 'appointment'. They do not hold a post. The scheme of alternative appointment framed for regular employees of abolished organisation cannot, therefore, confer a similar entitlement on the daily wagers of abolished organisation to such alternative employment. Their relevance in the context of appointment arose by

reason of the concept of regularisation as a source of appointment. Appointment on daily wage basis is not an appointment to a post according to the rules. Usually, the projects in which the daily wagers were engaged, having come to an end, their appointment is necessarily terminated for want of work. Therefore, the status and rights of daily wagers of a Government concern are not equivalent to that of a Government servant and his claim to permanency has to be adjudged differently. In these circumstances, the regularisation/absorption is not a matter of course. It would depend upon the facts of the case following the rules and regulations and cannot be de hors the rules for such regularisation/absorption. [paras 22, 23] [210-D-H; 211-A]

Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors. **2006 (4) SCC 1: 2006 (3) SCR 953;** *Avas Vikas Sansthan v. Avas Vikas Sansthan Engineers Association* **2006 (4) SCC 132: 2006 (3) SCR 516 - relied on.**

Case Law Reference:

2006 (3) SCR 953	**relied on**	**Para 8**
2010 (9) SCR 543	**held inapplicable**	**Para 9**
2006 (3) SCR 516	**relied on**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2835 of 2014.

From the Judgment and Order dated 09.12.2009 of the High Court of Patna in CWJC No. 16109 of 2008.

WITH

C.A. No. 2836-2837, 2838, 2839-2841, 2842 and 2843 of 2014.

Amarendra Sharan, V. Shekhar, Amit Kumar, Rituraj Kumar, Kameshwar Singh, J.P. Verma,

Sahay, Suchita Pokharna, Himanshu Shekhar, Tarkeshwar Nath, B.K. Pandey, Saurabh Kumar Tuteja, Rameshwar Prasad Goyal, Ambreesh Kumar Aggarwal, Mahish Kumar, Chandan Kumar, Gopal Singh for the appearing parties.

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J. 1. Leave granted.

2. Six writ petitions were filed before the High Court of Patna which were taken up and disposed of by the High Court by a common order dated December 9, 2009. The High Court rejected the prayer made by the writ petitioners for absorption/ regularisation in their posts.

3. The facts of the case, briefly, are as follows:

3.1 The appellants were appointed on daily wages. It is not in dispute that some of the appellants had also worked as daily wagers for a long period. It is also not in dispute that the services of said daily wagers varied from period to period. Nand Kumar, appellant, was appointed as an Accounts Clerk on daily wage basis on September 18, 1982. Similarly, others (appellants in civil appeals arising out of SLP [C] Nos.8865-66/2010, 10876/2010, 20833-20835/2010 and 30317/2010) were also appointed, from time to time, and served as daily wagers. It is not in dispute that some of the appellants received monthly salary in the minimum pay scale with usual allowances.

3.2 In 2006, the State Legislature passed the Bihar Agriculture Produce Market (Repeal) Act, 2006 (hereinafter referred to as the Repeal Act, 2006) with effect from September 1, 2006. As a result whereof, the Bihar Agriculture Produce Market Act, 1960 and rules framed thereunder in the year 1975 stood repealed, save and except certain decisions rendered earlier as well as disciplinary proceedings initiated or pending against its employees were saved. It appears that in these appeals the appellants are not challenging the validity of the

Repeal Act. The claim of the appellants is that they have worked on daily wage basis for a long period and cannot be relieved from service by virtue of Section 6 of the Repeal Act, 2006 and, furthermore, such decision is violative of the principles of natural justice and accordingly is arbitrary.

4. A question has also been raised in these appeals whether the daily wage employees are included within the meaning of "all officers and employees" as used in Section 6(i) of the Repeal Act, 2006. The High Court while answering the said question and dealing with the writ petitions, has observed that the said Section under the Repeal Act itself maintains the distinction between the status of daily wage employees and regular employees of the Board.

5. It appears to us that under Section 4 of the said Repeal Act, the assets and liabilities of the Bihar Agriculture Produce Marketing Board or of the Marketing Committees or Bazar Samitis constituted under the Act of 1960, have vested in the State Government. The State Government by virtue of Section 5 of the said Act, has the authority, power and jurisdiction to issue necessary directions and/or orders to secure the object of the Repeal Act, 2006.

6. In the backdrop of the facts of this case, Section 6 is relevant for the purpose of deciding the cases of the appellants and to find out whether it provides for absorption of the daily wagers who worked for a longer period with the Board. It further appears that by virtue of the said Repeal Act, a Committee of Secretaries was constituted under Section 6(ii) and whether the said Committee has the power to prepare a scheme for absorption/regularisation, denying the absorption of the appellants on the ground that they have been appointed by the Board/Market Committee/Bazar Samiti on daily wages or they have a duty to prepare a scheme for such absorption.

7. Now it is necessary for us to reproduce Section 6 of the said Act which reads as follows :

"Section 6: Absorption of officers and employees of Bihar Agriculture Marketing Board/Market Committee/Bazar Samiti. -

(i) On and from the date of repeal of the Act, all officers and employees of the Board, shall remain in employment, as if the Act has not been repealed and they shall continue to be paid same salary and allowances as was payable on the date of repeal of the Act till such time State Government has taken such final decision as is provided hereafter.

(ii) The State Government shall constitute a committee of Secretaries consisting of three Secretaries who shall prepare detailed scheme of absorption, retirement, compulsory retirement or voluntary retirement, other service conditions of officers and employees of the Board and the Committee. Scheme prepared by group of Secretaries shall be placed before the State Government within two months from the date of enforcement of the present Act. The State Government shall thereafter approve the scheme;

Provided that it shall be open to the State Government to modify, amend or suggest modification or amendment and the scheme thereafter shall be made operational in such form and intent as finally approved by the State Government. Scheme approved by the State Government shall be considered as statutory scheme framed under this Act.

(iii) After the scheme approved by the State Government is enforced it shall be fully implemented in its form and intent within three months from the date of its enforcement.

(iv) Group of Secretaries constituted under sub-section (ii) above shall be competent to decide utility and deployment of officers and employees of the Board or the Committee during transition period and it shall not be open to any officer or employee to question decision of group of Secretaries.

(v) Scheme framed under this Act shall have effect, notwithstanding any other Act, Ordinance, Rule, regulation, direction, order or instruction and condition of service of officers and employees of the Board or the Committee, shall be governed and regulated under the scheme to the extent provision has been made in the scheme.

Provided further that it shall be competent for the State Government to amend, modify, alter or substitute the scheme so framed for removal of difficulties in implementation of the scheme."

8. Mr. V.Shekhar, learned senior counsel appearing for the appellants in civil appeals arising out of SLP (C) Nos. 30317/2010 and 30318/2010 has contended that the daily wagers have asked for pay parity with the State employees treating them at par. The appellants claimed to have been working against the posts of Agriculture Produce Marketing Divisions on muster roll basis for the last 5 to 15 years and are in the employment of the Board. He further submitted that the recommendation of the Committee of Secretaries which has decided not to absorb the daily wage employees, is nothing but illegal and malafide. According to him, after working for such a long time and since they have been allowed to draw the pay scale along with usual allowances, would automatically entitle them to the benefit of a regular employee. He further stated that the appellants worked under the duly sanctioned posts. He further drew our attention to the *Secretary, State of Karnataka & Ors. V. Umadevi (3) & Ors.* [2006 (4) SCC 1, paras 40, 41 and 53] and submitted that the State should take steps to regularise all these appellants by way of one-time measure.

9. Mr. A. Sharan, learned senior counsel appearing for the appellants in civil appeals arising out of SLP [C] Nos.7555/ 2010 and 8865-8866/2010, submitted that the appellant has worked in the post for a long time and he should be regularised in the said post since he has already obtained the status of employee working in the Board. He relied upon the judgment reported in *State of Karnataka & Ors. v.M.L. Kesari & Ors.* [2010 (9) SCC 247].

10. It is further submitted that an advertisement was issued for filling up vacancies by the Board. Some of the petitioners applied for the said post but no steps were taken to fill the said post by the Board. Board issued directions to pay equal pay for equal work to the daily wagers who were working in Grade III and Grade IV. It is also stated that on 27th September, 2006 Executive Engineer, Muzaffarnagar Division Marketing Board sent a report about the strength of the employees in the said division. In the said report, it was also mentioned that Nand Kumar has been working as an accounts clerk from 17th September, 1992 and it has also been mentioned that he will complete his 60 years on 30th September, 2018. Accordingly, it is submitted that the petitioner and similarly situated persons have not been treated as daily wages employees.

11. Our attention has already been drawn by the learned senior counsel to the report of the three Member Committee constituted in terms of section 6(ii) of the Repeal Act which recommended the termination of services of all illegal and irregular employees and was submitted to the Government recommending absorption of only regular employees in para 3.1 and further recommended for termination of daily wagers in para 3.6 of the said report.

12. It is submitted by the appellants that the appellants who have been working for more than 25 years getting regular pay scales and work against the vacant sanctioned posts cannot be treated as ordinary daily wage employees. The provision in the Section 6 of the Repeal Act deals with "all officers and

employees" which includes the daily wagers and section 6 of the Repeal Act also provide that all officers of the Board shall remain in employment as if the Act has not been repealed and they would continue on the basis of the regular pay scale, dearness pay and dearness allowances. Therefore, it is submitted by the appellants that the rights of all employees working were adequately protected in the said section 6 of the Repeal Act.

13. It is contended by the appellant that the Committees of Secretaries have wrongly treated the appellant Nand Kumar and similar situated persons as daily wagers without appreciating the facts that they were working in the said post for more than 20-25 years and drawing the salaries in pay scale with dearness allowance. Therefore they cannot be treated differently from regular employees. It is further contended that the term existing employees used in section 6(ii) of the Repeal Act includes all the employees including the petitioners, who were daily wagers. Accordingly, it is submitted that the appellants must get a chance in the matter to be considered by the authorities for absorption/regularization in their posts and cannot be treated differently than that of regular employees.

14. It is further contended by the appellants that the phrase "all officers and employees" in Section 6 of the Repeal Act means all employees without any permutation and combination or without any reservation and qualification. The legislature was fully aware of different types of employees that could be in service like contractual employees, daily wage employees, work charged employees etc. But legislature chooses the expression "all officers and employees". Sub-section (i) of Section 6 makes clear the legislative intent that the services of "all officers and employees" would continue as if the Principal Act had not been repealed, meaning thereby that there would not be change in service condition of whatsoever till the scheme was finalised as contemplated under section 6(ii) of the Act. Section 6 of the Repeal Act, [illegible]ll

officers and employees of the Board shall remain in employment, as if the Act has not been repealed and they continue on the basis of regular pay scale, dearness pay and dearness allowance. Section 6(ii) of the Repealing Act gives jurisdiction to the Committee to prepare "detailed scheme of absorption, retirement, compulsory retirement or voluntary retirement of existing employees". The term "existing employees" used in the Act does not distinguish between contractual or regular employee or employees working on sanctioned, vacant post for more than 25 years and getting salary in minimum pay scale and also dearness allowance.

15. The appellant further submitted that the appellants are squarely coming within the purview of *Umadevi* (supra) and drew our attention to para 53 which reads as follows:

> "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore v. S.V. Narayanappa* 1967 (1) SCR 128, *R.N.Nanjundappa v. T.Thimmiah* 1972 (1) SCC 409 and *B.N. Nagarajan v. State of Karnataka* 1979 (4) SCC 507 and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

16. Per contra, it was submitted by counsel appearing on behalf of the State that the words "absorption, retirement, compulsory retirement or voluntary retirement" used in Section 6 of the Repeal Act, 2006 have been used with reference to only the permanent employees of the Board. That absorption in the present case does not mean regularisation. It is further submitted that all the appellants worked on daily wage basis and had not been regularised till the date of repeal of the said Act. It is further submitted that with undoing of the establishment, there is no regulation of the market and as such there is no procurement of revenue. In these circumstances, there cannot be any scope for regularisation. He further pointed out that the daily wagers are engaged in view of work exigencies prevailing in the establishment but in the event of dissolution of the establishment, there cannot be any work exigency. He further submitted that regularisation is not a matter of course, it has to follow the mode of recruitment. The Committee constituted under Section 6 of the Repeal Act duly examined the cases of daily wagers and clause 3.1 of the Resolution prepared by the Market Committee clearly states that any appointment without recommendation or proper authority will be considered as illegal and irregular. It is pointed out that engagement of the appellants was without following any norms and in violation of the rules of recruitment and principles of equality. Accordingly, he submitted that Section 6 of the Repeal Act, 2006 has a provision for protection of permanent employees and not daily wage employees, and such a provision is in violation of Article 14 of the Constitution. The daily wagers [illegible] n

themselves and all the daily wagers have been retrenched and not even a single one has been retained in these cases.

17. The High Court dismissed the writ petition which was filed before it on the ground that petitioners cannot claim themselves as a part of same class and the Three Member Committee did not commit any wrong in not recommending absorption of the petitioners.

18. We have also noticed that Constitution Bench of this Court in paras 44, 45 & 47 of *Umadevi* (supra) held :

> "44. The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the decision in Dharwad District PWD Literate Daily Wage Employees Assn. v. State of Karnataka [1990 (2) SCC 396], the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had

> ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.
>
> 45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain -- not at arm's length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, woul e

people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

x x x x x

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post

could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

19. Therefore, considering the facts of the present case, it appears to us that the appellants were never appointed through a proper procedure. It is not in dispute that they all served as daily wagers. Therefore, it was within their knowledge all the consequences of appointment being temporary, they cannot have even a right to invoke the theory of legitimate expectation for being confirmed in the post. Accordingly, we cannot accept the contention of the appellants in the matter. We have further considered the case of the appellants in the light of Section 6 of the Repeal Act which has made it clear that the employees of the Board and the appellants cannot be said to be of the same status and cannot enjoy the benefit given under Section 6(i) of the Repeal Act, 2006. Therefore, we are unable to accept the contention that the daily wagers would also come within the meaning of "all officers and employees" as specifically stated in Section 6 of the Repeal Act. In these circumstances, we are unable to accept the submission of learned senior counsel appearing on behalf of the appellants.

We have also considered the decision in *M.L.Kesari* (supra) of this Court which deals with the exception contained in para 53 of *Umadevi* (supra) but considering the facts of this case, we do not have any hesitation to hold that the said decisions can not be a help to the appellants.

20. We have heard learned couns e

have also perused the records placed before us. We find that the status of the appellants was continuing to be as daily wagers. They cannot be treated as permanent Government employees. They all worked as employees of the Board. We have also found that no steps were followed by the Board to safeguard the service of these appellants. We have not been able to find out whether any advertisement was issued by the Government to regularise them. In these circumstances, in view of the submission which has been advanced on behalf of the appellants, we do not find that there is any substance in the matter/arguments put forwarded before us on behalf of the appellants as we have been able to find out that the appellants have served as daily wagers and we do find that Section 6(i) makes it clear that after the repeal of the Agriculture Produce Act, 1960, all officers and employees of the Board are to continue in employment and they shall continue to be paid what they were getting earlier as salary and allowance till such time the State Government takes an official decision as per the further provisions of Section 6. Such provision certainly allows continuance of the officers and employees of the Board to continue in employment in the same status. The status of the daily wage employees and regular employees of the Board is eminent from the said provision. It cannot be said that the status of the daily wage employees can enjoy or acquire the same status as that of the regular employees. In these circumstances, we do not find that there was any discrimination between the daily wage employees and the regular employees as is tried to be contended before us. Therefore, such submission has no substance, in our opinion, for the reason that the difference continues and is recognised under the said provision of the Repeal Act. So far as the power of the Committee of Secretaries constituted in terms of section 6(ii) of the Repeal Act is concerned, it is to prepare a scheme of absorption as well as of retirement, compulsory retirement or voluntary retirement and other service conditions of officers and employees of the Board. In our opinion, the scheme which was prepared by the Committee of Secretaries is only in the nature

of recommendation and the State has the power either to accept, modify or amend the same before granting its official approval. Therefore, after the sanction is granted by the Government in respect of the said scheme, it would gain the status of statutory scheme framed under the said Act and would be enforced within the time to be indicated in section 6(iii) of the Repeal Act, 2006.

21. Therefore, in the light of the said provision, we do not find that the Committee of Secretaries can be faulted in treating the daily wage employees on a different footing and deciding for removal of their services.

22. We have consciously noted the aforesaid decisions of this Court. The principle as has been laid down in *Umadevi* (supra) has also been applied in relation to the persons who were working on daily wages. According to us, the daily wagers are not appointees in the strict sense of the term 'appointment'. They do not hold a post. The scheme of alternative appointment framed for regular employees of abolished organisation cannot, therefore, confer a similar entitlement on the daily wagers of abolished organisation to such alternative employment. [See *Avas Vikas Sansthan v. Avas Vikas Sansthan Engineers Association* (2006 (4) SCC 132)]. Their relevance in the context of appointment arose by reason of the concept of regularisation as a source of appointment. After *Umadevi* (supra), their position continued to be that of daily wagers. Appointment on daily wage basis is not an appointment to a post according to the rules. Usually, the projects in which the daily wagers were engaged, having come to an end, their appointment is necessarily terminated for want of work. Therefore, the status and rights of daily wagers of a Government concern are not equivalent to that of a Government servant and his claim to permanency has to be adjudged differently.

23. In these circumstances, in our considered opinion, the regularisation/absorption is not a matter of course. It would depend upon the facts of the case fo[illegible]d

regulations and cannot be de hors the rules for such regularisation/absorption.

24. Accordingly, we do not find any substance with regard to the arguments advanced before us on behalf of the appellants. We do not find any merit in the appeals. Accordingly, we uphold the decision of the High Court and affirm the same, dismissing these appeals.

D.G. Appeals dismissed.

RAJKUMAR

v.

STATE OF M.P.

(Criminal Appeal Nos. 1419-1420 of 2013)

FEBRUARY 25, 2014

[DR. B.S. CHAUHAN AND M.Y. EQBAL, JJ.]

PENAL CODE, 1860: ss.302, 376, 450 - Rape and murder of 14 years old girl - Accused-appellant on visiting terms with the family of the victim-deceased, was asked to sleep in their house on the fateful night by the parents of the deceased as they had to irrigate fields at night and the children would be alone - Appellant committed rape on the deceased and then caused grievous injuries resulting in her death - Conviction and death sentence by courts below -Held: Courts below rightly drew adverse inference against appellant - He did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court - He also did not deny his presence in the house on that night - When the children were left in the custody of the appellant, he was bound to explain as to under what circumstances girl died - Incident witnessed by brother of the deceased - Also, no case of false implication was made out - In view of the concurrent findings of fact recorded by courts below, particularly in respect of the DNA report to the extent that the semen of appellant was found in the vagina swab of the deceased and that she died of asphyxia caused by strangulation, the findings of fact recorded by the courts below affirmed - Order of conviction not interfered with.

WITNESS: Child witness - Evidentiary value of - Held: Every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of

his mental or physical condition - The evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him - In the instant case, the eye-witness, was a child aged 10 years at the time of incident - Courts below found him worth reliance as he understood the questions put to him and he was able to answer the same - No cogent reason to take a view contrary to the same.

SENTENCE/SENTENCING: Death sentence - Held: The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability - Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception - The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime - In the instant case, appellant had committed a heinous crime and raped an innocent, helpless and defenceless minor girl who was in his custody - He is liable to be punished severely but it is not a case which falls within the category of 'rarest of rare' cases - Hence, the death sentence is set aside and life imprisonment is awarded - The appellant to serve a minimum of 35 years in jail without remission, before consideration of his case for pre-mature release.

The prosecution case was that on the fateful night, the appellant aged 32 years was asked by the father of the victim-deceased to stay at his house with his four children as he and his wife had to irrigate the land at night. The appellant was on visiting terms with the family and the children used to call him mama. On that night, the appellant consumed liquor and asked the deceased aged 14 years to sleep else where and the appellant slept with

her other siblings. Around midnight, he committed rape on the deceased and then killed her by causing some grievous injuries. The incident was witnessed by PW-2, the brother of the deceased but out of fear he could not raise his voice. He narrated the incident to his parents in the morning when they came back home. The case was registered against the appellant under Sections 302, 376 and 450, IPC. The trial court convicted the appellant under the said offences and awarded death sentence. The High Court affirmed the conviction and the death sentence. Hence the appeal.

Disposing of the appeal, the Court

HELD: 1. In view of the concurrent findings of fact recorded by the courts below, particularly in respect of the DNA report to the extent that the semen of the appellant was found in the vagina swab of the prosecutrix and that she died of asphyxia caused by strangulation, the findings of fact recorded by the courts below are affirmed. PW.2, who is an eye-witness, was a child as he was 10 years of age at the time of incident. The courts below have found him worth reliance as he has understood the questions put to him and he was able to answer the same. It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection b[illegible]s

susceptible to be swayed by what others tell him. The trial court must ascertain as to whether a child is able to discern between right or wrong and it may be ascertained only by putting the questions to him. As the courts below have found the child witness worth reliance, there was no cogent reason to take a view contrary to the same. [paras 6 to 8, 10] [224-C-H; 225-A and F]

State of Madhya Pradesh v. Ramesh & Anr., **(2011) 4 SCC 786: 2011 (5) SCR 1;** *Suryanarayana v. State of Karnataka,* **AIR 2001 SC 482: 2012 (3) SCR 630 - relied on.**

2. Admittedly, the appellant did not take any defence while making his statement under Section 313 Cr.P.C., rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, appellant could not reveal as for what reasons the police was by any means inimical to him. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances prosecutrix died. [Para 11 to 13] [225-F-H; 226-A-E]

Ramnaresh & Ors. v. State of Chhattisgarh, **AIR 2012 SC 1357: 2012 (9) SCR 193;** *Munish Mubar v. State of Haryana,* **AIR 2013 SC 912;** *Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan* **AIR 2013 SC 3150 - relied on.**

3. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand. Thus, in spite of the fact that the appellant had committed a heinous crime and raped an innocent, helpless and defenceless minor girl who was in his custody and he is liable to be punished severely but it is not a case which falls within a category of rarest of rare cases. Therefore, the death sentence is set aside and life imprisonment is awarded. The appellant must serve a minimum of 35 years in jail without remission, before consideration of his case for pre-mature release. However, it would be subject to clemency power of the Executive. [para 19, 21] [229-E-H; 230-A-B and D-E]

Prithipal Singh & Ors. v. State of Punjab & Anr., **(2012) 1 SCC 10: 2012 (14) SCR 862;** *State of W.B. v. Mir Mohammad Omar,* **AIR 2000 SC 2988: 2000 (2) Suppl. SCR 712;** *Neel Kumar alias Anil Kumar v. State of Haryana,* **(2012) 5 SCC : 2012 (5) SCR 696; 766;** *Gian Chand & Ors. v. State of Haryana,* **AIR 2013 SC 3395;** *Prajeet Kumar Singh v. State of Bihar* **(2008) 4 SCC 434: 2008 (5) SCR 969;** *Kamta Tiwari v. State of M.P.,* **AIR 1996 SC 2800;** *Dhananjoy Chatterjee @ Dhana v. State of W.B.,* **(1994) 2 SCC 220;** *Bantu @ Naresh Giri v. State of M.P.,* **AIR 2002 SC 70;** *Mohinder Singh v. State of Punjab,* **AIR 2013 SC 3622;** *Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka* **AIR 2008 SC 3040: 2008 (11) SCR 93 - relied on.**

Case Law Reference:

2011 (5) SCR 1	**Relied on**	**Para 9**
2012 (3) SCR 630	**Relied on**	**Para 9**
2012 (9) SCR 193	**Relied on**	**Para 12**
AIR 2013 SC 912	**Relied on**	**Para 12**
AIR 2013 SC 3150	**Relied on**	**Para 12**
2012 (14) SCR 862	**Relied on**	**Para 14**
2000 (2) Suppl. SCR 712	**Relied on**	**Para 14**
2012 (5) SCR 696	**Relied on**	**Para 14**
AIR 2013 SC 3395	**Relied on**	**Para 14**
2008 (5) SCR 969	**Relied on**	**Para 15**
1996 (5) Suppl. SCR 507	**Relied on**	**Para 16**
1994 (1) SCR 37	**Relied on**	**Para 16**
2001 (4) Suppl. SCR 298	**Relied on**	**Para 17**
AIR 2013 SC 3622	**Relied on**	**Para 18**
2008 (11) SCR 93	**Relied on**	**Para 20**

[Note: In the instant case, investigation and all judicial proceedings upto this Court stood concluded in less than 8 months from the date of incident. The court appreciated that it is an exemplar of expeditious justice in country of chronic delay by smooth functioning of investigating agency, courts and the members of legal fraternity and such prompt disposal of cases is expected specifically in cases of such grave nature.]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1419-1420 of 2013.

From the Judgment and Order dated 27.06.2013 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in Criminal Reference No. 1 of 2013.

A. Sumathi for the Appellant.

Mishra Saurabh, Vanshaja Shukla, Ankit Lal for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 27.6.2013 passed in Criminal Reference No. 01 of 2013 and Criminal Appeal No. 397 of 2013 passed by the High Court of Madhya Pradesh at Jabalpur affirming the conviction of the appellant under Sections 376 and 450 of the Indian Penal Code, 1860 (hereinafter referred to as the `IPC') as well as confirming the death sentence awarded for the offence under Section 302 IPC by the trial court vide judgment and order dated 5.2.2013 passed in Sessions Trial No. 20 of 2013.

2. Facts and circumstances giving rise to these appeals as per the prosecution are that:

A. On 26.12.2012, the appellant, aged 32 years, came to the house of his neighbour Iknis Jojo (PW.1) and stayed with his four children as Iknis Jojo (PW.1) and his wife Albisiya had gone to irrigate agricultural fields in the night. The appellant was on visiting terms with the family and the children used to call him "Mama" i.e. maternal uncle. On the said night, he had taken liquor and meals in the complainant's house and when retiring for the night, the appellant asked the prosecutrix Gounjhi, aged 14 years not to sleep with her three siblings i.e. Sushma, Sanchit and Aric, rather to sleep at some distance from them. Around midnight, he raped prosecutrix Gounjhi. While committing rape, he caused some grievous injuries and consequently she died. The incident was witnessed by Sanchit (PW.2), brother of the prosecutrix, however, out of fear, he could not raise any hue and cry. After committing the crime, the appellant left the place of occurrence. In the morning, Iknis Jojo (PW.1) alongwith his wife Albisiya came from their fields and found the children sleeping. They woke them up and also tried to wake the prosecutrix when they realised that she was dead. Sanchit (PW.2) narrated the incident that had occurred in the night.

B. Iknis Jojo (PW.1) immediately went to the police station and lodged the complaint, on the basis of which Crime No. 294 of 2012 was registered for the offence under Sections 302 and 450 IPC. Shri K.S. Thakur, Inspector of Police, Police Station: Nainpur, District Mandla, Madhya Pradesh started the investigation. He came to the spot, recovered the dead body, prepared the Panchnama, also recovered the blackish brown colour purse and clothes lying near the place of occurrence. Some coins and a small packet of tobacoo were also recovered. Some hair were found lying near the dead body of the prosecutrix and one sky blue coloured shawl was also recovered from the place of occurrence which had blood stains and some other kind of stains at various places. The earth of that place having some fluid material thereon was also recovered. The investigating officer prepared the site plan in

presence of the witnesses and dead body of the prosecutrix was sent for postmortem and the appellant was arrested.

C. Dr. Surendra Barkare (PW.6) alongwith lady Dr. (Smt.) Prahba Pipre (PW.7) conducted the postmortem of the prosecutrix and submitted the report. As per the postmortem report, rape had been committed upon the deceased and, thus, Sections 376 and 511 IPC were also added in the case.

D. After taking permission from the Judicial Magistrate, the specimen blood of the appellant was obtained to conduct his DNA finger printing which was sent for analysis to State Forensic Science Laboratory, Sagar. All the materials sent for chemical analysis were analysed and the report was submitted and on the basis of which the chargesheet was filed and the appellant was put to trial. Appellant denied his involvement in the offence, thus trial commenced.

E. Dr. Surendra Barkare (PW.6) deposed and proved the postmortem report and deposed that the prosecutrix died of asphyxia as a result of strangulation and her death was homicidal in nature.

F. Iknis Jojo (PW.1), father of the deceased, deposed while giving the version as mentioned in the FIR and admitted that the appellant used to come to his house occasionally and he was referred to by his children as "Mama" and sometimes he used to stay in the house though his house was only half a kilometer away from his house and he was already married having a child.

G. Sanchit (PW.2), a 10 years old boy, supported the case of the prosecution and deposed that his "Mama" had come to their house. He consumed liquor and was served rice and water by the deceased. Appellant asked the prosecutrix to sleep at some distance from her siblings. The appellant slept with other three children and it was about 11-12 in the night that he heard the shrieks of his sister and saw that the

her neck and he got so much scared that he could not even raise the voice. All this was disclosed by PW.2 to his parents in the morning on their returning from the fields.

H. Dr. (Smt.) Prabha Pipre (PW.7) deposed about the conduct of the postmortem of the body of the deceased alongwith Dr. Surendra Barkare (PW.6). They further deposed that hymen of the deceased was torn and blood was oozing out from her private parts. Some blood was present in the cavity of the private part and some blood was also present in the cavity of her uterus. Her vagina accommodated one finger and it accommodated two fingers with difficulty. On the basis of the above, she had opined that deceased had been subjected to rape before murder.

I. The deceased was 14 years of age and a student in sixth standard which was proved from the school register and the statement of her father Iknis Jojo (PW.1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age.

J. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the appellant.

K. The trial court after considering the entire evidence on record, recorded the following findings of fact:

(i) The evidence of Sanchit Jojo (PW.2), a child witness was worth placing reliance and it duly supported the case of the prosecution;

(ii) His deposition corroborates medical evidence;

(iii) The hymen of the deceased was found torn;

(iv) Semen of the appellant was found on the slide prepared from the vaginal swab of the prosecutrix as proved by the DNA report;

(v) The shawl of the deceased was also found having semen stains which were of the appellant;

(vi) The hair found near the body of the prosecutrix were found to be of the appellant as per the DNA report;

(vii) The appellant did not take any defence in his statement under Section 313 Cr.P.C. except that he had been falsely implicated by the family of the deceased at the instance of the police and that the appellant did not lead any evidence in his defence.

L. Considering all the aforementioned circumstances and evidence of the relationship with the family of the deceased, the trial court treated it to be a case of extreme culpability and a rarest of rare case awarding death sentence under Section 302 IPC with a fine of Rs. 3,000/-. Under Section 376 IPC, the appellant was awarded rigorous life imprisonment and a fine of Rs.3,000/-; in default of making payment on both counts, sentence of one year on each count was also awarded. For the offence punishable under Section 450 IPC, the appellant was awarded 10 years rigorous imprisonment with a fine of Rs.3,000/- and in default, a rigorous imprisonment for one year. However, it was directed that all the sentences would run concurrently.

M. The trial court made a reference to the High Court for affirming the death sentence. The appellant, being aggrieved, also preferred an appeal against his conviction and sentence before the High Court. The appeal and the reference were heard together.

N. The High Court recorded the same findings after re-appreciation of evidence and came to the conclusion that

prosecutrix was 14 years of age at the time of incident. The appellant was admittedly present in the house but he furnished no explanation whatsoever about the injuries received by the deceased. As the appellant has committed rape upon an innocent and helpless child and then killed her brutally, it has shocked not only the judicial conscience but even the conscience of society as well. The High Court also recorded the finding that the offence had been committed in pre-mediated manner. The death sentence was affirmed and the appeal was dismissed.

Hence, these appeals.

3. Ms. A. Sumathi, learned counsel appearing on behalf of the appellant, has submitted that the appellant had falsely been implicated by the family members of the deceased at the instance of the police. There is no eye-witness in the case. Sanchit Jojo (PW.2), brother of the prosecutrix, is a child witness and cannot be relied upon simply for the reason that after seeing the incident and knowing well that his sister had been killed, he did not raise any alarm even after the accused had left the spot. Even in the morning, he did not tell his parents when they came back from the agricultural fields as what had happened. Therefore, the courts below have committed a grave error while placing reliance upon the deposition of the child witness. It is a clear cut case of circumstantial evidence for which the prosecution could not furnish explanation on various counts and it cannot be held that appellant had committed rape upon prosecutrix and, subsequently, killed her. The facts and circumstances of the case did not warrant death sentence as awarded by the courts below, and hence, the appeals deserve to be allowed.

4. Per contra, Ms. Vanshaja Shukla, learned counsel appearing on behalf of the State, has vehemently opposed the appeals contending that the appellant had a pre-meditated intention to commit the offence and that is why he asked the prosecutrix to sleep separately. The chemical analysis report

as well as the DNA report make it crystal clear that no other person except the appellant had committed the offence and the manner in which the offence had been committed and the gravity of the offence warrant nothing less than the death sentence and, thus, the appeals lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

6. We have been taken through the impugned judgments rendered by the High Court as well as the trial court and the evidence on record. In view of the concurrent findings of fact recorded by the courts below, particularly in respect of the DNA report to the extent that the semen of the appellant was found in the vagina swab of the prosecutrix and that she died of asphyxia caused by strangulation, we affirm the findings of fact recorded by the courts below.

7. Sanchit Jojo (PW.2), who is an eye-witness, was a child as he was 10 years of age at the time of incident. The courts below have found him worth reliance as he has understood the questions put to him and he was able to answer the same. The issue regarding the admissibility of evidence of a child witness is no more res intergra.

8. It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be s[illegible]s

tell him. The trial court must ascertain as to whether a child is able to discern between right or wrong and it may be ascertained only by putting the questions to him.

9. This Court in *State of Madhya Pradesh v. Ramesh & Anr.,* (2011) 4 SCC 786, after considering a large number of its judgments came to the conclusion as under:

> "In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

(See also: *Suryanarayana v. State of Karnataka,* AIR 2001 SC 482).

10. In view of the above, as the courts below have found the child witness worth reliance, we do not see any cogent reason to take a view contrary to the same.

11. Admittedly, the appellant did not take any defence while making his statement under Section 313 Cr.P.C., rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, appellant could not reveal as for what reasons the police was by any means inimical to him.

12. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any

incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide: *Ramnaresh & Ors. v. State of Chhattisgarh,* AIR 2012 SC 1357; *Munish Mubar v. State of Haryana,* AIR 2013 SC 912; and *Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan,* AIR 2013 SC 3150).

In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him.

13. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.

14. In *Prithipal Singh & Ors. v. State of Punjab & Anr.,* (2012) 1 SCC 10, this Court relying on its earlier judgment in *State of W.B. v. Mir Mohammad Omar,* AIR 2000 SC 2988, held as under:

> *"….. if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain* e

accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

(See also: *Neel Kumar alias Anil Kumar v. State of Haryana,* (2012) 5 SCC 766; and *Gian Chand & Ors. v. State of Haryana,* AIR 2013 SC 3395).

15. This Court in *Prajeet Kumar Singh v. State of Bihar,* (2008) 4 SCC 434 had confirmed the death sentence awarded by the High Court observing that accused had been living as a family member of the victim and had been provided with shelter and meals, despite which he committed ghastly and brutal murder of three defenceless children without any provocation.

16. In a similarly situated case in *Kamta Tiwari v. State of M.P.,* AIR 1996 SC 2800, this Court found that the accused was close to the family of the deceased. The deceased and her siblings used to call the accused uncle and her closeness with the appellant encouraged her to trust him and when the accused had committed the rape and gruesome murder causing numerous injuries on her body, this Court found it to be a fit case for awarding death sentence. The Court observed as under:

"When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also

to give emphatic expression to society's abhorrence of such crimes."

(See also: *Dhananjoy Chatterjee @ Dhana v. State of W.B.,* (1994) 2 SCC 220)

17. However, in *Bantu @ Naresh Giri v. State of M.P.,* AIR 2002 SC 70, while dealing with the case of rape and murder of a six years old girl, this Court found that the case was not one of the 'rarest of rare case'. The Court noticed that, accused was less than 22 years at the time of commission of the offence, there were no injuries on the body of the deceased and the death probably occurred as a result of gagging of the nostril by the accused. Thus, the Court while noticing that the crime was heinous, commuted the sentence of death to one of life imprisonment.

18. In *Mohinder Singh v. State of Punjab,* AIR 2013 SC 3622, this Court dealt with the case of death sentence observing:

"In this context, we are only reminded of the Tamil proverb " " which means in English "when the fence eats the crops". When the father himself happens to be the assailant in the commission of such beastly crime, one can visualise the pathetic situation in which the girl would have been placed and that too when such a shameless act was committed in the presence of her own mother. When the daughter and the mother were able to get their grievances redressed by getting the appellant convicted for the said offence of rape one would have in the normal course expected the appellant to have displayed a conduct of remorse. Unfortunately, the subsequent conduct of the appellant when he was on parole disclosed that he approached the victims in a far more vengeful manner by assaulting the hapless victims which resulted in filing of an FIR once in the year 2005 and subsequently when he was

2006. The monstrous mindset of the appellant appears to have not subsided by mere assault on the victims who ultimately displayed his extreme inhuman behaviour by eliminating his daughter and wife in such a gruesome manner in which he committed the murder by inflicting the injuries on the vital parts of the body of the deceased and that too with all vengeance at his command in order to ensure that they met with instantaneous death. The nature of injuries as described in the post-mortem report speaks for itself as to the vengeance with which the appellant attacked the hapless victims. He was not even prepared to spare his younger daughter viz. PW 2 who, however, escaped the wrath of the appellant by bolting herself inside a room after she witnessed the grotesque manner in which the appellant took away the life of his wife and daughter."

However, the Court concluded that applying various principles culled out from earlier judgments of this Court, the case did not fall within the category of "rarest of rare case", though it called for a stringent punishment.

19. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised.

Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

20. A three-Judge Bench of this Court in *Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka,* AIR 2008 SC 3040, wherein considering the facts of the case, the Court set aside the sentence of death penalty and awarded life imprisonment, but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.

21. Thus, taking into consideration the aforesaid judgments, we are of the view that in spite of the fact that the appellant had committed a heinous crime and raped an innocent, helpless and defenceless minor girl who was in his custody, he is liable to be punished severely but it is not a case which falls within a category of rarest of rare cases. Hence, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 35 years in jail without remission, before consideration of his case for pre-mature release. However, it would be subject to clemency power of the Executive.

The appeals stand disposed of.

Before we part, we would like to note with appreciation that in the instant case investigation and all judicial proceedings upto this Court stood concluded in less than 8 months from the date of incidence. Thus, it is an exemplar of expeditious justice in country of chronic delay by smooth functioning of investigating agency, courts and the members of legal fraternity. We expect such prompt disposal of cases specifically in cases of such grave nature.

D.G. Appeals disposed of.

PAL SINGH & ANR.
v.
STATE OF PUNJAB
(Special Leave Petition (Crl.) No. 191 of 2014)

FEBRUARY 25, 2014

[DR. B.S. CHAUHAN AND A.K. SIKRI, JJ.]

Penal Code, 1860: s.302 - Charge sheet filed against five accused including the petitioners u/ss.148, 302/149, 120B - Trial court convicted all accused under the charged offences - During pendency of appeal before High Court, one accused died - High Court acquitted two accused while upheld conviction of petitioners u/s.302- Plea of petitioners that conviction u/s.302 simpliciter for which no charge was ever framed was not proper - Held: Initially, the charges were framed by trial court u/s.302 r/w s.34 and s.120-B against all the accused persons - Fresh charges were subsequently framed u/ss.148, 302, 302/149 and 120-B - Therefore, the ultimate situation remained that there was charge u/ss.302, 302/149 and 120-B - It was also on record that these two petitioners had iron rods while the other three accused were empty handed - Evidence on record was that petitioner no.1 raised an exhortation that deceased be caught hold and should not escape alive and gave two iron rod blows on his head - Petitioner no.2 gave two iron rod blows on the person of deceased out of which one hit his forehead - Version of prosecution and injuries found on the person of deceased stood proved by evidence of PWs as well as by deposition of the doctor - Conviction u/s.302 simpliciter is permissible if the court finds that injuries caused by accused were sufficient in the ordinary course of nature to cause death - Applying this test, both the petitioners can be convicted u/s.302 simpliciter as both of them could be convicted u/ss.302/34 since both came fully armed with iron rods and gave two blows each on

the vital part of the body i.e. head and forehead which proved fatal for the deceased - No interference called for.

Nanak Chand v. State of Punjab **AIR 1955 SC 274: 1955 SCR 1201;** *Suraj Pal v. State of Uttar Pradesh* **AIR 1955 SC 419 1955 SCR 1332;** *Willie (William) Slaney v. State of Madhya Pradesh* **AIR 1956 SC 116: 1955 SCR 1140;** *Dhari & Ors. v. State of Uttar Pradesh* **AIR 2013 SC 308: 2012 (8) SCR 1219;** *Amar Singh v. State of Punjab* **AIR 1987 SC 826;** *Nagamalleswara Rao (K) v. State of A.P.* **AIR 1991 SC 1075:1991 (1) SCR 87;** *Nethala Pothuraju v. State of A.P.* **AIR 1991 SC 2214: 1991 (1) Suppl. SCR 4;** *Mohd. Ankoos v. Pubic Prosecutor* **AIR 2010 SC 566: 2009 (15) SCR 616 ;** *Jivan Lal v. State of M.P.* **(1997) 9 SCC 119: 1996 (9) Suppl. SCR 537 ;** *Hamlet v. State of Kerala* **AIR 2003 SC 3682;** *Fakhruddin v. State of M.P.* **AIR 1967 SC 1326;** *Gurpreet Singh v. State of Punjab* **AIR 2006 SC 191: 2005 (5) Suppl. SCR 90;** *S. Ganesan v. Rama Raghuraman & Ors.* **AIR 2013 SC 840: 2012 (7) SCR 541;** *Sanichar Sahni v. State of Bihar* **AIR 2010 SC 3786: 2009 (10) SCR 112;** *Darbara Singh v. State of Punjab* **AIR 2013 SC 840: 2012 (7) SCR 541 ;** *Dhaneswar Mahakud & Ors. v. State of Orissa* **AIR 2006 SC 1727: 2006 (3) SCR 849 - relied on.**

Case Law Reference:

1955 SCR 1201	**relied on**	**Para 8**
1955 SCR 1332	**relied on**	**Para 9**
1955 SCR 1140	**relied on**	**Para 10**
2012 (8) SCR 1219	**relied on**	**Para 11**
AIR 1987 SC 826	**relied on**	**Para 11**
1991 (1) SCR 87	**relied on**	**Para 11**
1991 (1) Suppl. SCR 4	**relied on**	**Para 11**
2009 (15) SCR 616	**relied**	

1996 (9) Suppl. SCR 537	**relied on**	**Para 11**
AIR 2003 SC 3682	**relied on**	**Para 11**
AIR 1967 SC 1326	**relied on**	**Para 11**
2005 (5) Suppl. SCR 90	**relied on**	**Para 11**
212 (7) SCR 541	**relied on**	**Para 11**
2009 (10) SCR 112	**relied on**	**Para 12**
2012 (7) SCR 541	**relied on**	**Para 13**
2006 (3) SCR 849	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 191 of 2014.

From the Judgment and Order dated 04.07.2013 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 14 of 2005.

Pramod Swarup, Pareena Swarup, Syed Tabinda, Sushma Verma, Akshay Verma, Pankaj Kumar Singh, Satpal Singh for the petitioners.

The Order of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This special leave petition has been filed against the judgment and order dated 4.7.2013 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. D-14-DB of 2005, maintaining the conviction and sentence of life imprisonment of the petitioners under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC').

2. Facts and circumstances giving rise to this petition are that:

A. As per the case of the prosecution, an FIR No. 69 dated 14.4.2002 was lodged at 1.00 a.m. alleging that five accused

persons including the present two petitioners committed the murder of Sarabjit Singh @ Kala. Thus, on the basis of the complaint the case was registered under Sections 148, 302/149 IPC in P.S. Sadar, Phagwara, District Kapurthala.

B. In view thereof, the investigation ensued and after completion of the investigation, a charge sheet was filed against the five accused persons including the present two petitioners under Sections 148, 302/149 and 120-B IPC. The trial was concluded and the learned Sessions Court convicted all the five accused persons including these two petitioners vide judgment and order dated 16.11.2004 for the aforesaid offences and awarded different sentences including life imprisonment under Section 302 IPC.

C. Aggrieved, all the five accused persons preferred Criminal Appeals before the High Court. Accused Pal Singh @ Amarjit Singh, appellant in Criminal Appeal No. D-14-DB of 2005 died during the pendency of the appeals. Thus, his appeal stood abated. Accused Sarabjit Singh and Gurdev Singh @ Manga had been acquitted of the charges under Sections 148 and 302 r/w 149 IPC and the appeal of the present petitioners had been dismissed, and therefore their conviction under Section 302 IPC and the sentences awarded by the trial court remained intact.

Hence, this petition.

3. Shri Pramod Swarup, learned senior counsel appearing for the petitioners has vehemently submitted that as one of the accused has died and two have been acquitted by the trial court, the present petitioners had been convicted under Section 302 IPC simpliciter for which no charge had ever been framed. Therefore, the conviction of the petitioners deserves to be set aside. He has also taken us through the judgments of the trial court as well as of the High Court and the relevant evidence to show that none of the petitioners could be held exclusively responsible for the murder of Sarabjit Si[illegible]e

petition deserves to be allowed.

4. Both the courts below had considered the evidence on record and the relevant issue for us remains to consider the consequences of not framing the charge properly and none else.

Initially, the charges had been framed by the trial court under Sections 302 r/w 34 IPC and Section 120-B IPC against all the accused persons. Fresh charges were subsequently framed under Sections 148, 302, 302/149 and 120-B IPC. Therefore, the ultimate situation remained that there was charge under Sections 302, 302/149 and 120-B IPC. The trial court has convicted the present two petitioners and sentenced them to undergo imprisonment for life and to pay a fine of Rs. 2,000/- each. In default of payment of fine to undergo further RI for one month each for the offence punishable under Section 302 IPC. These petitioners also stood convicted and sentenced to undergo RI for a period of two years each and fine of Rs.1000/- each and in default of payment of fine, to undergo further RI for a period of one month each for the offence punishable under Section 148 IPC. However, they have been acquitted of the charge under Section 120-B IPC. The High Court has affirmed the conviction and sentence of the present petitioners under Section 302 IPC, but set aside the conviction under Section 148 IPC. The ultimate result remains that the present two petitioners had been convicted under Section 302 IPC.

5. Whether it is legally permissible in the facts and circumstances of the case to convict these two petitioners under Section 302 IPC simpliciter without altering the charges by the High Court? In order to decide the limited issue it may be necessary for us to go into some detail to the factual matrix of the case.

6. The post-mortem report revealed the following injuries on the person of the deceased:

1) Diffuse swelling 4 cm x 5 cm on the left temporo parietal region. Clotted blood was present in both the nostrils. Underlying skull bones were fractured, laceration of the brain matter was present. Cranial cavity was full of blood.

2) Diffuse swelling 6 cm x 6 cm on the top of head. Skull bones were fractured. Laceration of brain matter was present. Cranial cavity was full of blood.

3) Diffuse swelling 6 cm x 5 cm on the right side of the fore-head. Underlying skull bones were fractured. The cranial cavity was full of blood.

4) Right eye was black. Underlying bone was normal.

7. It is also on record that these two petitioners were having the iron rods while the other three accused named in the FIR were empty handed. The evidence on record had been that Pal Singh, petitioner no.1 raised an exhortation that Sarabjit Singh @ Kala be caught hold and should not escape alive and gave two iron rod blows on his head. Manjinder Singh, petitioner no.2 gave two iron rod blows on the person of Sarabjit Singh, out of which one hit his forehead and other his right cheek. On hearing hue and cry, a large number of people gathered on the place of occurrence and all the five accused persons ran away. Version of the prosecution and the injuries found on the person of the deceased stood proved by the evidence of Gurdev Singh (PW.6) and Amandeep Singh (PW.11) as well as by the deposition of Dr. Daljit Singh Bains (PW.1), Senior Medical Officer, Civil Hospital, Phagwara. The ocular evidence of the eye-witnesses corroborates with the medical evidence. As there are concurrent findings in this regard we have not been invited to determine the said issue.

8. Shri Pramod Swarup, learned senior counsel has placed a heavy reliance on the judgment of this Court in *Nanak Chand v. State of Punjab,* AIR 1955 S

been held that Section 149 IPC creates a specific offence but Section 34 IPC does not, and they both are separate and distinguishable. Section 149 IPC creates an offence punishable, but it depends on the offence of which the offender is by that section made guilty. Therefore, for the appropriate punishment section must be read with it. Section 34 does not, however, create any specific offence and there is a clear distinction between the provisions of Sections 34 and 149 IPC and the said two sections are not to be confused. The principal element in Section 34 IPC is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In that situation, Section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone.

9. In *Suraj Pal v. State of Uttar Pradesh,* AIR 1955 SC 419, this Court examined a case where the charge had been framed against the accused under Sections 147, 307/149 and 302/149 IPC, and there had been no direct and individual charge against any of the accused for specific offence under Sections 307 and 302 IPC, though the accused had been convicted under Sections 307 and 302 IPC. The court had set aside their conviction as no specific charge had been framed against any of the accused for which they had been convicted.

10. As there were doubts about the conflict/correctness of these two judgments, the matter was decided by a Constitution Bench in *Willie (William) Slaney v. State of Madhya Pradesh,* AIR 1956 SC 116, and the court came to the following conclusions:

> *"Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the*

> *direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.*
>
> *In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence; without a charge can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.*
>
> *xx xx xx*
>
> *This judgment should not be understood by the subordinate courts as sanctioning a deliberate disobedience to the mandatory requirements of the Code, or as giving any license to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted.*
>
> *In the main, the provisions of section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged."*

11. In *Dhari & Ors. v. State of Uttar Pradesh,* AIR 2013 SC 308, this Court re-considered the issue whether the appellants therein could be convicted under Sections 302 r/w 149 IPC, in the event that the High Court had convicted three persons among the accused and the n s

thus remained less than 5 which is in fact necessary to form an unlawful assembly as described under Section 141 IPC. This Court considered the earlier judgments in *Amar Singh v. State of Punjab,* AIR 1987 SC 826; *Nagamalleswara Rao (K) v. State of A.P.,* AIR 1991 SC 1075, *Nethala Pothuraju v. State of A.P.,* AIR 1991 SC 2214; and *Mohd. Ankoos v. Pubic Prosecutor,* AIR 2010 SC 566, and came to the conclusion that in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty person with the aid of Section 34 IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. (See also: *Jivan Lal v. State of M.P.,*(1997) 9 SCC 119; *Hamlet v. State of Kerala,* AIR 2003 SC 3682; *Fakhruddin v. State of M.P.,* AIR 1967 SC 1326; *Gurpreet Singh v. State of Punjab,* AIR 2006 SC 191; and *S. Ganesan v. Rama Raghuraman & Ors.,* AIR 2013 SC 840).

12. In *Sanichar Sahni v. State of Bihar,* AIR 2010 SC 3786, this Court considered the issue and held:

> *"Therefore, … unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."*

13. In *Darbara Singh v. State of Punjab,* AIR 2013 SC 840, this Court considered the similar issue and came to the conclusion that the accused has to satisfy the court that if there is any defect in framing the charge it has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality the court may interfere. The Court elaborated the law as under:

> *"The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465*

> *CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).*
>
> *"Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal ju*

accused can seek benefit under the orders of the court. (Vide: Rafiq Ahmed @ Rafi v. State of U.P., AIR 2011 SC 3114; Rattiram v. State of M.P., AIR 2012 SC 1485; and Bhimanna v. State of Karnataka, AIR 2012 SC 3026)".

14. In view of the above, we do not find any force in the submissions advanced on behalf of the petitioners on this count.

15. Shri Pramod Swarup has also placed reliance on the judgment of this Court in *Dhaneswar Mahakud & Ors. v. State of Orissa,* AIR 2006 SC 1727, wherein though the charge had been framed, this Court held that even if the accused has not been charged with the aid of Section 34 IPC and instead charged with the aid of Section 149 IPC, he can be convicted with the aid of Section 34 IPC when evidence shows that there was common intention to commit the crime and no prejudice or injustice has been caused to the accused therein. Even the conviction of the accused under Section 302 IPC simpliciter is permissible if the court reaches the conclusion on the basis of material placed before it that injuries caused by the accused were sufficient in the ordinary course of nature to cause death and nature of the injuries was homicidal.

16. If the test laid down in this case is applied to the facts of the instant case both the petitioners can be convicted under Section 302 IPC simpliciter as both of them could be convicted under Section 302/34 IPC as both of them came fully armed with iron rods and both of them gave two blows each on the vital part of the body i.e. head and forehead which proved fatal for the deceased. More so, no question had been put to Dr. Daljit Singh Bains (PW.1) as to whether the injuries caused by each of the petitioners was sufficient to cause death independently. It is not a fit case where this court should examine the issue any further or grant any indulgence. The special leave petition is dismissed accordingly.

D.G. SLP dismissed.

JUSTICE RIPUSUDAN DAYAL (RETD.) & ORS.
v.
STATE OF M.P. & ORS.
(Writ Petition (Civil) No. 613 of 2007)

FEBRUARY 25, 2014.

[P. SATHASIVAM, CJI. RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

MADHYA PRADESH LOKAYUKT EVAM UPLOKAYUKT ADHINIYAM, 1981:

s.2(g) of 1981 Act r/w s.2(c) of Prevention of Corruption Act - 'Public servant' - Complaint to Lokayukt regarding irregularities in certain construction works - Case registered by SPE, Lokayukt Administration against Secretary, Vidhan Sabha, Deputy Secretary, Vidhan Sabha and other officers - - Notice by Secretary Vidhan Sabha alleging breach of privilege of Vidhan Sabha - Held: Inquiry or investigation into an allegation of corruption against some officers of the Legislative Assembly cannot be said to be interfering with the legislative functions of the Assembly - Officers working under the office of the Speaker are also public servants within the meaning of s.2(g) of the Lokayukt Act and s. 2 (c) of Prevention of Corruption Act and, therefore, the Lokayukt and his officers are entitled and duty bound to make inquiry and investigation into the allegations made in any complaint filed before them - Lokayukt organization has not made any inquiry against the Members of the Legislative Assembly or the Speaker or about their conduct -- Assembly does not enjoy any privilege of a nature that may have the effect of restraining any inquiry or investigation against Secretary or Deputy Secretary of Legislative Assembly.

CONSTITUTION OF INDIA, 1950:

Art. 32 r/w Art. 142 - On a complaint alleging irregularities in certain construction works, after inquiry, case registered by SPE, Lokayukt Organisation against Secretary and Deputy Secretary, Vidhan Sabha and other officers - Notice by Secretary Vidhan Sabha to Lokayukt alleging breach of privilege of Vidhan Sabha - Writ petition by Lokayukt - Held: Maintainable --For the application of provisions of Lokayukt Act, and Prevention of Corruption Act, jurisdiction of Lokayukt or the Madhya Pradesh Special Police Establishment is for all public servants and no privilege is available to the officials and, in any case, they cannot claim any privilege more than an ordinary citizen to whom the provisions of the said Acts apply - Privileges do not extend to the activities undertaken outside the House on which the legislative provisions would apply without any differentiation -- The action taken by petitioners under the said Act cannot constitute a breach of privilege of Legislative Assembly -- The impugned letters/ notices are quashed -- Madhya Pradesh Lokayukt Evam Uplokayukt Adhiniyam, 1981.

s.11(2) - Proceedings before Lokauykta - Held: Any proceeding before Lokayukt shall be deemed to be a judicial proceeding within the meaning of ss. 193 and 228 IPC and as per s. 11(3), the Lokayukt is deemed to be a court within the meaning of Contempt of Courts Act, 1971 -- Central Provinces and Berar Special Police Establishment Act, 1947 -- Procedures and Conduct of Business Rules of the Madhya Pradesh Vidhan Sabha - Rule 164.

On 22.12.2006, a complaint was filed alleging irregularities in certain construction works under the control of the Vidhan Sabha Secretariat. After receiving information from the Chief Engineer, Public Works Department, petitioner No. 2, a member of the M.P. Higher Judicial Service on deputation as Legal Advisor with Lokayukt, found that it was a fit case to be sent to the Special Police Establishment (SPE) of the Lokayukt

Organisation for taking action in accordance with law. Petitioner No.1 was in agreement with the said opinion. Thereafter, Crime Case No. 33/07 was registered against the Secretary, Vidhan Sabha (Respondent No.10), Deputy Secretary, Vidhan Sabha, the then Administrator, the Superintending Engineer, the Capital Project Administration and the Contractors on 06.10.2007. After registration of the case, petitioner No.1 received the impugned letters dated 15.10.2007 and 18.10.2007 alleging breach of privilege under Procedures and Conduct of Business Rules 164 of the Madhya Pradesh Vidhan Sabha against him and the officers of the Special Police Establishment. By letter dated 23.10.2007, the Secretary, Lokayukt explained the factual position stating that no case of breach of privilege was made out and he also pointed out that neither any complaint had been received against the Speaker nor any inquiry was conducted by the Lokayukt Organization against him nor his name was found in the FIR. On 26.10.2007, the Secretary, Vidhan Sabha, respondent No.4, sent six letters stating that the reply dated 23.10.2007 was not acceptable and that individual replies should be sent by each of the petitioners. Aggrieved, the petitioners filed the instant writ petition.

Allowing the petition, the Court

HELD:

Maintainability of the writ petition under Art. 32 of the Constitution:

1. If it is established that the proposed actions are not permissible involving infringement of Arts. 14 and 21 of the Constitution, this Court is well within its power to pass appropriate order in exercise of its jurisdiction under Arts. 32 and 142 of the Constitution. Further, if the petitioners are compelled to [illegible] **e**

proceedings before the Vidhan Sabha and that too in spite of the fact that no proceeding was initiated against the Speaker or Members of the House but only relating to the officers in respect of contractual matters, and if urgent intervention is not sought for by exercising extraordinary jurisdiction, undoubtedly, it would cause prejudice to the petitioners. This Court, therefore, holds that writ petition under Art. 32 is maintainable. [para 29-30] [272-G-H; 273-A-C]

The Bengal Immunity Company Limited vs. The State of Bihar and Others, **[1955] 2 SCR 603,** *East India Commercial Co., Ltd., Calcutta and Another vs. The Collector of Customs, Calcutta,* **[1963] 3 SCR 338, and** *Kiran Bedi & Ors. vs. Committee of Inquiry & Anr.* **[1989] 1 SCR 20 - referred to.**

2.1 Under the provisions of s. 39(1)(iii) of the Code of Criminal Procedure, 1973, every person who is aware of the commission of an offence under the Prevention of Corruption Act is duty bound to give an information available with him to the police. Every citizen, who has knowledge of the commission of a cognizable offence, has a duty to lay information before the police and to cooperate with the investigating officer who is enjoined to collect the evidence. [para 68] [288-E-G]

2.2 Petitioner No. 1 is the Lokayukt appointed under the provisions of the Madhy Pradesh Lokayukt Act Evam Uplokayukt Adhiniyam, 1981(Lokayukt Act), exercising powers and functions as provided under Lokayukt Act. In the course of the performance of the said functions, the Lokayukt Organization received the complaint in question regarding certain irregularities in the award of contracts. Petitioner Nos. 1 and 2, therefore, conducted preliminary inquiry in the matter and on finding that a prima facie case under the Prevention of Corruption Act, 1980 was made out, the matter was referred to the SPE

established under the provisions of the Madya Pradesh Special Police Establishment Act, 1947 to be dealt with further, and thereafter, a case was registered by the said Establishment under the provisions of the Prevention of Corruption Act. [para 32] [273-D-G]

2.3 In the matter of the application of laws, particularly, the provisions of the Lokayukt Act and the Prevention of Corruption Act, insofar as the jurisdiction of the Lokayukt or the SPE established under the MP Special Establishment Act is concerned, all public servants except the Speaker and the Deputy Speaker of the Madhya Pradesh Vidhan Sabha for the purposes of the Lokayukt Act fall in the same category and cannot claim any privilege more than an ordinary citizen to whom the provisions of the said Acts apply. [para 36] [275-D-F]

2.4 The basic concept is that the privileges are those rights without which the House cannot perform its legislative functions. They do not exempt the Members from their obligations under any statute which continue to apply to them like any other law applicable to ordinary citizens. Thus, enquiry or investigation into an allegation of corruption against some officers of the Legislative Assembly cannot be said to be interfering with the legislative functions of the Assembly. No one enjoys any privilege against criminal prosecution. The privileges are available only insofar as they are necessary in order that the House may freely perform its functions but do not extend to the activities undertaken outside the House on which the legislative provisions would apply without any differentiations. [para 36 and 41] [275-F-G; 278-C-D]

Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha and Others, **2007 (1) SCR 317 = (2007) 3 SCC 184,** *A. Kunjan Nadar vs. The State,* **AIR 1955 Travancore-Cochin 154 - referred to.**

2.5 The officers working under the office of the Speaker are also public servants within the meaning of s.2(g) of the Lokayukt Act and s. 2 (c) of the Prevention of Corruption Act and, therefore, the Lokayukt and his officers are entitled and duty bound to make inquiry and investigation into the allegations made in any complaint filed before them. As such, the initiation of action does not and cannot amount to a breach of privilege of the Legislative Assembly, which has itself conferred powers in the form of a statute to eradicate the menace of corruption. It is, thus, clear that, no privilege is available to the Legislative Assembly to give immunity to them against the operation of laws. [para 54-55] [284-G-H; 285-C]

Dasaratha Deb case (1952), the Committee of Privileges-Parliament Secretariat Publication, July 1952, 45th Report of the Committee of Privileges of the Rajya Sabha dated 30th November, 2000 **- referred to.**

2.6 In the instant matter, the petitioners have not made any inquiry against the members of the Legislative Assembly or the Speaker or about their conduct and, therefore, the complaints made against the petitioners by some of the members of the Legislative Assembly were completely uncalled for, illegal and unconstitutional. By carrying out investigation on a complaint received, the petitioners merely performed their statutory duty and did not in any way affect the privileges which were being enjoyed by the Assembly and its members. The action of the petitioners did not interfere in the working of the House and as such there are no grounds for issuing a notice for the breach of Privilege of the Legislative Assembly. The Speaker has no jurisdiction to entertain any such complaint, which is not even maintainable. [para 56, 60] [285-D-E; 286-E-F]

2.7 Also, in terms of the provisions of s. 11(2) of the Lokayukt Act, any proceeding before the Lokayukt shall

be deemed to be a judicial proceeding within the meaning of ss. 193 and 228 IPC and as per s. 11(3), the Lokayukt is deemed to be a court within the meaning of Contempt of Courts Act, 1971. Further, the petitioners have merely made inquiry within the scope of the provisions of the Act and have not done anything against the Speaker personally. [para 61] [286-F-G]

2.8 This Court is of the view that the action being investigated by the petitioners has nothing to do with the proceedings of the House and as such the said action cannot constitute any breach of privilege of the House or its members. [para 65] [287-G-H; 288-A]

2.9 It is made clear that privileges are available only insofar as they are necessary in order that House may freely perform its functions. For the application of laws, particularly, the provisions of the Lokayukt Act, and the Prevention of Corruption Act, the jurisdiction of the Lokayukt or the Madhya Pradesh Special Police Establishment is for all public servants (except the Speaker and the Deputy Speaker of the Madhya Pradesh Vidhan Sabha) and no privilege is available to the officials and, in any case, they cannot claim any privilege more than an ordinary citizen to whom the provisions of the said Acts apply. Privileges do not extend to the activities undertaken outside the House on which the legislative provisions would apply without any differentiation. The impugned letters/notices are quashed. [para 66 and 69] [288-A-D, G]

Case Law Reference:

[1955] 2 SCR 603	**referred to**	**para 27**
[1963] 3 SCR 338	**referred to**	**para 28**
[1989] 1 SCR 20	**referred to**	**para 29**
2007 (1) SCR 317	**referred**	

AIR 1955 154 referred to para 46

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 613 of 2007.

Under Article 32 of the Constitution of India.

K.K. Venugopal, Sushil Kr. Jain, Puneet Jain, Ashish Kumar,Chhaya Kirti, Ankur Talwar, Amit Dayal, Pratibha Jain for the Petitioners.

Mishra Saurabh, Vanshaja Shukla, Ankit Lal, C.D. Singh, Sunny Chowdhary for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. The present writ petition, under Article 32 of the Constitution of India, has been filed by the petitioners challenging the validity of certain letters issued by Mr. Qazi Aqlimuddin - Secretary, Vidhan Sabha (Respondent No.4 herein) on various dates against them with regard to a case registered by the Special Police Establishment (SPE) of the Lokayukt Organisation, against the officials of the Vidhan Sabha Secretariat as well as against the concerned officials of the Capital Project Administration-the Contractor Company alleging irregularity in the construction work carried out in the premises of Vidhan Sabha.

2. It is relevant to mention that Petitioner No.1 herein was the Lokayukt of the State of Madhya Pradesh appointed under the provisions of the Madhya Pradesh Lokayukt Evam Uplokayukt Act, 1981 (hereinafter referred to as "the Lokayukt Act"). Petitioner No.2 was the Legal Advisor, a member of the Madhya Pradesh Higher Judicial Service on deputation with the Lokayukt and Petitioner Nos. 3 to 5 were the officers of Madhya Pradesh Special Police Establishment.

3. The petitioners herein claimed that the said letters violate their fundamental rights under Articles 14, 19 and 21 of

the Constitution of India and are contrary to Article 194(3) and prayed for the issuance of a writ, order or direction(s) quashing the said letters as well as the complaints filed by Respondent Nos. 5, 6 (since expired), 7, 8 and 9 herein.

4. **Brief facts**

(a) An anonymous complaint was received on 21.06.2005 in the office of the Lokayukt stating that a road connecting the Vidhan Sabha with Vallabh Bhawan, involving an expenditure of about Rs. 2 crores, was being constructed without inviting tenders and complying with the prescribed procedure. It was also averred in the said complaint that with a view to regularize the above-said works, the officers misused their official position and got the work sanctioned to the Capital Project Administration in violation of the rules which amounts to serious financial irregularity and misuse of office. It was also mentioned in the said complaint that in order to construct the said road, one hundred trees had been cut down without getting the permission from the concerned department. The said complaint was registered as E.R. No.127 of 2005. During the inquiry, the Deputy Secretary, Housing and Environment Department, vide letter dated 18.08.2005 stated that the work had been allotted to the lowest tenderer and the trees were cut only after obtaining the requisite permission from the Municipal Corporation. In view of the said reply, the matter was closed on 22.08.2005.

(b) On 22.12.2006, again a complaint was filed by one Shri P.N. Tiwari, supported with affidavit and various documents, alleging the same irregularities in the said construction work by the officers of the Vidhan Sabha Secretariat in collusion with the Capital Project Administration which got registered as E.R. No. 122 of 2006. A copy of the said complaint was sent to the Principal Secretary, Madhya Pradesh Government, Housing and Environment Department for comments. In reply, the Additional Secretary, M.P. Government, Housing and Environment Department submitted the comments along with certain documents stating that the Build[illegible]n

working under the Capital Project Administration was transferred to the administrative control of the Vidhan Sabha Secretariat vide Order dated 17.07.2000 and consequently the Secretariat Vidhan Sabha was solely responsible for the construction and maintenance work within the Vidhan Sabha premises.

(c) On 26.06.2007, a request was made to the Principal Secretary, Housing and Environment Department to submit all the relevant records, tender documents, note sheets, administrative, technical and budgetary sanctions by 10.10.2007. By letter dated 17.07.2007, the Under Secretary of the said Department informed that since the administrative sanctions were issued by the Secretariat Vidhan Sabha, the materials were not available with them. In view of the said reply, the Lokayukt-(Petitioner No.1 herein) sent letters dated 31.07.2007 addressed to the Principal Secretary, Housing and Environment Department, Administrator, Capital Project Administration and the Deputy Secretary, Vidhan Sabha Secretariat to appear before him along with all the relevant records on 10.08.2007. On 10.08.2007, the Principal Secretary, Housing and Environment appeared before the Lokayukt and informed that since the Controller Buildings of Capital Project Administration was working under the administrative control of the Vidhan Sabha Secretariat since 2000, all sanctions/approvals and records relating to construction and maintenance work were available in the Vidhan Sabha Secretariat. In view of the above reply, the Lokayukt summoned the Secretary and the Deputy Secretary, Vidhan Sabha, Respondent Nos. 10 and 11 respectively on 24.08.2007 to give evidence and produce all records/note-sheets of administrative and technical sanctions and budgetary and tender approvals relating to construction works carried out in MLA Rest House and Vidhan Sabha Premises in the year 2005-2006.

(d) The Secretary, Vidhan Sabha, Respondent No. 10

herein, in his deposition dated 24.08.2007, admitted giving of administrative approval to the estimated cost which was available with the office of the Lokayukta and stated that the relevant note-sheet was in the possession of the Hon'ble Speaker, therefore, he prayed for time to produce the same by 07.09.2007.

(e) Vide letter dated 07.09.2007, Respondent No.10 conveyed his inability to produce the same. After receiving information from the Chief Engineer, Public Works Department, Capital Project, Controller Buildings, Vidhan Sabha, Capital Project Administration and Chief Engineer, Public Works Department vide letters dated 11.09.2007, 13.09.2007 and 18.09.2007 respectively, the Legal Advisor -Petitioner No. 2 herein - a member of the M.P. Higher Judicial Service thoroughly examined the same and found that it is a fit case to be sent to the SPE for taking action in accordance with law. Petitioner No.1 was in agreement with the said opinion. Thereafter, Crime Case No. 33/07 was registered against the Secretary, Vidhan Sabha (Respondent No.10 herein), Shri A.P. Singh, Deputy Secretary, Vidhan Sabha, the then Administrator, Superintendent Engineer, Capital Project Administration and Contractors on 06.10.2007.

(f) After registration of the case, Petitioner No.1 received the impugned letters dated 15.10.2007 and 18.10.2007 alleging breach of privilege under Procedures and Conduct of Business Rules 164 of the Madhya Pradesh Vidhan Sabha against him and the officers of the Special Police Establishment. In response to the aforesaid letters, by letter dated 23.10.2007, the Secretary, Lokayukt explained the factual position of Petitioner No.1 herein stating that no case of breach of privilege was made out and also pointed out that neither any complaint had been received against the Hon'ble Speaker nor any inquiry was conducted by the Lokayukt Organization against him nor his name was found in the FIR.

(g) On 26.10.2007, the Secreta-

Respondent No.4 sent six letters stating that the reply dated 23.10.2007 is not acceptable and that individual replies should be sent by each of the petitioners.

(h) Being aggrieved by the initiation of action by the Hon'ble Speaker for breach of privilege, the petitioners have preferred this writ petition.

5. Heard Mr. K.K. Venugopal, learned senior counsel for the writ petitioners, Mr. Mishra Saurabh, learned counsel for the State-Respondent No. 1 and Mr. C.D. Singh, learned counsel for the Secretary, Vidhan Sabha-Respondent No.4.

Contentions:

6. Mr. K.K. Venugopal, learned senior counsel for the petitioners raised the following contentions:-

(i) Whether the Legislative Assembly or its Members enjoy any privilege in respect of an inquiry or an investigation into a criminal offence punishable under any law for the time being in force, even when inquiry or investigation was initiated in performance of duty enjoined by law enacted by the very Legislative Assembly of which the breach of privilege is alleged?

(ii) Whether officials of the Legislative Assembly also enjoy the same privileges which are available to Assembly and its Members?

(iii) Whether seeking mere information or calling the officials of Vidhan Sabha Secretariat for providing information during inquiry or investigation amounts to breach of privilege?

(iv) In view of the letter dated 23.08.2007, sent by the Principal Secretary to Respondent Nos. 10 and 11, i.e., Secretary and Deputy Secretary, Vidhan Sabha respectively directing them to appear before the Lokayukt (as per the order of the Speaker), whether Respondent Nos. 10 and 11 can have

any grievance that information was sought from them without sanction and knowledge of the Speaker?

7. On behalf of the respondents, particularly, Respondent No.4-Secretary, Vidhan Sabha, Mr. C.D. Singh, at the foremost submitted that the present petition under Article 32 of the Constitution of India invoking writ jurisdiction of this Court is not maintainable as no fundamental right of the petitioners, as envisaged in Part III of the Constitution, has been violated by any of the actions of Respondent No. 4. It is their stand that every action pertaining to the Assembly and its administration is within the domain and jurisdiction of the Hon'ble Speaker. The matter of privilege is governed under the rules as contained in Chapter XXI of the Rules of Procedure and Conduct of Business in the Madhya Pradesh Vidhan Sabha. Hence, it is stated that the writ petition is liable to be dismissed both on the ground of maintainability as well as on merits.

8. Before considering rival contentions and the legal position, it is useful to recapitulate the **factual details** and **relevant statutory provisions** which are as under:-

The legislature of the Central Province and Berar enacted the Central Provinces and Berar Special Police Establishment Act, 1947 (hereinafter referred to as 'the SPE Act'). Under the said Act, a Special Police Force was constituted which has power to investigate the offences notified by the State Government under Section 3 of the said Act, which reads as under:-

> **"3. Offences to be investigated by Special Police Establishment:-** The State Government may, by notifications, specify the offences or classes of offences which are to be investigated by (Madhya Pradesh) Special Police Establishment."

9. On 16.09.1981, Legislative Assembly of the State of Madhya Pradesh enacted the Lokayukt g

objective as has been stated in the preamble of the said Act:-

> "An Act to make provision for the appointment and functions of certain authorities for the enquiry into the allegation against "Public Servants" and for matters connected there with."

Section 2(a) of the Lokayukt Act defines "officer" in the following manner:-

> "officer" means a person appointed to a public service or post in connection with the affairs of the State of Madhya Pradesh."

Section 2(b) defines "allegation" as follows:-

> "allegation" in relation to a public servant means any affirmation that such public servant,
>
> (i) has abused his position as such to obtain any gain or favour to himself or to any other person or to cause undue harm to any person;
>
> (ii) was actuated in the discharge of his functions as such public servant by improper or corrupt motives;
>
> (iii) is guilty of corruption; or
>
> (iv) is in possession of pecuniary resources or property disproportionate to his known sources of income and such pecuniary resources or property is held by the public servant personally or by any member of his family or by some other person on his behalf.
>
> **Explanation:-** For the purpose of this sub-clause "family" means husband, wife, sons and unmarried daughters living jointly with him;"

The phrase "Public Servant" has been defined under Section 2(g) of the Lokayukt Act in the following terms:

> "Public Servant" means a person falling under any of the following categories, namely:-
>
> (i) Minister;
>
> (ii) a person having the rank of a Minister but shall not include Speaker and Deputy Speaker of the Madhya Pradesh Vidhan Sabha;
>
> (iii) an officer referred to in clause (a);
>
> (iv) an officer of an Apex Society or Central Society within the meaning of Clause (t-1) read with Clauses (a-1), (c-1) and (z) of Section 2 of the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961).
>
> (v) Any person holding any office in, or any employee of -
>
> (i) a Government Company within the meaning of Section 617 of the Companies Act, 1956; or
>
> (ii) a Corporation or Local Authority established by State Government under a Central or State enactment.
>
> (vi) (a) Up-Kulpati, Adhyacharya and Kul Sachiva of the Indira Kala Sangit Vishwavidyalaya constituted under Section 3 of the Indira Kala Sangit Vishwavidyalaya Act, 1956 (No. 19 of 1956);
>
> (b) Kulpati and Registrar of the Jawahar Lal Nehru Krishi Vishwavidyalaya constituted under Section 3 of the Jawaharlal Nehru Krishi Vishwavidyalaya Act, 1963 (No. 12 of 1963);
>
> Kulpati Rector and Registrar of the Vishwavidyalay constituted under Section 5 of the Madhya Pradesh Vishwavidyalay Adhiniyam, 1973 (No. 22 of 1973)."

10. Thus, all persons, except thos[illegible]d

under the said definition, come within the domain of the Lokayukt Act and the Lokayukt can, therefore, entertain complaints and take actions in accordance with the said provisions. Section 7 of the said Act thereafter defines the role of the Lokayukt and the Up-Lokayukt in the following terms:-

"7. Matters which may be enquired into by Lokayukt or Up-Lokayukt:-

Subject to the provision of this Act, on receiving complaint or other information:-

(i) the Lokayukt may proceed to enquire into an allegation made against a public servant in relation to whom the Chief Minister is the competent authority.

(ii) the Up-Lokayukt may proceed to enquire into an allegation made against any public servant other than referred to in clause (i)

Provided that the Lokayukt may enquire into an allegation made against any public servant referred to in clause (ii).

Explanation:- For the purpose of this Section, the expression "may proceed to enquire", and "may enquire", include investigation by Police agency put at the disposal of Lokayukt and Up-Lokayukt in pursuance of sub-Section (3) of Section 13.

11. On 14.09.2000, the State Government issued a notification in exercise of powers under Section 3 of the SPE Act by which the Special Police Establishment was empowered to investigate offences with regard to the following offences:-

(a) Offences punishable under the Prevention of Corruption Act, 1988 (No. 49 of 1988);

(b) Offences under Sections 409 and 420 and Chapter XVIII of the Indian Penal Code, 1860 (No. XLV of 1860) when they are committed, attempted or abused by public servants or employees of a local authority or a statutory corporation, when such offences adversely affect the interests of the State Government or the local authority or the statutory corporation, as the case may be;

(c) Conspiracies in respect of offences mentioned in item (a) and (b) above; and

(d) Conspiracies in respect of offences mentioned in item (a) and (b) shall be charged with simultaneously in one trial under the provisions of Criminal Procedure Code, 1973 (No. 2 of 1974).

12. As per the provision of Section 4 of the SPE Act, the superintendence of investigation by the M.P. Special Police Establishment was vested in the Lokayukt appointed under the Lokayukt Act.

13. On 22.12.2006, a complaint was received from one Shri P.N. Tiwari supported by affidavit and various documents making allegations that works had been carried out in the new Assembly building by the Capital Project Administration in gross violation of the rules, without making budgetary provisions and committing financial irregularities. The said complaint was registered as E.R. 122 of 2006. In the said complaint, it was mentioned that:

(a) An order had been issued to the Administrator, Capital Project Administration by Shri A.P. Singh, Deputy Secretary, Vidhan Sabha giving administrative approval for the estimate of the cost of construction against rules and without making budgetary provision vide order dated 19.10.2005 in respect of

the following works:

S.No.	Name of works	Amount in lakhs
(i)	Construction of 30 rooms in MLA Rest House Block-2	Rs. 5.51
(ii)	Construction of toilets in Block 1-3 of MLA Rest House	Rs. 25.48
(iii)	Construction of shops in MLA Rest House premises	Rs. 5.98
(iv)	Up-gradation/construction of road from Mazar to Gate No. 5 of Vidhan Sabha (Old Jail)	
	(a) Construction of road from Mazar to Rotary	Rs. 22.52
	(b) Construction of road from Rotary to Jail Road	Rs. 13.23
(v)	Construction of lounge for the Speaker and Officers in Vidhan Sabha Hall	Rs. 6.80
(vi)	Construction of new reception zone (including parking/road) for Vidhan Sabha	Rs. 54.00
(vii)	Upgradation work of campus lights and electric work in MLA Rest House premises	Rs. 26.60
(viii)	Construction of road from Vidhan Sabha to Secretariat (including development of helipad and connected area) and proposed upgradation and development work of M.P. Pool/spraypond:	
	(a) Construction of new road from the VIP entrance upto the proposed new gate	Rs. 10.85
	(b) Construction of road from present Char Diwari to Rotary	Rs. 21.56
	(c) Construction of road from Rotary to Secretariat	Rs. 12.00
	Total sanctioned amount	Rs. 204.53

(b) the officers had abused their powers by getting the works carried out without making budgetary provisions and without getting approval from the Finance Department in respect of the works specified at item numbers (iv), (vi), (vii) and (viii) above.

(c) Following financial irregularities were also pointed out:

(i) Though administrative approval was accorded by Shri A.P. Singh, Deputy Secretary, Vidhan Sabha on 19.10.2005, works had already been executed and inaugurated in the presence of the then Chief Minister, Shri Babulal Gaur and the Speaker, Vidhan Sabha and other Ministers on 03.08.2005. The proper procedure is to first invite tenders and it is only after the acceptance of the suitable tenders that work orders are to be issued.

(ii) Budgetary head of the Vidhan Sabha is 1555. This head is meant for maintenance and not for new construction, but the administrative approval dated 19.10.2005 was accorded by Shri A.P. Singh, Deputy Secretary, Vidhan Sabha in respect of new works of total value of Rs. 160.76 lakh.

(iii) Works of the value of Rs. 160.76 lakh were carried out without any budgetary provision and also without the approval of the Finance Department. Furthermore, a proposal had been sent by the Capital Project Administration for sanction of budget but the same was not approved by the Finance Department. Even then the works were got executed.

(iv) As per the approval dated 1[illegible]e

was to be incurred from the main budgetary head 2217 which is the head of Urban Development. From that head, construction activities in the Vidhan Sabha premises could not be carried out.

(v) The Controller Buildings, Capital Project (Vidhan Sabha) executed the works in collusion with the other officers and in violation of the rules. It was stated that the officials had abused their powers to regularize their irregular activities. The works had been undertaken for the personal benefit of some officers and payments were made in violation of the rules.

14. By letter dated 04.01.2007, a copy of the complaint was sent to the Principal Secretary, Madhya Pradesh Government, Housing and Environment Department calling factual comments along with the relevant documents. The comments were submitted by the Additional Secretary, M.P. Government, Housing and Environment Department vide letter dated 15.05.2007. The comments, inter alia, stated that the Building Controller Division functioning under the Capital Project Administration was transferred to the administrative control of the Vidhan Sabha Secretariat vide order dated 17.07.2000, consequently, Secretariat Vidhan Sabha is solely responsible for the construction and maintenance works within the Vidhan Sabha premises. On examination of the comments received along with the supporting documents, following discrepancies were revealed:

(a) Whereas the comments stated that budget provision had been made for an amount of Rs.204.53 lakh for the purpose of special repairs and maintenance of old and new Vidhan Sabha and MLA Rest House under Demand No. 21, main head 2217, sub main head 01, minor head 001, development head 1555 (3207), no amounts were specified under those heads, sub heads and minor

heads which were related to new construction works;

(b) Whereas the comments stated that work had been executed through tenders, but tender documents had not been annexed.

(c) Whereas the comments stated that approval in respect of nine works had been accorded by the Secretariat, Vidhan Sabha on the request of the Controller Buildings on 21.03.2005, however, it is not clear from the letter dated 21.03.2005 that administrative approval had been accorded; and

(d) Whereas the comments stated that amended sanction was granted vide order dated 19.10.2005, while the letter dated 19.10.2005 does not indicate that it was an amended administrative sanction.

15. In view of the above preliminary observations, as noted above, a request was made to the Principal Secretary, Housing and Environment Department to submit all relevant records, tender documents, note-sheets, administrative, technical and budgetary sanctions by 10.07.2007. It was again informed by the Under Secretary, Housing and Environment Department, vide letter dated 17.07.2007 that since the administrative sanctions were issued by the Secretariat Vidhan Sabha, the note-sheets/records relating to such sanctions were not available with the Housing and Environment Department.

16. In view of the reply submitted by the Under Secretary, Housing and Environment Department, the Petitioner sent a letter dated 31.07.2007 addressed to the Principal Secretary, Housing and Environment Department, Administrator, Capital Project Administration and the Deputy Secretary, Vidhan Sabha Secretariat to appear before the Lokayukt along with all relevant information/records on 10.08.2007.

17. On the date fixed for appearance, i.e., 10.08.2007, the Principal Secretary, Housing and Environment appeared before the Lokayukt. He informed that since the Controller Buildings of Capital Project Administration was working under the administrative control of the Vidhan Sabha Secretariat since the year 2000, all sanctions/approvals and records regarding construction and maintenance works carried out in MLA Rest House and Vidhan Sabha premises were available in the Vidhan Sabha Secretariat. On receiving such information, the Principal Secretary, Vidhan Sabha Secretariat, informed that the records relating to construction works were not with him and that such type of work was looked after by the Secretary and the Deputy Secretary, Vidhan Sabha. In this situation, Secretary and Deputy Secretary, Vidhan Sabha Secretariat and Controller Buildings, Vidhan Sabha, Capital Project Administration were summoned to give evidence and produce all records/note-sheets of administrative and technical sanctions and budgetary and tender approvals relating to construction works carried out in MLA Rest House and Vidhan Sabha premises in the year 2005-06 on 24.08.2007. Summons were issued as per the provisions of Section 11(1) of the Lokayukt Act, read with Sections 61 and 244 of the Code of Criminal Procedure, 1973. Summons were received by the Deputy Secretary, Vidhan Sabha, Shri G.K. Rajpal and the Controller Buildings, Shri Devendra Tiwari. Process Server of the Lokayukt Organisation tried to serve summons on Shri Israni in his office. Process Server contacted Shri Harish Kumar Shrivas, P.A. to Shri Israni. The P.A. took the summons to Shri Israni. After coming back, he asked the Process Server to wait till 4.00 p.m. Later, the P.A. told the Process Server to take permission of the Hon'ble Speaker to effect service of the summons on the Secretary. As such, summons could not be served on Shri Israni.

18. Thereafter, D.O. letter dated 14.08.2007 was received from the Principal Secretary, Vidhan Sabha stating that as per the direction of the Hon'ble Speaker, he was informing the Lokayukt Organization that:

(a) The Vidhan Sabha Secretariat was not aware as to the complaint which was being inquired into;

(b) All proceedings relating to invitation of tenders, technical sanction, work orders and payment etc. were conducted through the Controller Buildings, Capital Project Administration and, therefore, all the records relating to these works should be available with them;

(c) If, a copy of the complaint, which is being inquired into, is made available to the Vidhan Sabha Secretariat, it would be possible to make the position more clear. That was the reason why the Speaker had not granted permission to the Deputy Secretary to appear in the Office of the Lokayukt; and

(d) Under the provisions of Section 2(g)(ii) of the Lokayukt Act, the Speaker, the Deputy Speaker and the Leader of Opposition are exempted from the jurisdiction of the Lokayukt.

19. Shri Israni appeared before the Lokayukt on 24.08.2007 when his deposition was recorded. In his deposition, he stated that the administrative approval to the estimated cost dated 19.10.2005 was given, which was available with the office of the Lokayukt. He further stated that note-sheet relating to administrative approval had been prepared which was in possession of the Speaker. Accordingly, he was required to produce the same by 07.09.2007.

20. Information was called for from the Chief Engineer, Public Works Department, Capital Project Administration, Controller Buildings, Vidhan Sabha, Capital Project Administration and Chief Engineer, Public Works Department. The same was received vide letters dated 11.09.2007, 13.09.2007 and 18.09.2007 respective

21. Scrutiny note was prepared by the Legal Advisor, Mrs. Vibhawari Joshi, a member of the Madhya Pradesh Higher Judicial Service, on deputation to the Lokayukt Organization, with the assistance of the Technical Cell, with the approval of the Lokayukt. After examination of the information and records received from the various authorities concerned, she prima facie found established that:

(a) contracts in respect of construction of roads and reception plaza and renovation of toilets were awarded at rates higher than the prevailing rates;

(b) works were got executed even when there were no budgetary provisions. Demand for budget was made from the Finance Department but the same had not been accepted;

(c) new construction works of the value of Rs. 173.54 lakh were got executed from the maintenance head, which was not permissible, since the maintenance head is meant for maintenance works and not for new works;

(d) for new construction works of the value of Rs.173.54 lakh, administrative approval and technical sanction had been accorded by the authorities, who were not competent to do so;

(e) works of Rs.205.61 lakh were got executed without obtaining administrative approval and technical sanction;

(f) records show that measurements of WBM work were recorded after the Bitumen work (tarring) had been completed. Proper procedure is that first the measurements of WBM work are recorded, thereafter Bitumen work is executed and it is only thereafter measurements of Bitumen work are recorded. Discrepancies in the recording of measurements create doubt;

(g) Rules provide that in the Notice Inviting Tenders (NIT), schedule of quantities is annexed so that the tenderers may make proper assessment while quoting rates, but in the present case, in the NIT for roads in Schedule-I, quantities were not

specified. So, it was difficult for the tenderers to make proper assessment while quoting rates. This throws doubt on the legitimacy of the process.

(h) (i) Road was to be constructed within the diameter of 300 meters. For this small area, work was split up into five portions and four contractors were engaged. Rules provide that for one road, there should be one estimate, one technical sanction and one NIT. In the present case, five estimates were prepared, five technical sanctions were granted, five tenders were invited and four contractors were engaged. This throws doubt on the legitimacy of the process;

(ii) There are three processes involved in the construction of roads, i.e., WBM, Bitumen and thermoplastic. As per the rules and practice, for all the three processes, there should be one tender, but in the present case, the work was split up into three portions inasmuch work of WBM was given to two contractors, work of Bitumen to one other and work of thermoplastic to still another;

(iii) Cement concrete road was constructed for a small part of the same road. For this small part of the road another separate NIT was invited and work was awarded to a separate contractor, i.e., the fifth contractor;

(i) The Secretary and the Deputy Secretary of Vidhan Sabha Secretariat and Administrator, Superintending Engineer and Controller Buildings of Capital Project Administration in collusion with the contractors, in order to give undue benefits to them by abusing their official position caused loss of Rs.12,62,016/- to Rs.20,71,978/- to the Government.

In view of the above, the Legal Advisor (

recorded her opinion that it is a fit case to be sent to the SPE for taking action in accordance with law. The Lokayukt Petitioner No. 1 agreed with the note of the Legal Advisor and observed that it is a fit case to be dealt with further by the SPE. The case was accordingly sent to the SPE.

22. The SPE, thereafter, registered Crime Case No. 33/07 on 06.10.2007 against Shri Bhagwan Dev Israni, Secretary Vidhan Sabha, Shri A.P. Singh, Deputy Secretary Vidhan Sabha, the then Administrator, Superintending Engineer, Capital Project Administration and Contractors. Soon after the registration of the criminal case, the petitioners received the impugned notices dated 15.10.2007 wherein allegations of breach of privilege were made against the petitioners. The petitioners understood that the said letters had been issued on the basis of some complaints by the Members of Legislative Assembly. The petitioners received further notices for breach of privilege on the basis of the complaint made by Shri Gajraj Singh, MLA.

23. In response to the aforesaid letters, the Secretary of the Lokayukt Organization, on the direction of the Petitioner No. 1 sent a letter dated 23.10.2007, to Respondent No. 4-Shri Qazi Aqlimuddin, Secretary, Vidhan Sabha giving in details about the constitutional, legal and factual position stating that no case of privilege was made out. It was also pointed out that neither any complaint had been received against the Speaker, Respondent No. 1 nor any inquiry was conducted by the Lokayukt Organization against him nor was he named in the FIR.

24. Respondent No. 4, i.e., Secretary, Vidhan Sabha, thereafter sent six letters dated 26.10.2007 to the petitioners. By the said letters, the petitioners were informed that the reply dated 23.10.2007 had not been accepted and it was directed that individual replies should be sent by each of the petitioners. Being aggrieved by the initiation of action by the Speaker for breach of privilege against the petitioners, as noted above, the

petitioners herein filed the present writ petition.

Maintainability of the writ petition under Article 32 of the Constitution:

25. Mr. C.D. Singh, learned counsel appearing for Respondent No.4, by drawing our attention to the relief prayed for and of the fact that quashing relates to letters on various dates wherein after pointing out the notice of breach of privilege received from the members of Madhya Pradesh Assembly sought comments/opinion within seven days for consideration of the Hon'ble Speaker, submitted that the proper course would be to submit their response and writ petition under Article 32 of the Constitution of India is not maintainable.

26. Mr. Venugopal, learned senior counsel for the petitioners submitted that as the impugned proceedings which are mere letters calling for response as they relate to breach of privilege, amount to violation of rights under Article 21 of the Constitution, hence, the present writ petition is maintainable. In support of his claim, he referred to various decisions of this Court.

27. There is no dispute that all the impugned proceedings or notices/letters/complaints made by various members of the Madhya Pradesh Assembly claimed that the writ petitioners violated the privilege of the House. Ultimately, if their replies are not acceptable, the petitioners have no other remedy except to face the consequence, namely, action under Madhya Pradesh Vidhan Sabha Procedure and Conduct of Business Rules, 1964. If any decision is taken by the House, the petitioners may not be in a position to challenge the same effectively before the court of law. In *The Bengal Immunity Company Limited vs. The State of Bihar and Others,* [1955] 2 SCR 603, seven Hon'ble Judges of this Court accepted similar writ petition. The said case arose against the judgment of the High Court of Patna dated 04.12.1952 whereby it dismissed the application made by th

under Article 226 of the Constitution praying for an appropriate writ or order quashing the proceedings issued by the opposite parties for the purpose of levying and realising a tax which is not lawfully leviable on the petitioners and for other ancillary reliefs. As in the case on hand, it has been argued before the seven-Judge Bench that the application was premature, for there has, so far, been no investigation or finding on facts and no assessment under Section 13 of the Act. Rejecting the said contention, this Court held thus:

> "…. In the first place, it ignores the plain fact that this notice, calling upon the appellant company to forthwith get itself registered as a dealer, and to submit a return and to deposit the tax in a treasury in Bihar, places upon it considerable hardship, harassment and liability which, if the Act is void under article 265 read with article 286 constitute, in presenti, an encroachment on and an infringement of its right which entitles it to immediately appeal to the appropriate Court for redress. In the next place, as was said by this Court in *Commissioner of Police, Bombay vs. Gordhandas Bhanji,* [1952] 3 SCR 135 when an order or notice emanates from the State Government or any of its responsible officers directing a person to do something, then, although the order or notice may eventually transpire to be ultra vires and bad in law, it is obviously one which prima facie compels obedience as a matter of prudence and precaution. It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do.
>
> Another plea advanced by the respondent State is that the appellant company is not entitled to take proceedings praying for the issue of prerogative writs

> under article 226 as it has adequate alternative remedy under the impugned Act by way of appeal or revision. The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself ultra vires and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is ultra vires the powers of the legislature which enacted it and as such void and prays for appropriate relief under article 226. As said by this Court in *Himmatlal Harilal Mehta vs. The State of Madhya Pradesh* (supra) this plea of the State stands negatived by the decision of this Court in *The State of Bombay vs. The United Motors (India) Ltd.* (supra). We are, therefore, of the opinion, for reasons stated above, that the High Court was not right in holding that the petition under article 226 was misconceived or was not maintainable. It will, therefore, have to be examined and decided on merits…. …."

28. In *East India Commercial Co., Ltd., Calcutta and Another vs. The Collector of Customs, Calcutta,* [1963] 3 SCR 338, which is a three-Judge Bench decision, this Court negatived similar objection as pointed out in our case by the State. In that case, the appellants-East India Commercial Co. Ltd., Calcutta had brought into India from U.S.A. a large quantity of electrical instruments under a licence. The respondent, Collector of Customs, Calcutta, started proceedings for confiscation of these goods under Section 167(8) of the Sea Customs Act, 1878. The appellants mainly contended that the proceedings are entirely without jurisdiction as the Collector can confiscate only when there is an import in contravention of an order prohibiting or restricting it and in that case the Collector was proceeding to confiscate on the ground that a condition of the licence under which the goods had been imported had been disobeyed. The appellants, therefo of

prohibition directing the Collector to stop the proceedings. The objection of the other side was that the appellant had approached the High Court at the notice stage and the same cannot be considered under Article 226 of the Constitution. Rejecting the said contention, this Court held:

> ".....The respondent proposed to take action under Section 167(8) of the Sea Customs Act, read with Section 3(2) of the Act. It cannot be denied that the proceedings under the said sections are quasi-judicial in nature. Whether a statute provides for a notice or not, it is incumbent upon the respondent to issue notice to the appellants disclosing the circumstances under which proceedings are sought to be initiated against them. Any proceedings taken without such notice would be against the principles of natural justice. In the present case, in our view, the respondent rightly issued such a notice wherein specific acts constituting contraventions of the provisions of the Acts for which action was to be initiated were clearly mentioned. Assuming that a notice could be laconic, in the present case it was a speaking one clearly specifying the alleged act of contravention. If on a reading of the said notice, it is manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified sections was contravened, the respondent would have no jurisdiction to initiate proceedings pursuant to that notice. To state it differently, if on a true construction of the provisions of the said two sections the respondent has no jurisdiction to initiate proceedings or make an inquiry under the said sections in respect of certain acts alleged to have been done by the appellants, the respondent can certainly be prohibited from proceeding with the same. We, therefore, reject this preliminary contention."

29. In *Kiran Bedi & Ors. vs. Committee of Inquiry & Anr.* [1989] 1 SCR 20, which is also a three Judge Bench decision,

the following conclusion in the penultimate paragraph is relevant:

> "47 As regards points (v), (vi) and (vii) suffice it to point out that the petitioners have apart from filing special leave petitions also filed writ petitions challenging the very same orders and since we have held that the action of the Committee in holding that the petitioners were not covered by Section 8B of the Act and compelling them to enter the witness box on the dates in question was discriminatory and the orders directing complaint being filed against the petitioners were illegal, it is apparently a case involving infringement of Articles 14 and 21 of the Constitution. In such a situation the power of this Court to pass an appropriate order in exercise of its jurisdiction under Articles 32 and 142 of the Constitution cannot be seriously doubted particularly having regard to the special facts and circumstances of this case. On the orders directing filing of complaints being held to be invalid the consequential complaints and the proceedings thereon including the orders of the Magistrate issuing summons cannot survive and it is in this view of the matter that by our order dated 18th August, 1988 we have quashed them. As regards the submission that it was not a fit case for interference either under Article 32 or Article 136 of the Constitution inasmuch as it was still open to the petitioners to prove their innocence before the Magistrate, suffice it to say that in the instant case if the petitioners are compelled to face prosecution in spite of the finding that the orders directing complaint to be filed against them were illegal it would obviously cause prejudice to them. Points (v), (vi) and (vii) are decided accordingly."

It is clear from the above decisions that if it is established that the proposed actions are not permissible involving infringement of Articles 14 and 21 of the Constitution, this Court is well within its power to pass appropriate order in exercise of its jurisdiction under Articles 32 and 142 of the Cons

petitioners are compelled to face the privilege proceedings before the Vidhan Sabha, it would cause prejudice to them. Further, if the petitioners are compelled to face the privilege motion in spite of the fact that no proceeding was initiated against Hon'ble Speaker or Members of the House but only relating to the officers in respect of contractual matters, if urgent intervention is not sought for by exercising extraordinary jurisdiction, undoubtedly, it would cause prejudice to the petitioners.

30. Accordingly, we reject the preliminary objection raised by the counsel for Respondent No.4 and hold that writ petition under Article 32 is maintainable.

31. With the above factual background and the relevant statutory provisions, let us examine the rival submissions.

32. Now, we will consider the contentions raised by Mr. Venugopal. As mentioned earlier, Petitioner No. 1 is the Lokayukt appointed under the provisions of the Lokayukta Act exercising powers and functions as provided under the Act. In the course of the performance of the said functions, the Lokayukt Organization received a complaint regarding certain irregularities in the award of contracts. Petitioner Nos. 1 and 2, therefore, conducted preliminary inquiry in the matter and on finding that a *prima facie* case under the Prevention of Corruption Act was made out, the matter was referred to the SPE established under the provisions of the M.P. Special Police Establishment Act, 1947 to be dealt with further, and thereafter, a case was registered by the said Establishment under the provisions of the Prevention of Corruption Act, 1988.

33. Article 194(3) of the Constitution provides for privileges of the Legislative Assembly and its members which reads as under:

"194. Powers, privileges, etc, of the House of Legislatures and of the members and committees

thereof

(1) ***

(2) ***

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution forty fourth Amendment Act, 1978."

34. Article 194 is similar to Article 105 of the Constitution, which provides for the privileges of Parliament and its Members. The said Articles provide that the privileges enjoyed by the legislature shall be such as may from time to time be defined by the legislature by law. It is relevant to mention that any law made by the Parliament or the legislature is subject to the discipline contained in Part III of the Constitution. The privileges have not been defined but the above Article provides that until the same are so defined (i.e. by the legislature by law), they shall be those which the House or its members and committees enjoyed immediately before the coming into force of Section 26 of the Constitution Forty-fourth Amendment Act, 1978.

35. As per Chapter XI of the 'Practice and Procedure of Parliament' (Fifth edition), by M.N. Kaul and S.L. Shakdher in interpreting parliamentary privileges at Page 211 observed:

"…regard must be had to the general principle that the privileges of Parliament are granted to members in order that they may be able to perform their duties in Parliament without let or hindrance. They apply to individual members

only insofar as they are necessary in order that the House may freely perform its functions. They do not discharge the member from the obligations to society which apply to him as much and perhaps more closely in that capacity, as they apply to other subjects. Privileges of Parliament do not place a Member of parliament on a footing different from that of an ordinary citizen in the matter of the application of laws unless there are good and sufficient reasons in the interest of Parliament itself to do so.

The fundamental principle is that all citizens, including members of Parliament, have to be treated equally in the eye of the law. Unless so specified in the Constitution or in any law, a member of Parliament cannot claim any privileges higher than those enjoyed by any ordinary citizen in the matter of the application of law."

36. It is clear that in the matter of the application of laws, particularly, the provisions of the Lokayukt Act and the Prevention of Corruption Act, 1988, insofar as the jurisdiction of the Lokayukt or the Madhya Pradesh Special Establishment is concerned, all public servants except the Speaker and the Deputy Speaker of the Madhya Pradesh Vidhan Sabha for the purposes of the Lokayukt Act fall in the same category and cannot claim any privilege more than an ordinary citizen to whom the provisions of the said Acts apply. In other words, the privileges are available only insofar as they are necessary in order that the House may freely perform its functions but do not extend to the activities undertaken outside the House on which the legislative provisions would apply without any differentiations. In view of the above, we reject the contra argument made by Mr. C.D. Singh.

37. As rightly submitted by Mr. K.K. Venugopal, in India, there is rule of law and not of men and, thus, there is primacy of the laws enacted by the legislature which do not discriminate between persons to whom such laws would apply. The laws would apply to all such persons unless the law itself makes an

exception on a valid classification. No individual can claim privilege against the application of laws and for liabilities fastened on commission of a prohibited Act.

38. In respect of the scope of the privileges enjoyed by the Members, the then Speaker Mavalankar, while addressing the conference of the Presiding Officers at Rajkot, on 03.01.1955, observed:

"The simply reply to this is that those privileges which are extended by the Constitution to the legislature, its members, etc. are equated with the privileges of the House of Commons in England. It has to be noted here that the House of Commons does not allow the creation of any privileges; and only such privileges are recognized as have existed by long time custom."

39. The scope of the privileges enjoyed depends upon the need for privileges, i.e., why they have been provided for. The basic premise for the privileges enjoyed by the members is to allow them to perform their functions as members and no hindrance is caused to the functioning of the House. Committee of Privileges of the Tenth Lok Sabha, noted the main arguments that have been advanced in favour of codification, some of which are as follows:

"(i) Parliamentary privileges are intended to be enjoyed on behalf of the people, in their interests and not against the people opposed to their interests;

*** *** ***

(iii) the concept of privileges for any class of people is anarchronistic in a democratic society and, therefore, if any, these privileges should be the barest minimum - only those necessary for functional purposes - and invariably defined in clear and precise terms;

(iv) sovereignty of Parliament has increasingly become a myth and a fallacy for, sovereignty, if any, vests only in the people of India who exercise it at the time of general elections to the Lok Sabha and to the State Assemblies;

(v) in a system wedded to freedom and democracy - rule of law, rights of the individual, independent judiciary and constitutional government - it is only fair that the fundamental rights of the citizens enshrined in the Constitution should have primacy over any privileges or special rights of any class of people, including the elected legislators, and that all such claims should be subject to judicial scrutiny, for situations may arise where the rights of the people may have to be protected even against the Parliament or against captive or capricious parliamentary majorities of the moment;

(vi) the Constitution specifically envisaged privileges of the Houses of parliament and State Legislatures and their members and committees being defined by law by the respective legislatures and as such the Constitution-makers definitely intended these privileges being subject to the fundamental rights, provisions of the Constitution and the jurisdiction of the courts;

*** *** ***

(viii) in any case, there is no question of any fresh privileges being added inasmuch as (a) under the Constitution, even at present, parliamentary privileges in India continue in actual practice to be governed by the precedents of the House of Commons as they existed on the day our Constitution came into force; and (b) in the House of Commons itself, creation of new privileges is not allowed."

40. The Committee also noted the main arguments against codification. Argument no. (vii) is as under:

"(vii) The basic law that all citizens should be treated equally before the law holds good in the case of members of Parliament as well. They have the same rights and liberties as ordinary citizens except when they perform their duties in the Parliament. The privileges, therefore, do not, in any way, exempt members from their normal obligation to society which apply to them as much and, perhaps, more closely in that as they apply to others."

41. It is clear that the basic concept is that the privileges are those rights without which the House cannot perform its legislative functions. They do not exempt the Members from their obligations under any statute which continue to apply to them like any other law applicable to ordinary citizens. Thus, enquiry or investigation into an allegation of corruption against some officers of the Legislative Assembly cannot be said to interfere with the legislative functions of the Assembly. No one enjoys any privilege against criminal prosecution.

42. According to Erskine May, the privilege of freedom from arrest has never been allowed to interfere with the administration of criminal justice or emergency legislation. Thus, in any case, there cannot be any privilege against conduct of investigation for a criminal offence. There is a provision that in case a member is arrested or detained, the House ought to be informed about the same.

43. With regard to "Statutory detention", it has been stated, thus:

"The detention of a member under Regulation 18B of the Defence (General), Regulation 1939, made under the Emergency Powers (Defence) Acts 1939 and 1940, led to the committee of privileges being directed to consider whether such detention constituted a breach of Privilege of the House; the committee reported that there was no breach of privilege involved. In the case of a member deported from Northern Rhodesia f h

an order declaring him to be prohibited immigrant, the speaker held that there was no prima-facie case of breach of privilege.

The detention of members in Ireland in 1918 and 1922 under the Defence of the Realm Regulations and the Civil Authorities (Special Powers) Act, the speaker having been informed by respectively the Chief Secretary of the Lord Lieutenant and the secretary to the Northern Ireland Cabinet, was communicated by him to the House."

44. The committee for Privileges of the Lords has considered the effect of the powers of detention under the Mental Health Act, 1983 on the privileges of freedom from arrest referred to in Standing Order No. 79 that 'no Lord of Parliament is to be imprisoned or restrained without sentence or order of the House unless upon a criminal charge or refusing to give security for the peace'. The Committee accepted the advice of Lord Diplock and other Law Lords that the provisions of the statute would prevail against any existing privilege of Parliament or of peerage.

45. In *Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha and Others,* (2007) 3 SCC 184, this Court observed:

"71. In U.P. Assembly case (Special Reference No. 1 of 1964), while dealing with questions relating to powers, privileges and immunities of the State Legislatures, it was observed as under:

> "70. … Parliamentary privilege, according to May, is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus, privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law. The particular privileges of the House of Commons have been defined as
>
> > 'the sum of the fundamental rights of the House and of its individual Members as against the prerogatives of the Crown, the authority of the ordinary courts of law and the special rights of the House of Lords'.
>
> … …. The privileges of Parliament are rights which are 'absolutely necessary for the due execution of its powers'. They are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity (May's Parliamentary Practice, pp. 42-43)."

The privilege of freedom from arrest has never been allowed to interfere with the administration of criminal justice or emergency legislation.

87. In U.P. Assembly case (Special Reference No. 1 of 1964) it was settled by this Court that a broad claim that all the powers enjoyed by the House of Commons at the commencement of the Constitution of India vest in an Indian Legislature cannot be accepted in its entirety because there are some powers which cannot obviously be so claimed. In this context, the following observations appearing at SCR p. 448 of the judgment should suffice: (AIR p. 764, para 45)

> "Take the privilege of freedom of access which is exercised by the House of Commons as a body and through its Speaker 'to have at all times the right to petition, counsel, or remonstrate with their Sovereign through their cho[illegible]d

> have a favourable construction placed on his words was justly regarded by the Commons as fundamental privilege' [Sir Erskine May's Parliamentary Practice, (16th Edn.), p. 86]. It is hardly necessary to point out that the House cannot claim this privilege. Similarly, the privilege to pass acts of attainder and impeachments cannot be claimed by the House. The House of Commons also claims the privilege in regard to its own Constitution. This privilege is expressed in three ways, first by the order of new writs to fill vacancies that arise in the Commons in the course of a Parliament; secondly, by the trial of controverted elections; and thirdly, by determining the qualifications of its members in cases of doubt (May's Parliamentary Practice, p. 175). This privilege again, admittedly, cannot be claimed by the House. Therefore, it would not be correct to say that all powers and privileges which were possessed by the House of Commons at the relevant time can be claimed by the House."

195. The debate on the subject took the learned counsel to the interpretation and exposition of law of Parliament as is found in the maxim lex et consuetudo parliamenti as the very existence of a parliamentary privilege is a substantive issue of parliamentary law and not a question of mere procedure and practice."

46. In *A. Kunjan Nadar vs. The State,* AIR 1955 Travancore-Cochin 154, the High Court while dealing with the scope of privileges under Article 194(3) of the Constitution held as under:-

> "(3) Article 194(3) deals with the powers, privileges and immunities of the Legislature and their members in Part A states and Article 238 makes those powers, privileges and immunities available to legislatures and its members

> in the Part B states as well. Article 194(3) deals with the privileges and immunities available to the petitioner in a matter like this and they are according to that clause "such as may time to time be defined by the legislature by law" and until so defined, those of a member of the House of Commons of the Parliament of the United Kingdom at the commencement of the constitution.
>
> (4) As stated before, there is no statutory provision granting the privilege or immunity invoked by the petitioner and it is clear from May's Parliamentary Practice 15th Edn. 1950, p. 78 that "the privilege from freedom from arrest is not claimed in respect of criminal offences or statutory detention" and that the said freedom is limited to civil clauses, and has not been allowed to interfere with the administration of criminal justice or emergency legislation.
>
> Xxxx xxxx xxxx
>
> (8) …… So long as the detention is legal - and in this case there is no dispute about its legality - the danger of the petitioner losing his seat or the certainty of losing his daily allowance cannot possibly form the foundation for relief against the normal or possible consequences of such detention."

47. In *Dasaratha Deb* case (1952), the Committee of Privileges-Parliament Secretariat Publication, July 1952, inter alia, held that the arrest of a Member of Parliament in the course of administration of criminal justice did not constitute a breach of privilege of the House.

48. On 24.12.1969, a question of privilege was raised in the Lok Sabha regarding arrests of some members while they were stated to be on their way to attend the House. The Chair ruled that since the members were arrested under the provisions of the Indian Penal Code and had pleaded guilty, no question of privilege was involved.

49. In order to constitute a breach of privilege, however, a libel upon a Member of Parliament must concern his character or conduct in his capacity as a member of the House and must be "based on matters arising in the actual transaction of the business of the House." Reflections upon members otherwise than in their capacity as members do not, therefore, involve any breach of privilege or contempt of the House. Similarly, speeches or writings containing vague charges against members of criticizing their parliamentary conduct in a strong language, particularly, in the heat of a public controversy, without, however, imputing any mala fides were not treated by the House as a contempt or breach of privilege.

50. Similarly, the privilege against assault or molestation is available to a member only when he is obstructed or in any way molested while discharging his duties as a Member of the Parliament. In cases when members were assaulted while they were not performing any parliamentary duty it was held that no breach of privilege or contempt of the House had been committed.

51. Successive Speakers have, however, held that an assault on or misbehaviour with a member unconnected with his parliamentary work or mere discourtesy by the police officers are not matters of privilege and such complaints should be referred by members to the Ministers directly.

52. 45th Report of the Committee of Privileges of the Rajya Sabha dated 30th November, 2000 stated as under:

> "6. The issue for examination before the Committee is whether CRPF personnel posted at Raj Bhawan in Chennai committed a breach of privilege available to Members of Parliament by preventing Shri Muthu Mani from meeting the Governor in connection with presentation of a memorandum.
>
> 7. The Committee notes that privileges are available to

> Member of Parliament so that they can perform their parliamentary duties without let or hindrance. Shri Muthu Mani had gone to the residence of Governor for presentation of a memorandum in connection with party activities. Before Shri Muthu Mani reached there, two delegations of his party had been allowed to meet the Governor. It appears that due to security related administrative reasons the entry of another delegation of which Shri Muthu Mani was a Member, was denied by the Police officers. Since Shri Muthu Mani was present in connection with the programme of his political party, apparently along with other party workers, it cannot be said that he was in any way performing a parliamentary duty. As such preventing his entry by lawful means cannot be deemed to constitute a breach of his parliamentary privilege."

53. Now, with regard to the contention of Mr. Venugopal, viz., about the privileges available to the Assembly and its Members, in case of arrest of employees of the Legislature Secretariat within the precincts of the House, the Speaker of the Kerala Legislative Assembly, disallowing the question of privilege, ruled that the prohibition against making arrest, without obtaining the permission of the Speaker, from the precincts of the House is applicable only to the members of the Assembly. He observed that it is not possible, nor is it desirable to extend this privilege to persons other than the members, since it would have the effect of putting unnecessary restrictions and impediments in the due process of law.

54. The officers working under the office of the Speaker are also public servants within the meaning of Section 2(g) of the Lokayukt Act and within the meaning of Section 2 (c) of the Prevention of Corruption Act, 1988 and, therefore, the Lokayukt and his officers are entitled and duty bound to make inquiry and investigation into the allegations made in any complaint filed before them.

55. The law applies equally and there is no privilege which prohibits action of registration of a case by an authority that has been empowered by the legislature to investigate the cases relating to corruption and bring the offenders to book. Simply because the officers happen to belong to the office of the Hon'ble Speaker of the Legislative Assembly, the provisions of the Lokayukt Act do not cease to apply to them. The law does not make any differentiation and applies to all with equal vigour. As such, the initiation of action does not and cannot amount to a breach of privilege of the Legislative Assembly, which has itself conferred powers in the form of a statute to eradicate the menace of corruption. It is, thus, clear that, no privilege is available to the Legislative Assembly to give immunity to them against the operation of laws.

56. In the present matter, the petitioners have not made any inquiry even against the members of the Legislative Assembly or the Speaker or about their conduct and, therefore, the complaints made against the petitioners by some of the members of the Legislative Assembly were completely uncalled for, illegal and unconstitutional. The Speaker has no jurisdiction to entertain any such complaint, which is not even maintainable.

57. Thus, it is amply clear that the Assembly does not enjoy any privilege of a nature that may have the effect of restraining any inquiry or investigation against the Secretary or the Deputy Secretary of the Legislative Assembly.

58. Thus, from the above, it is clear that neither did the House of Commons enjoy any privilege, at the time of the commencement of the Constitution, of a nature that may have the effect of restraining any inquiry or investigation against the Secretary or the Deputy Secretary of the Legislative Assembly or for that matter against the member of the Legislative Assembly or a minister in the executive government nor does the Parliament or the Legislative Assembly of the State or its members. The laws apply equally and there is no privilege

which prohibits action of registration of a case by an authority which has been empowered by the legislature to investigate the cases. Simply because the officers belong to the office of the Hon'ble Speaker of the Legislative Assembly, the provisions of the Act do not cease to apply to them. The law does not make any differentiation and applies to all with equal vigour. As such, the initiation of action does not and cannot amount to a breach of privilege of the Legislative Assembly, which has itself conferred powers in the form of a Statute to eradicate the menace of corruption.

59. The petitioners cannot, while acting under the said statute, be said to have lowered the dignity of the very Assembly which has conferred the power upon the petitioners. The authority to act has been conferred upon the petitioners under the Act by the Legislative Assembly itself and, therefore, the action taken by the petitioners under the said Act cannot constitute a breach of privilege of that Legislative Assembly.

60. By carrying out investigation on a complaint received, the petitioners merely performed their statutory duty and did not in any way affect the privileges which were being enjoyed by the Assembly and its members. The action of the petitioners did not interfere in the working of the House and as such there are no grounds for issuing a notice for the breach of Privilege of the Legislative Assembly.

61. Also, in terms of the provisions of Section 11(2) of the Lokayukt Act, any proceeding before the Lokayukt shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code and as per Section 11(3), the Lokayukt is deemed to be a court within the meaning of Contempt of Courts Act, 1971. The petitioners have merely made inquiry within the scope of the provisions of the Act and have not done anything against the Speaker personally. The officers working under the office of the Speaker are also public servants within the meaning of Section 2(c) of the Lokayukt Act and, therefore, the Lokayu

entitled and duty bound to carry out investigation and inquiry into the allegations made in the complaint filed before them and merely because the petitioners, after scrutinizing the relevant records, found the allegations prima facie proved, justifying detailed investigation by the Special Police Establishment under the Prevention of Corruption Act, and the performance of duty by the petitioners in no way affects any of the privileges even remotely enjoyed by the Assembly or its Members.

62. In the present matter, the petitioners have not made any inquiry against any member of the Legislative Assembly or the Speaker or about their conduct and, therefore, the complaints made against the petitioners by some of the members of Legislative Assembly were completely uncalled for, illegal and unconstitutional.

63. Further, the allegations made in the complaint show that while dealing with the first complaint (E.R. 127/05), the Lokayukt found that there was no material to proceed further and closed that matter since the allegations alleged were not established. While inquiring into the second complaint since the Lokayukt found that the allegations made in the complaint were prima facie proved, SPE was directed to proceed further in accordance with law.

64. On behalf of the petitioners, it is pointed out that the facts and circumstances in the present matter show that complaints have been filed by the Members not in their interest but for the benefit of the persons involved who all are public servants. It is also pointed out that the action of breach of privilege has been instituted against the petitioners since the officers, against whom the investigation has been launched, belong to the Vidhan Sabha Secretariat.

65. We are of the view that the action being investigated by the petitioners has nothing to do with the proceedings of the House and as such the said action cannot constitute any breach

of privilege of the House or its members.

66. It is made clear that privileges are available only insofar as they are necessary in order that House may freely perform its functions. For the application of laws, particularly, the provisions of the Lokayukt Act, and the Prevention of Corruption Act, 1988, the jurisdiction of the Lokayukt or the Madhya Pradesh Special Police Establishment is for all public servants (except the Speaker and the Deputy Speaker of the Madhya Pradesh Vidhan Sabha for the purposes of the Lokayukt Act) and no privilege is available to the officials and, in any case, they cannot claim any privilege more than an ordinary citizen to whom the provisions of the said Acts apply. Privileges do not extend to the activities undertaken outside the House on which the legislative provisions would apply without any differentiation.

67. In the present case, the action taken by the petitioners is within the powers conferred under the above statutes and, therefore, the action taken by the petitioners is legal. Further, initiation of action for which the petitioners are legally empowered, cannot constitute breach of any privilege.

68. Under the provisions of Section 39(1)(iii) of the Code of Criminal Procedure, 1973, every person who is aware of the commission of an offence under the Prevention of Corruption Act is duty bound to give an information available with him to the police. In other words, every citizen who has knowledge of the commission of a cognizable offence has a duty to lay information before the police and to cooperate with the investigating officer who is enjoined to collect the evidence.

69. In the light of the above discussion and conclusion, the impugned letters/notices are quashed and the writ petition is allowed as prayed for. No order as to costs.

R.P. Writ petition allowed.