ARUN KUMAR AGRAWAL
v.
UNION OF INDIA & ORS.
(Writ Petition (Civil) No. 374 of 2012)

NOVEMBER 01, 2013

[SURINDER SINGH NIJJAR AND PINAKI CHANDRA GHOSE, JJ]

CONSTITUTION OF INDIA, 1950:

Art.32 - Writ petition challenging appointment of Chairman, SEBI - Held: Section 4(5) of SEBI Act inter alia stipulates that Chairman and other Members of SEBI shall be persons of "ability, integrity and standing who have shown capacity in dealing with problems relating to securities market" - Thus, statutorily, a person cannot be appointed as Chairman/Member of SEBI unless he or she is a person of high integrity - Therefore, selection and appointment of Chairman, SEBI could be challenged before Supreme Court in a writ petition under Art. 32 of the Constitution on the ground that he does not satisfy the statutory requirements of a person of high integrity - Securities and Exchange Board of India Act, 1992 - s. 4(5).

SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992:

s.4(5) - Appointment of Chairman of SEBI - Challenged on the ground of integrity, mala fides, conspiracy etc. - Held: SEBI is an institution of high integrity -- The functions performed by it are such that any malfunctioning in performance of such functions can disturb economy of the country - Therefore, only persons of high integrity would be eligible to be appointed as Chairman/Member of SEBI - This is imperative - There is no substance in the alleged

irregularities regarding deputation of fourth respondent, the alleged misstatement/non-disclosure about his pay scale/ sanctioned emoluments as disclosed -- There is nothing which would render him a person of not high integrity - SEBI (Terms and Conditions of Service and Members) Rules, 1992 - r.3(5) -- IAS Cadre Rules - rr.6(2)(i) and 6(2)(ii).

Appointment of Chairman, SEBI - Allegation of mala fide - Held: If the allegations of mala fide are established, it would vitiate the selection procedure, recommendation and appointment of fourth respondent as Chairman, SEBI - But, burden of proving the allegations of mala fide would lie very heavily on petitioner - It was incumbent on petitioner not only to make specific allegations, but also to produce very strong evidence to lead to a clear conclusion that the selection was actuated by mala fide - Petitioner has not made out a case of mala fide to vitiate the selection process and appointment of fourth respondent as Chairman, SEBI.

Appointment of Chairman, SEBI - Allegation of conspiracy - Held: The charge of conspiracy has to be taken seriously as it involves commission of very serious criminal offence u/s 120-B, IPC - Such a charge of criminal intent and conduct had to be clearly pleaded and established by evidence of very high degree of probative value - No notice of such allegations can be taken based only on pure conjectures, speculations and interpretation of notings in the official files -Appointment of fourth respondent is strictly in conformity with the procedure prescribed - Petitioner has not placed on record any material to establish that any conspiracy was hatched to ensure the selection of fourth respondent as Chairman, SEBI - All India Services (Death-cum-Retirement Benefits) Rules, 1958 - rr.16 and 26.

PUBLIC INTEREST LITIGATION:

Writ petition challenging appointment of Chairman, SEBI - Held: In the instant case, petitioner ha[illegible]d

integrity of the entire selection process - The petition does not satisfy the test of utmost good faith which is required to maintain public interest litigation -- On facts, petitioner could not justify invoking the jurisdiction of the Court under Art. 32.

The instant writ petition was filed by the petitioner purporting to be in public interest, challenging the appointment of respondent no. 4 as Chairman of the Securities Exchange Board of India (SEBI) on the grounds: (a) that respondent no. 4 failed to fulfill one of the eligibility condition as laid down in sub-s. (5) of s.4 of the Securities and Exchange Board of India Act, 1992 (SEBI Act), as well as the qualification contained in Government communication, which required that the Chairman should be a person of high integrity; (b) that appointment of respondent No.4 was the result of manipulation, misrepresentation and suppression of vital material before the Search-cum-Selection Committee and the Appointment Committee of the Cabinet 'ACC'; (c) that the appointment of respondent No.4, was mala fide; and (d) that a conspiracy was hatched to ensure selection of respondent no. 4 as Chairman, SEBI. The petitioner alleged that respondent no. 4 was wrongly sent on deputation to Unit Trust of India Asset Management Company Ltd. (UTI AMC) and further, the deputation was in violation of the policy of not allowing deputation to an officer who had overseen the organisation to which he was being deputed; that there was suppression of material facts relating to remuneration of respondent no. 4 as CMD, UTI AMC before the Search-cum-Selection Committee and the ACC. As regards the mala fides, it was stated by the petitioner, that the earlier Chairman of SEBI was denied extension in tenure and in order to facilitate the selection of respondent no. 4, there was illegal and arbitrary change in composition of Search-cum-Selection Committee.

On behalf of the respondents, besides contesting the

petition on merits, a preliminary objection was raised as to the maintainability of the writ petition as the same was alleged not to have been filed in public interest, but as a surrogate litigation on behalf of an individual who was anxious to continue as Chairman, SEBI; and that the writ petition did not disclose all the facts relevant for adjudication of the issues raised.

Dismissing the writ petition, the Court

HELD: 1.1 SEBI is an institution of high integrity. Therefore, the Chairman of SEBI has to be a person of high integrity. This is imperative. The wide sweep of the powers of SEBI leaves no manner of doubt that it is the supreme authority for the control and regulations and orderly development of the securities market in India. It would not be mere rhetoric to state that in this era of globalisation, the importance of the functions performed by SEBI are of paramount importance to the well being of the economic health of the nation. [para 29] [897-B, F-H; 898-A]

Sahara India Real Estate Corporation Ltd. & Ors. Vs. Securities and Exchange Board of India & Anr. **2012 (12) SCR 1 = 2013 (1) SCC 1 - referred to.**

1.2 The functions performed by SEBI are such that any malfunctioning in the performance of such functions can disturb the economy of the country. Therefore, only persons of high integrity would be eligible to be appointed as Chairman/Member of the SEBI. Section 4(5) of SEBI Act inter alia stipulates that the Chairman and other Members of the SEBI shall be persons of "ability, integrity and standing who have shown capacity in dealing with problems relating to securities market." Statutorily, therefore, a person cannot be appointed as Chairman/Member of the SEBI unless he or she is a person of high integrity. [para 30] [

1.3 Therefore, selection and appointment of respondent No.4 could be challenged before this Court in a writ petition under Art. 32 of the Constitution of India on the ground that he does not satisfy the statutory requirements of a person of high integrity. [para 30] [899-E-F]

Centre for PIL & Anr. Vs. Union of India & Anr. **2011 (4) SCR 445 = 2011 (4) SCC 1 - referred to.**

DEPUTATION : Was it irregular, illegal or vitiated by colourable exercise of power?

2.1 It is a matter of record that respondent No.4 was on deputation with UTI AMC since the year 2005. His deputation was duly approved by the Ministry of Finance, DOPT and the Government of Bihar, wherever applicable. Respondent No.4 was first appointed as CEO, UTI AMC by order dated 30.10.2005. He was initially on deputation under r.6(2)(ii) and subsequently under r.6(2)(i) of the IAS Cadre Rules. The terms and conditions of service of respondent No.4 at UTI AMC were settled on 16.4.2007. This was in conformity with the letter dated 31.10.2005 written by the DOPT accepting the request made by the Government of Bihar in its letter dated 28.10.2005 for approval of deputation of respondent No.4 with UTI AMC for a period of two years under r.6(2)(ii) of IAS Cadre Rules. The letter further indicated that terms and conditions applicable in the said deputation were under examination and would be communicated shortly. The deputation was converted from r.6(2)(ii) to r.6(2)(i), upon clarification of the applicability of the appropriate rule. [para 35] [901-D-H]

2.2 Therefore, it cannot be said that respondent No.4 was in any manner responsible for being sent on deputation initially under r.6(2)(ii) and subsequently under r.6(2)(i) or that his deputation under r.6(2)(ii) was approved in colourable exercise of power. [para 35] [902-B-C, D]

"False Declaration in Form L"

2.3 A perusal of Office Memorandum dated 1.5.2008 sent by the Department of Economic Affairs in reference to the letter sent by DoP&T seeking comments of DEA under r.26 (3) of All India Services (Death-cum-Retirement Benefits) Rules, 1958 would show that necessary facts relating to the service of respondent No.4 in the six years prior to the response dated 1.5.2008 had been faithfully set out. Therefore, it cannot be said that the petitioner has made any false declaration in 'Form L', Clause 9 read with r.26(3) of All India Services (Death-cum-Retirement Benefits) Rules, 1958, while working in his previous job as Chairman, UTI AMC. [para 36-37] [902-E-F; 904-H; 905-A]

2.4 The respondents have rightly pointed out that respondent No.4 was on deputation in UTI AMC when he filled up Form `L'. At that time, he held lien on the post of Additional Secretary, Government of India. His application for voluntary retirement had been processed. He was, however, required to obtain approval under r.26 for commercial employment-post retirement. Sr.No.5 of Form `L' requires the person seeking approval to state the pay scale of the post and pay drawn by the Officer at the time of retirement. Undoubtedly, respondent No.4 was drawing the pay scale of Rs.22400-525-24500. He also stated his pay to be Rs.23,450/-. There is no legal infirmity in the said statement by respondent No.4. It is a settled proposition of law that deputationist would hold the lien in the parent department till he is absorbed on any post. [para 38] [905-E-H]

State of Rajasthan & Anr. Vs. S.N.Tiwari & Ors. **2009 (4) SCR 448 = 2009 (4) SCC 700; and** *Triveni Shankar Saxena Vs. State of U.P. & Ors.* **1991 (3) Suppl. SCR 524 = 1992 (1) Suppl. SCC 524 - referred to.**

2.5 In response to Column No.7 Form L, respondent No.4 has quite clearly mentioned that he has been offered a fixed pay of Rs. 1.00 crore per annum alongwith performance related payment and other usual perks. It must be noticed that respondent No.4 had sought retirement from the IAS w.e.f. 15.5.2008 to enable him to join UTI AMC on a regular basis as its CMD. Therefore, it cannot be said that at the time when he filled the Form for seeking VRS, respondent No.4 was not drawing the pay scale stated by him. The Board of UTI AMC by resolution dated 12.4.2008 approved that the CMD can draw revised compensation w.e.f. 27.12.2006. Till that date, he was still placed in the scale of Additional Secretary, Government of India. The fact that emoluments were paid to respondent No.4 w.e.f. 27.12.2006 would not affect the statement made by respondent No.4 in Form `L' filled on 15.4.2008. Therefore, it cannot be said that respondent No.4 had deliberately suppressed the information regarding his salary. [para 40] [906-F-G; 907-A-D]

2.6 Respondent No.4 in his capacity as a Joint Secretary/Additional Secretary to Government of India was required to state whether he was privy to any sensitive information in his official capacity. The information would be required if the Officer was in receipt of information whilst working as Officer in the Government and is aware of the sensitive proposals or other decisions which are not otherwise known to others and which can be used for giving undue advantage to the Organization in which he is seeking a future position. In the case of respondent No.4, he was already working as CMD-cum-CEO in the UTI AMC. Therefore, there was no question of respondent No.4 having been privy to any sensitive information with regard to UTI AMC at the time when he was posted as Joint Secretary/Additional Secretary in the Government of India. In fact, respondent

No.4 in the same Form No. L at Sr.No.7-C had stated that he was earlier working as Director in UTI AMC and was appointed as CEO cum MD from 3.11.2005 and CMD from 13.1.2006. The declaration is in fact in conformity with the 3rd proviso to Rule 26 of All India Service (DCRB) Rules which envisages that an Officer in deputation of an Organization under Cadre rules can be absorbed in the same Organization post VRS. The word "Service" in Sr. No. 9(ii) in Form L is in contrast to the work of proposed Organization. [para 41] [907-E-H; 908-A-B]

2.7 It can also not be said that the deputation was in violation of policy of not allowing deputation to an Officer who has over-seen the Organization to which he was being deputed. Respondent No.4 had no role to play in the grant of approval of deputation, once he fully disclosed that he had been working as Joint Secretary Banking. It can also not be accepted that whilst respondent No.4 worked as Joint Secretary Banking he can be said to have over-seen the Organization of UTI AMC. [para 42] [908-C-D]

2.8 UTI AMC cannot be said to be a Government company. It was for this very reason that respondent No.4 had to make a request for VRS to seek re-employment in a Commercial Organization.The Central Government transferred its entire share holding in UTI AMC to Life Insurance Corporation, Punjab National Bank, Bank of Baroda and SBI. The entire consideration for the aforesaid transfer was received by the Central Government. Therefore, it becomes quite evident that UTI AMC is not a "Government Company" u/s 617 of the Companies Act. In the affidavit filed, this has been the consistent stand taken by the Central Government and the CAG in various writ petitions filed by the petitioner. In a company like the UTI AMC, it is for the shareholder on the Board to decide what process [illegible]n

to appoint. When the selected candidate is not a government employee having a lien on a government job, then the government would have nothing to do with the selection process. [para 43] [908-G-H; 909-A-E]

2.9 As regards the grievance of the petitioner that respondent No.4 had made a mis-statement in Column No.7F of Form `L' whilst giving information as to whether the post which has been offered to him was advertised, it is significant to note that in reply to the said question, respondent No.4 categorically stated that such higher-level posts are generally not advertised. The statement made by respondent No.4 that such higher posts are generally not advertised, cannot be said to be a misleading or a false statement. Keeping in mind the contribution made by him and the needs of the Company, the shareholders had made the offer to him. In any event, it would be the decision to be taken by the Board of Directors. Respondent No.4 would clearly have no say in the matter. [para 45-46] [910-D-E; 911-A-B, E]

2.10 The Government of India never adopted the policy of not sending IAS Officer on deputation to UTI AMC and informed the Parliament in its 3rd action taken report submitted in December, 2004. The decision to grant approval of commercial employment post retirement under r.26 was taken by the Government of India. The post was filled up by Board of Directors and shareholders of UTI AMC. It was entirely for them to adopt such policy of appointment as they deem fit. Respondent No.4 has complied with all the conditions of deputation, and as such, there is nothing which would render him a person of not high integrity. The Appointment Committee of the Cabinet (ACC) had approved the extension of tenure of respondent no.4 as CMD UTI AMC till 31.5.2008. [para 48] [914-B-D]

2.11 Therefore, there is no substance in the alleged irregularities regarding deputation of respondent No.4,

the alleged misstatement/non-disclosure about his pay scale/sanctioned emoluments as disclosed in the letter dated 16.4.2007; the alleged appointment of respondent No.4 so as to be contrary to recommendations made by the AAPTE Committee on July, 2007; the alleged false declaration under r.26(3)(ii) of AIS Death-cum-Retirement Rules that in the last three years of his career he had not been privy to sensitive and strategic information of UTI AMC; the alleged false statement about advertisement of higher-level posts. [para 49] [914-E-G]

Was the recommendation and appointment of respondent no. 4 as Chairman, SEBI vitiated by MALA FIDE exercise of powers?

3.1 Undoubtedly, if the allegations of mala fide are established, it would vitiate the selection procedure, recommendation and the appointment of respondent no. 4 as the Chairman, SEBI. But the burden of proving the allegations of mala fide would lie very heavily on the petitioner. It was incumbent on the petitioner not only to make specific allegations, but to produce very strong evidence to lead to a clear conclusion that the selection was actuated by mala fide. [para 50 and 61] [914-H; 915-A-B; 923-E]

Purushottam Kumar Jha Vs. State of Jharkhand & Ors., **2006 (1) Suppl. SCR 215 = 2006 (9) SCC 458;** *Indian Railway Construction Co. Ltd. Vs. Ajay Kumar,* **2003 (2) SCR 387 = 2003 (4) SCC 579; and** *Saradamani Kandappan Vs. S. Rajalakshmi & Ors.* **2011 (8) SCR 874 = 2011 (12) SCC 18;** *S. Partap Singh Vs. State of Punjab* **1964 SCR 733 and** *E.P. Royappa Vs. State of T.N.* **1974 (2) SCR 348 = 1974 (4) SCC 3 - referred to.**

3.2 This Court holds that there was no mala fides involved in denying the extension to the earlier Chairman. It has been rightly pointed out that no illegality was committed in making the amend s

pertaining to the selection of Chairman/WTM of SEBI. It is borne out from the record that prior to 23.7. 2009, there was no rule on the procedure to be followed in the selection of Chairman/whole time Member of SEBI. The selection procedure for the Chairman of SEBI in 2008 was approved by the Finance Minister on 2.11. 2007. This procedure envisaged that the selection has to be made on the recommendation of the high powered Search Committee. The composition of the Search Committee was changed on the orders of the Finance Minister. It has also been pointed out that the amendment of the rules had no relevance to the consideration of recommendation of respondent no. 4 to be appointed as Chairman of the SEBI. [para 54-55] [916-F; 917-F-H; 918-A]

3.3 The amendment in r.3 of the SEBI (Terms and Conditions of Service and Members) Rules, 1992 was to provide for more participation by the expert members. Therefore, sub-r. (5) of the aforesaid rules was incorporated which requires that recommendation of Search-cum-Selection Committee will consist of Cabinet Secretary, Department of Economic Affairs, Chairman, SEBI for selection of WTM and two eminent expert from relevant field. The record indicates that respondent No.4 was unanimously placed at Sr.No.1 by the Search-cum-Selection Committee.[para 55] [918-C-D, G]

3.4 The petitioner has falsely contended that rules concerning the constitution of Search-cum-Selection Committee amended through notification dated 7.10.2010 were to ensure the selection of respondent no. 4. The rules were amended in exercise of the powers conferred on the Finance Minister u/s 29 of the SEBI Act. The said notification issued by the Finance Ministry has not been challenged by the petitioner. It is also significant to note that prior to the amendment, the procedure for selection of Chairman, SEBI was determined by the Finance Minister. From perusal of the entire record, it cannot be

said that the petitioner has made out a case of mala fide to vitiate the proceedings of the Search-cum-Selection Committee. [para 56] [919-B-D]

3.5 Applications for filling the post of Chairman were invited on 10.9.2010. Respondent no. 4 did not apply in response to the said invitation. Out of the 19 applicants, in the first meeting of the Committee held on 2.11.2010, five were short listed. In addition, the Search-cum-Selection Committee also decided to invite respondent no. 4 for interaction, who at the relevant time, was CMD, UTI AMC. The Search-cum-Selection Committee based on the qualification, experience and personal interaction with the short listed candidates, recommended the names of respondent no. 4 and another person in that order of merit, for being considered for appointment as Chairman SEBI. There is no illegality in the procedure adopted by the Search-cum-Selection Committee. The Finance Minister proposed the appointment of respondent no. 4 as Chairman, SEBI, for an initial period of three years from the date he resumes the charge or till he attain the age of 65 years, whichever is earlier. The proposal was sent to the ACC on the express approval of the then Finance Minister. It is therefore evident that respondent no. 4 had not role to play in the whole procedure except for accepting the invitation of the Search-cum-Selection Committee for interaction. [para 56-57] [919-B-C; 920-C-H; 921-A]

4.1 The charge of conspiracy has to be taken seriously as it involves the commission of very serious criminal offence u/s 120-B of the IPC. Such a charge of criminal intent and conduct had to be clearly pleaded and established by evidence of very high degree of probative value. No notice of such allegations can be taken based only on pure conjectures, speculations and interpretation of notings in the official files. [para

4.2 The appointment of respondent no. 4 is strictly in conformity with the procedure prescribed by service rules, i.e, rr. 16 and 26 of the AIS (DCRB) Rules, 1958. The official record discloses that the Chairman, SEBI is appointed by the Central Government by following an established process by the ACC headed by the Prime Minister. This is done on the basis of Search-cum-Selection Committee of the Government of India. The opinion of other independent and reputed experts in the field of Economics, Finance and Management is also taken through an institutional mechanism approved by the DOPT. The petitioner has not placed on record any material to establish that any conspiracy was hatched to ensure the selection of respondent No.4. [para 61-62] [923-F-H; 924-E-F]

State of Madhya Pradesh Vs. Narmada Bachao Andolan & Anr. **2011 (6) SCR 443 = 2011 (7) SCC 639; and** *K.D. Sharma Vs. Steel Authority of India Limited & Ors.* **2008 (10) SCR 454 = 2008 (12) SCC 481 - referred to.**

5. As regards the maintainability of the writ petition as a public interest litigation, the petitioner has unjustifiably attacked the integrity of the entire selection process. The petition does not satisfy the test of utmost good faith which is required to maintain public interest litigation. In the facts of the instant case, the petitioner cannnot justify invoking the jurisdiction of this Court under Art. 32 of the Constitution of India. [para 63] [926-H; 927-A, D, E-F]

Case Law Reference:

2011 (4) SCR 445	**referred to**	**para 13**
2011 (6) SCR 443	**referred to**	**para 26**
2008 (10) SCR 454	**referred to**	**para 26**
2012 (12) SCR 1	**referred to**	**Para 29**

2009 (4) SCR 448	**referred to**	**Para 39**
1991 (3) Suppl. SCR 534	**referred to**	**Para 39**
2006 (1) Suppl. SCR 215	**referred to**	**Para 50**
2003 (2) SCR 387	**referred to**	**Para 50**
2011 (8) SCR 874	**referred to**	**Para 50**
964 SCR 733	**referred to**	**Para 51**
1974 (2) SCR 348	**referred to**	**Para 51**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 374 of 2012.

Under Article 32 of the Constitution of India.

Goolam E. Vahanvati, AG, Mohan Parasaran, SG, Paras Kuhad, ASG, Harish Salve, Altaf Ahmed, Harish N. Salve, Prashant Bhushan, Rohit Kumar Singh, Prashant Kumar, Anurag Sharma, Joseph Pookkatt (for Ap & J Chambers), Rupesh Kumar, Jitin Chaturvedi, Shalaj Mridul, Sushma Suri, Rajesh Inamdar, Saniya Hasani, Suruchi Suri, Devdatt Kamat, Chanchal Kumar Ganguli, Bhargava V. Desai, Shreyas Mehrotra, Gopal Singh, Manish Kumar, Chandan Kumar, T.A. Khan, Syed Tanweer Ahmed, B.V. Balram Das for the appearing Parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This writ petition has been filed by one Mr. Arun Kumar Agrawal under Article 32 of the Constitution of India; seeks the issuance of a writ of *quo warranto* or any other direction against Mr. U.K. Sinha, Chairman of the Securities and Exchange Board of India (hereinafter referred to as 'SEBI') and his consequential removal from the post of Chairman.

2. Stated concisely, the petitioner challenges the appointment of respondent No.4 on the following grounds :-

(a) Mr. Sinha failed to fulfill one of the eligibility condition as laid down in sub-section (5) of Section 4 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act'), as well as the qualification contained in Government communication, which required that the Chairman shall be a person of high integrity.

(b) The appointment of respondent No.4 is the result of manipulation, misrepresentation and suppression of vital material before the Search-cum-Selection Committee and the Appointment Committee of the Cabinet (hereinafter referred to as 'ACC').

(c) The appointment of respondent No.4, a Chairman of SEBI, is mala fide.

3. Mr. Prashant Bhushan, learned counsel appearing for the petitioner, has made detailed submissions with regard to the manipulations and the maneuvers indulged in by the petitioner with the active connivance of some other persons to successfully mislead the Search Committee as well as the ACC. He has highlighted that the petitioner does not fulfill the requirements of Section 4(5) of SEBI Act which provides as under:-

"(5) The Chairman and the other members referred to in clauses (a) and (d) of sub-section (1) shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities marker or have special knowledge or experience of law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board."

4. Giving the factual background, he referred to the communication dated 10th September, 2010 of the Department

of Economic Affairs inviting the application for the post of Chairman SEBI. In paragraph 3 of the aforesaid communication which provided that "keeping in view the role and importance of SEBI as a regulator, it is desirable that person with high integrity, eminence and reputation preferably with more than 25 years of professional experience and in the age group of 50 to 60 years may apply". Learned counsel submits that Mr. Sinha lacks integrity which is well illustrated by a reference to events leading to his appointment.

5. He points out that Mr. Sinha was Joint Secretary, Banking till May, 2002. He became Joint Secretary, Ministry of Finance in June, 2002. Thereafter, he held the post of Joint Secretary, Capital Market, Ministry of Finance from 1st July, 2003. Whilst working as such he was appointed as Additional Director on the Board of Unit Trust of India Asset Management Company Ltd. (hereinafter referred to as 'UTI AMC'). Thereafter, on 3rd November, 2005 Mr. Sinha was appointed as CEO and MD of UTI AMC on deputation for two years. According to Mr. Bhushan, Mr. Sinha was wrongly sent on deputation under Rule 6(2)(ii) of the IAS (Cadre) Rules, 1954, which is applicable in case of deputation in an international organization, NGO or body not owned by the Government. Since the equity share capital in UTI AMC is held by the State Bank of India, Life Insurance Corporation, Bank of Baroda and Punjab National Bank, each holding 25% of the shares, it could not be said that UTI AMC was not controlled by the Government. According to Mr. Bhushan, Mr. Sinha ought to have been sent on deputation under Rule 6(2)(i) of the IAS (Cadre) Rules, 1954 which is applicable for deputation of an IAS officer "under a company, association or body of individuals, whether incorporated or not, which is wholly or substantially owned or controlled by the State Government, Municipal Corporation or a local body by the State Government on whose cadre she/he is borne." According to Mr. Bhushan, Mr. Sinha was deliberately sent on deputation under Rule 6(2)(ii) for ulterior motive. He points out that the deputa

against the accepted assurance given to the J.P.C. on the appointment of CMD of UTI AMC. Mr. Sinha as Joint Secretary, Capital Market and member of the Board of UTI AMC was aware of the recommendation of JPC. He deliberately violated the recommendations. According to Mr. Bhushan, the deputation was also in violation of policy of not allowing deputation to an officer who had overseen the organization to which he was being deputed. Deputation of Mr. Sinha was also in conflict of interest as he was Joint Secretary, Banking till May 2002 and the ownership of UTI AMC was with the SBI, Bank of Baroda, PNB and LIC. According to Mr. Bhushan, Mr. Sinha was privy to sensitive information. Under the rules, Mr. Sinha was required to file affidavit/undertaking that person sent on deputation was not privy to any sensitive information.

6. Continuing further, Mr. Bhushan pointed out that on appointment as CMD, UTI AMC on 13th January, 2006, Mr. Sinha continued to get pay scale of Joint Secretary, even though he had an option under Rule 6(2)(ii) of drawing the pay of the UTI AMC or the scale of pay of the Government which is beneficial. There was no separate pay scale for CMD of UTI AMC and the same needed to be created in view of the option under Rule 6(2)(ii). On 29th January, 2007, Mr. Sinha made representation to the Government claiming that his batch cadre IAS Officer has been empanelled as Additional Secretary, therefore, his salary be fixed accordingly in the pay scale of Additional Secretary to the Government of India i.e. 22400-525-24500. On 1st March, 2007, the salary of Mr. Sinha was fixed in the aforesaid scale, with effect from 10th February, 2007. A communication was also sent on 16th April, 2007 enclosing the terms and conditions of the deputation of Mr. Sinha. It was pointed out that the member of service may opt for his grade pay or the pay of the post, whichever is more beneficial to him. It was also pointed out that the terms and conditions will be applicable with effect from 27th December, 2007. Mr. Bhushan thereafter laid considerable emphasis on the fact that on 27th September, 2007 the Board UTI AMC approved the

remuneration package of Mr. Sinha keeping in view the remuneration package of CEO in the industry, roles and responsibilities of the CMD, UTI AMC and the current surge of the salary structure in the market, as follows :-

- Fixed Pay — Rs. 10 million per annum
- Variable Pay — upto 100% of Fixed pay subject to performance and as may be approved by the Board on yearly basis.

7. According to Mr. Bhushan, this decision was taken on the basis of the recommendation made by the Aapte Committee in July, 2007. This Committee had been set up to recommend the compensation to be paid to CMD, UTI AMC. This Committee had recommended the compensation to be paid to CMD, UTI AMC on the basis that the compensation should be market competitive to attract appropriate talent from the market.

8. According to Mr. Bhushan, the actual fact situation would show that the recommendation to appoint CMD, UTI AMC from the market was given a complete go by at the time of the appointment of Mr. Sinha in 2008, when his extension to deputation was denied. Therefore, in order to continue as CMD, UTI, AMC Mr. Sinha took voluntary retirement. Mr. Bhushan states that on 6th November, 2007 though a proposal for extension of deputation of Mr. Sinha for a period of two years was made, he was only granted an interim extension of three months till 2nd February, 2008. This was because some general issue regarding deputation under Rule 6(2)(ii) was being re-examined. On 28th November, 2007, the Consolidated Deputation Guidelines for All India Services was circulated by the Ministry of Personnel and under the Guidelines the deputation of Mr. Sinha was determined to be under Rule 6(1). He points out that under Rule 6(1) there is no option of getting remuneration as per the scheme of the

an officer is sent on deputation. On 12th December, 2007, the Finance Ministry, Department of Economic Affairs requested the Department of Personnel and Training (DOPT) to extend the deputation of Mr. Sinha for the remaining one year and nine months under Rule 6(1). On 10th March, 2008, the ACC advised the Finance Ministry (Department of Economic Affairs) that extension of tenure as CMD of UTI AMC has been granted to Mr. Sinha till 31st May, 2008 under Rule 6(1). It was indicated that upon completion of the aforesaid term he would return to his parent cadre (Bihar). A direction was issued to the Department of Economic Affairs to identify a suitable replacement of Mr. Sinha by that date. Mr. Bhushan points out that in the meantime on 25th March, 2008, the shareholders approved the emoluments of Mr. Sinha as recommended with effect from 27th December, 2006. This, according to Mr. Bhushan, was not permissible since 28th November, 2007 or at best since February, 2008 the deputation of Mr. Sinha was no longer under Rule 6(2)(ii). Mr. Bhushan points out that inspite of the recommendation of the ACC on 10th March, 2008, a recommendation was made by the Chairman of SBI on behalf of other shareholders proposing that Mr. Sinha should continue as CMD of UTI AMC even beyond 31st May, 2008. In the recommendation letter, it was proposed to offer four years tenure to Mr. Sinha as CMD of UTI AMC with effect from 1st June, 2008 or earlier without break of continuity. The letter also notices that under the existing Government Rules Mr. Sinha will be able to take this offer only if he takes voluntary retirement from the Government Service. A formal letter for extension of tenure was issued to Mr. Sinha on 11th April, 2008 by the UTI AMC. On 12th April, 2008 the Board of UTI AMC approved that the CMD can draw revised compensation with effect from 27th December, 2006.

9. Mr. Bhushan had laid considerable amount of emphasis on these facts to support the submission that although the words in the aforesaid letters give the impression that the approval of the shareholders of the pay package and the bonus was for

the future but in reality the resolution enhanced the emoluments with effect from 27th December, 2006. Mr. Sinha in fact drew emoluments on that basis with effect from 27th December, 2006. This fact, according to Mr. Bhushan, is evident from the annual return of UTI AMC for the year 2007-2008. The annual return shows his salary for the year ended 31st March, 2008 as Rs.20.12 million. The return also shows that Mr. Sinha has also been paid Rs. 4.40 million as an arrear of his salary from 27th December, 2006 to 31st March, 2007 consequent to his salary restructured with effect from 27th December, 2006. Being fully aware of all the facts and having received compensation in crores of rupees, Mr. Sinha did not disclose the same while making an application for VRS on 15th April, 2008. Whilst giving the answer to column No.5 in the form of application to accept the commercial appointment, Mr. Sinha stated Rs.22,400-Rs.525-Rs.24,500/- as his pay scale and Rs. 23,450/- as his present basic pay.

10. Mr. Bhushan pointed out that this information was necessary for getting the no-objection from the Cadre Controlling Authority and from the office from where the officer retired. Mr. Bhushan further pointed out that not only Mr. Sinha gave false information in the application for seeking voluntary retirement; he repeated the same in the counter affidavit, in response to the writ petition in this Court. According to Mr. Bhushan, the averments made in paragraph 18 of the counter affidavit are contrary to the Balance Sheet of the UTI AMC for the year 2007-2008. Mr. Bhushan emphasized that it is apparent from the annual report of UTI AMC for the year 2008-2009, 2009-2010 and 2010-2011 (10½ months), Mr. Sinha got remuneration of Rs.2.15 crores, Rs. 2.36 crores and Rs.3.62 crores, respectively. According to Mr. Bhushan again in paragraph 21 of the affidavit Mr. Sinha has tried to mislead this Court. Mr. Sinha had stated that the excessive payment of Rs. 4 crores for the year 2010-2011 was on account of severance payment. He submits that the severance payment is payable only when the concerned organization a[illegible]e.

In the case of Mr. Sinha, UTI AMC did not ask him to leave. In fact, Mr. Sinha did not even give the mandatory three months notice, and relinquished the charge without giving any opportunity to the organization to appoint another CEO. Mr. Bhushan submits that Mr. Sinha wrongly received benefits of retirement when in fact he had only resigned. He reiterated that Mr. Sinha has given false information repeatedly. He gives a false declaration under Rule 26(3)(ii) of All India Services Death-cum-Retirement Benefit Rules to the effect that in the last three years of his official career he has not been privy to sensitive or strategic information of UTI AMC. Mr. Bhushan pointed out that this statement is patently false as Mr. Sinha was already on deputation in the same organization at the time of taking VRS.

11. Mr. Bhushan also pointed out that the third deliberate mis-statement made by Mr. Sinha in the application to accept the post of CEO of UTI AMC, was to the effect that such higher level post are generally not advertised. This statement was in answer to the question whether the post on which the appointment is sought was advertised and, if not, how was the offer made. Mr. Sinha had stated that keeping in mind the contribution made by him and the needs of the company, the shareholders have made the offer to him. Mr. Bhushan submits that the statement about such higher level post not generally being advertised was against the Aapte Committee's direction. In fact, after Mr. Sinha relinquished the post, an advertisement was issued to fill the post of CMD, UTI AMC on 4th June, 2012. On the basis of the aforesaid facts, Mr. Bhushan submits that manipulation of deputation under Rule 6(2)(ii), extension of deputation, concealment of emoluments, misrepresentation and distortion of facts in the application for voluntary retirement and re-employment clearly reflect that respondent No.4 is not a man of integrity.

12. Mr. Bhushan has also made a reference to a very lengthy letter, written by one Dr. K.M. Abraham, a former Whole

Time Member of SEBI, dated 1st June, 2011, to the Prime Minister of India. In this letter, the Whole Time Member has complained that the Chairman, SEBI, Mr. U.K. Sinha is being directly influenced by the Union Minister of Finance or Smt. Omita Paul, Adviser to Finance Minister. Mr. Bhushan reiterated that the letter by Dr. Abraham contains unbiased information. The former Whole Time Member was only expressing his concern that under the leadership of Mr. U.K. Sinha the institutional integrity of SEBI is being compromised.

13. Another ground of attack on the appointment of the respondent No.4 pertains to the suppression of material facts relating to the remuneration of Mr. Sinha as CMD, UTI AMC before the Search-cum-Selection Committee and the ACC. Mr. Bhushan points out that the application form for the post of SEBI Chairman required the applicant to disclose scale of pay and basic pay of the post presently held along with service of the petitioner. The first meeting of the Search-cum-Selection Committee was held on 2nd November, 2010. The SSC short listed five candidates out of nineteen. Mr. Bhushan then points out that the second meeting of the Committee was held on 13th December, 2010, wherein the names of Mr. U.K. Sinha and Mr. Himadri Bhattacharya were recommended for the post of Chairman, SEBI in the order of merit. Mr. Bhushan further submitted that the selection of Chairman of SEBI required the approval of the ACC. The appointments recommended to the ACC have to be sent along with a standard Performa and annexures which are to be filled in by the Ministry recommending the appointment. The proposal for the appointment of Mr. Sinha was put up to the ACC by the Finance Ministry vide its confidential letter No.D.O.No.2/23/2007-RE dated 13th December, 2010. Blatantly false information is given against the column requiring details about the pay scale presently enjoyed by the applicant. In reply to this column, it is stated "not available". Against Column 6(ii), scale of pay of the post it is stated that "the chairman shall have an option to

receive pay (a) as admissible to a Secretary to the Government of India; or (b) a consolidated salary of Rs.3,00,000 per month. It was also submitted that in between the first and the second meeting of the Search-cum-Selection Committee, there were 40 days for the officials to ensure that the particulars of Mr. Sinha are verified before filling up the application form. The officials could have ascertained the particulars of his emoluments as CMD, UTI AMC. Mr. Bhushan submits that in order to mislead this Court, Mr. Sinha in paragraph 10 of the counter affidavit has given a totally false explanation that the Finance Secretary was aware of his market-bench-marked salary as CMD, UTI AMC. This, according to Mr. Bhushan, is a bald assertion without any material to substantiate the same. Mr. Bhushan submits that the other explanation given by Mr. Sinha that information relating to emoluments of CMD, UTI AMC was in public domain as full disclosure is made in the Balance Sheet of UTI AMC. It is submitted by Mr. Bhushan that such an explanation cannot possibly be accepted. The question before this Court, according to Mr. Bhushan, is not whether the person who filled up the form knew or could have known the correct emoluments drawn by Mr. Sinha. The issue is that the applicant had failed to disclose the correct particulars about his emoluments and the pay scale before the Search Committee. This misinformation was also placed before the ACC. According to Mr. Bhushan, such a manipulative person cannot be said to be a man of integrity. Mr. Bhushan, as noticed earlier, submitted that the Committee in its second meeting had recommended two names. However, the Finance Minister forwarded only the name of Mr. Sinha to the ACC for approval. Even the document which was placed before the ACC seeking approval for the appointment of Mr. Sinha mentions "not available" against the present scale of pay. Mr. Bhushan further pointed out that Mr. Sinha's total emoluments for the year 2010-2011 were over 4 crores per annum. This amount was probably more than what the bureaucrats senior to him and involved in the selection process were paid by the Government in their entire career. Mr. Bhushan, therefore,

submits that it was for this reason that Mr. Sinha manipulated that there should be no advertisement and the selection should be made through the Search route. In the case of advertisement, he would have to reveal the emoluments received by him. Relying on the aforesaid facts, Mr. Bhushan submits that since vital pieces of information was withheld from the Search Committee as well as ACC, Mr. Sinha clearly cannot be said to be a man of high integrity. The post of the Chairman, SEBI is a very important position having a bearing on the flow of investment, Indian and Foreign, economic growth and the safety of funds invested by large and small investors. Therefore, according to Mr. Bhushan, it was important that the complete facts particularly those having direct bearing on deciding the question of integrity should have been placed before the Search-cum-Selection Committee and the ACC. In support of the submission learned counsel has relied on the judgment of this Court in *Centre for PIL & Anr. Vs. Union of India & Anr.*[1]

14. The next ground of challenge of the petitioner to the appointment of Mr. Sinha as the Chairman of SEBI is that it is vitiated by mala fide. Mr. Bhushan pointed out that to accommodate Mr. Sinha the earlier Chairman of SEBI was denied extension in tenure. The SEBI (Term and Condition of Service of Chairman and Members) Rules were amended on 23rd July, 2009 not to extend the term of the Chairman and the WTM from three to five years. The Director of Capital Market Division put up a proposal on 2nd September, 2009 for aligning the terms of the Chairman and WTM by giving two years extension and the same was endorsed by the Finance Secretary. After following the due procedure, consent for the extension of the concerned persons was taken and the proposal for extension of tenure was recommended to the DOPT by the Director, Capital Market Division by letter dated 16th November, 2009. According to Mr. Bhushan, from that stage manipulation started with the active cooperation of Ms. Omita Paul, the then Advisor in the Finance Ministry. On 25th

1. (2011) 4 SCC 1.

November, 2009, she called for the file relating to the recommendation for extension, in the term of the Chairman and the Whole Time Member. The file was sent to her by the Finance Secretary on 27th November, 2009 and was seen by her on 30th November, 2009. It was again sent to the Advisor for her perusal on 16th December, 2009 and noting was made by her on 21st December, 2009 drawing the attention of the Finance Minister to Page 22 regarding the composition of the SEBI Board and the present tenure of the Board. Mr. Bhushan submits that the note was written in such a way by Ms. Omita Paul, the then Finance Minister reversed his earlier decision to accord extension to the then Chairman. Subsequently, the orders were issued to start the selection process for the Chairman on 10th August, 2010. Suggestion of giving further extension to the existing officers was overruled. Mr. Bhushan submits that the justification given by the respondents in the counter affidavit for non grant of the extension is wholly fallacious. He submits that the justification that earlier Chairman was not granted extension as his name was reported in newspapers of being involved in NSDL Scam. According to Mr. Bhushan, there is no such noting in the official files. Mr. Bhushan also emphasized that the real reason for denial of extension to the former chairman is that it was at his insistence that investigations were being held against the Sahara and RIL. There was a complaint pending with regard to insider trading relating to RIL and Reliance Petroleum in which over Rs.500 crores were made in four days of trading in September, 2007. Mr. Bhushan then submits that in order to facilitate the selection of Mr. Sinha there was illegal and arbitrary change in composition of Search-cum-Selection Committee. Ms. Omita Paul ordered two new names of her own to be appointed as experts of eminence on the Selection Committee. She also suggested Secretary (Financial Services) over and above the two experts. Thus, according to Mr. Bhushan, three of the five members of the Search-cum-Selection Committee were hand picked by Ms. Paul. In order to include Secretary (Financial Services) in the Search Committee, Rule 5 of the Rules, 2010

was amended to include clause (e) under which two nominees of the Finance Minister were included. In such a way, primacy was given to the Finance Minister. Mr. Bhushan submits that the record clearly shows that the object of the entire exercise of changing the Rules was to ensure that the Committee desired by the Advisor Ms. Omita Paul remains unchanged. It was also done probably to ensure that the ex-officio Chairman, the Cabinet Secretary, remains the only member unconnected with the Finance Minister. Mr. Bhushan submits that Ms. Omita Paul in the reply affidavit has admitted that her role was merely advisory. Mr. Bhushan submits that in spite of the admitted position that her role was merely advising without having any authority to process the matter or take a decision, the files relating to further extension or composition of Search-cum-Selection Committee were regularly sent to her. The composition of the Search Committee was changed at her behest. Mr. Bhushan then submitted that the respondents have sought to justify the selection of Mr. Sinha on the basis that he was earlier unanimously selected by the Search-cum-Selection Committee in 2008, on the same post. If that was so, it is surprising that the Government, in fact, appointed Mr. C.B. Bhave as the Chairman, SEBI, who had neither applied for the post nor appeared in the interview. He had in fact informed the Committee that he did not want to be considered for the post of Chairman, SEBI. According to Mr. Bhushan, this can hardly be a fact relevant to judge the integrity of Mr. Sinha.

15. To further establish the ground of a mala fide, Mr. Bhushan submits that the post of CMD of UTI AMC was kept vacant for 17 months to accommodate the brother of respondent No.6 Ms. Omita Paul. He points out that shortly after the appointment of Mr. Sinha in mid-February reports started appearing in the press from April, 2011, that the brother of Ms. Omita Paul, Jitesh Khosla, was the front runner for the post of UTI AMC because he had the backing of the Finance Minister. These reports also stated this was being resisted by a foreign investor and whose consent was neces of

CMD UTI AMC continued to remain vacant for 17 months because the brother of Omita Paul could not be appointed to the post. According to Mr. Bhushan, the whole episode of appointment of Mr. Sinha as CMD, UTI AMC and the proposed appointment of Mr. Jitesh Khosla was adversely commented upon by the Joint Parliamentary Committee, because the recommendations of the Committee were ignored. The Joint Parliamentary Committee had gone into the entire UTI Scam as a result of which massive losses were incurred by the Government investors and tax payers. The report in paragraph 5 made the following recommendations :-

> "(V) Government has stated that a professional Chairman and Board of Trustees will manage UTI-II and that advertisements for appointment of professional managers will be issued. The committee recommended that it should be ensured that the selection of the Chairman and professional managers of UTI-II should be done in a transparent manner, whether they are picked up from the public or private sector. If an official from the public sector is selected, in no case should deputation from the parent organization be allowed and the person chosen should be asked to sever all connections with the previous employer. This is imperative because under no circumstance should there be a public perception that the mutual fund schemes of UTI-II are subject to guarantee by the Government and will be bailed out in case of losses."

16. Mr. Bhushan submits that the aforesaid recommendations were blatantly ignored in the selection of Mr. Sinha. He further pointed out that neither Mr. Sinha nor Mr. Jitesh Khosla were professionals. Neither of them met any of the four criteria in the advertisement inserted for the post of UTI CMD in newspaper dated 4th June, 2012. In fact, the entire manipulation and mala fide exercise, according to Mr. Bhushan, is exposed by the advertisement that was released after the brother of Ms. Omita Paul, Advisor opted out of the race

because the tenure of Ms. Omita Paul, Advisor was coming to an end on account of it being co-terminus with that of Finance Minister. He emphasized that it was only then the advertisement was released fulfilling the commitment given to the JPC by the Government in 2002.

17. In reply to the preliminary objection raised by the respondents in the counter affidavit/replies, he submits that they deserve to be ignored. According to Mr. Bhushan, the respondents including the Government have made concerted attack on the public spirited attitude of the petitioner. He is wrongly labeled as a person who has been set up by persons or entities having vested interests. It is also wrongly alleged that the petitioner had similarly challenged the appointment of another past Chairman of SEBI which was decided against him with imposition of costs. The respondents have also wrongly stated that this is the 4th similar petition on a similar issue. Re-enforcing high credentials of the petitioner, Mr. Bhushan submits that he has filed several notable public interest litigations that have unearthed corruption and financial irregularities. The appointment of the petitioner as Advisor to Prasar Bharti benefited the organization by about Rs. 20 Crores. He was the original complainant in the 2G spectrum scam which eventually led to the registration of the FIR by the CBI. This fact has been noted by this Court in the 2G case. On the basis of the above, Mr. Bhushan submits that the petitioner has given his time and forgone earnings selflessly in the true spirit of Article 51A of the Constitution and continues to unravel financial scams because of the paucity of people who both understand and are willing to take risks and make sacrifices. Mr. Bhushan then points out that the petitioner had previously challenged the appointment of a previous SEBI Chairman, but it was not related to the integrity of the then Chairman. In fact, the then Chairman was a person with high integrity and compassion. However, his leniency in trusting the sharp players in the market resulted in lot of scams in the first three years of his tenure. Therefore, the petitioner [illegible] e

extension that had been given to the then Chairman SEBI on the ground that the Government should reassess his performance after three years. The writ petition was dismissed. The Chairman was given yet another extension in 2000 to make him the longest serving Chairman. What followed was the largest stock market scam in which the investors and the government lost tens of thousands of crores and the entire JPC report is the testimony to the scam. The Government and tax payer lost over Rs.10,000 crores in the UNIT 64 scam. Similarly Mr. Bhushan submits that the respondents have wrongly taken the preliminary objection that earlier two writ petitions having been filed by the petitioner challenging the appointment of respondent No.1 having been dismissed as withdrawn. He further submits that the respondents have wrongly leveled allegations that this petition is at the behest of some other person who is interested to continue as the Chairman of SEBI. The petitioner has not prayed for the reinstatement of any of the previous incumbents. The petitioner only prays for appointment of a person as the Regulator who should be a person of high integrity functioning in a transparent manner. Mr. Bhushan submits that although the respondents claim that the petitioner has suppressed material facts, the suppression of facts by respondent No.4 is not treated with the same amount of concern.

Respondents' Submissions:

18. In response to the submission made, learned Attorney General Mr. G.E. Vahanvati, appearing for the Union of India, has submitted that public interest litigation jurisdiction is based on the principle of Uberrimae fide which means 'utmost good faith'. Therefore, before the petitioner can attack the integrity of respondent No.4, he would have to establish his own good faith in filing the present writ petition. He further submits that this is a very unfair petition. Documents have been presented before the Court in a very selective manner. The petitioner has admitted the suppression of earlier petition but he has tried to

explain it by giving some excuses. The submission of the petitioner that the petition was dismissed on the pleadings has been contended by Mr. Vahanvati to be totally without any basis. This is evident from his letter to the Registrar sent in August, 2000. He stated that Writ Petition (C) No.69 of 2012 deals with Cairn-Vedanta deal and it has nothing to do with the present writ petition. Then it is stated that there is one similar matter filed by some other person which is pending before this Court which is W.P. (C) No.246 of 2012. The petitioner never mentioned the earlier petitions filed by him which were dismissed. The objection taken is that the petition deserves to be dismissed for suppression of earlier petition. The letter given to the Registrar gives the totally distorted version. Similarly, the petitioner has distorted the entire sequence of events with regard to the deputation of Mr. Sinha.

19. Mr. Vahanvati points out to paragraph 34 of the petition and the emphasis placed by the petitioner that "within a period of a day the emoluments too increased from around six lacs per annum to one crore per annum". It is submitted that the deputation of respondent No.4 commences on 3rd November, 2005 he became CEO, UTI AMC on 27th December, 2006. The letter dated 16th April, 2006 which is very relevant to the issue has been withheld by the petitioner. Referring to the affidavit of Mr. Sinha, he submits that all other information has been given according to law. The terms and conditions for deputation clearly show that Mr. Sinha was permitted to opt for his grade of pay or pay scale whichever is more beneficial for him. The recommendations made by the Aapte Committee were taken into notice when extension of tenure of Mr. Sinha was approved by the Board of Directors UTI AMC on 17th September, 2007. Actual sanction came on 11th April, 2008, as the approval of the Bank of Baroda did not come till 29th March, 2008. Therefore, there was no approval prior to 11th April, 2008 of the compensation of Rs.1 crore per annum alongwith the related payment of bonus of Rs. 1 crore. Similarly, it is stated by Mr. Vahanvati that submis[illegible]n

for voluntary retirement was done four days after the approval on 15th April, 2008. Until then, the petitioner had been in receipt of pay scale which was duly sanctioned on the post held by him in the Government. Therefore, the petitioner has unnecessarily tried to create an impression that there has been any deliberate misrepresentation or concealment of fact by respondent No.4. In the form of application to accept commercial appointment, respondent No.4 had clearly stated that he has been working as the Director/CEO UTI AMC since 3rd November, 2005 till date. Respondent No.4 had to state the pay scale of the post and the pay drawn by the officer at the time of the retirement which in his case was of Rs.22,400-535-24,500. Respondent No.4 had clearly mentioned his present basis pay as Rs.23,450/-.

20. Learned Attorney General submitted that the petitioner has wrongly alleged that respondent No.4 had given a false declaration that he was not privy to any sensitive information. This would clearly only indicate that the respondent No.4 has to disclose that he was not privy to any sensitive information received in his official capacity. Learned Attorney General submits that the petitioner in fact has an absurdity of facts with regard to compensation which were placed before the Ministry of Finance on 1st May, 2008. The Finance Minister approved the proposal. It was specifically observed that there is no conflict of interest between the Government of India and UTI AMC. On 17th April, 2008, Department of Personnel and Training sent a comprehensive note with regard to the application of respondent No.4 in the prescribed format to seek permission under Rule 26 of the All India Services (DCRB) Rules, 1958 to join the Company i.e. UTI Asset Management Company Ltd. on regular basis, post voluntary retirement. The proposal was thoroughly examined and duly approved by all the authorities. Learned Attorney General drew our attention to paragraph 30 of the petition and submitted a list of documents. The petition has given a twist in the tale. This has been done, according to learned Attorney General, to give the same controversy a new

flavour. He submits that the allegations about the pattern of JPC directions are false. The same petitioner had challenged Mr. Mehta's appointment earlier. It is the submission of learned Attorney General that public interest litigation cannot be filed irresponsibly. It has to be handled very carefully. It cannot be used as an AK-47 with the hope that some bullets will hit the target. The allegations of the petitioner that the rules were deliberately amended to hand pick Mr. Sinha are without any basis. In fact, there was no illegality committed in changing the composition of Search-cum-Selection Committee. Prior to 23rd July, 2009 there was no rule on the procedure to be followed for the selection of Chairman/WTM of SEBI. Therefore, before July, 2009 selections were made as decided by the Finance Minister from time to time. However, for the selection of the SEBI Chairman in 2008 the then Finance Minister had approved on 2nd November, 2007 that the High Powered Search Committee (later notified as the Search Committee) which had four members and one Chairman. The Finance Minister noted that there should be one more outside expert. Accordingly, Dr. S.A. Dave, Chairman CMIE, was nominated as the Member. Therefore, to say that the amendment of the rules has been made just to ensure that balance was tilted in favour of the Finance Minister is without any basis.

21. Learned Attorney General also pointed out that the Search-cum-Selection Committee in its meeting held on 29th January, 2008 had unanimously short listed two names in the following order: (1) Mr. U.K. Sinha and (2) Mr. J. Bhagwati. However, notwithstanding the recommendation of Mr. Sinha by the Selection Committee, Shri Bhave was appointed as Chairman, SEBI on 15th February, 2008. In 2009, a statutory system was established for selection of Chairman/Whole Time Member of the SEBI. The proposal was also placed to amend Rule 3 of the Securities & Exchange Board of India (Terms and Conditions of Service of Chairman and Members) Rules, 1992 to include the provision relating to procedure to be followed for the selection of Chairman/WTM of SE y

incorporating sub-rule (5) which required the recommendation of the Search-cum-Selection Committee consisting of Cabinet Secretary, Department of Economic Affairs, Chairman, SEBI for selection of WTM and two experts of eminence from the relevant field. When it was decided in 2010 to initiate action for the fresh selection for the post of Chairman, SEBI two experts of eminence from the relevant field were Shri Suman Bery, Director General, National Council of Applied Economic Research (NCAER) and Prof. Shekhar Choudhary, former Director, IIM Calcutta. The composition of the Search-cum-Selection Committee was sent to the Department of Personnel & Training for approval. However on 23rd September, 2010, Department of Personnel and Training pointed out that inclusion of the Secretary Financial Services was not within the Rules as amended on 23rd July, 2009. Therefore, the matter was again referred to the Ministry of Law & Justice. During the discussion that was held with the Ministry of Law, it was suggested that there could be an amendment to the rule based on the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963. Under these rules, the Selection Board inter alia consists of a nominee of the Ministry of Law as well as such other persons if any, not exceeding two, as the Law Minister may appoint. It was in these circumstances that the proposal to amend the 1992 Rules was approved.

22. The Search-cum-Selection Committee after scrutinizing the qualification and experience of the short listed candidates unanimously placed respondent No.4 first in the order of merit. The impression sought to be given wrongly by the petitioner is that respondent No.4 was placed at No.2 and Mr. Bhattacharya was at No.1. This is a deliberate distortion by the petitioner.

23. With regard to the role played by Ms. Omita Paul, learned Attorney General submitted that in fact the present petition is a mala fide attempt to resurrect the challenge earlier rejected by this Court. The petition is a sheer abuse of the process of law. The petitioner is guilty of making reckless

allegations against two highly respected dignitaries who were appointed expert members of the Selection Committee. Learned Attorney General also submitted that the submissions with regard to the non extension of tenure of Mr. Bhave are totally baseless and need to be ignored. He makes a reference to a detailed explanation given in the affidavit filed by the UOI. The term of Mr. Bhave was not extended to avoid the Government being unnecessarily involved in a scandal. In the earlier petition (W.P. No. 340 of 2012), the petitioner has sought an extension to continue the tenure of Mr. Bhave for 5 years which was withdrawn. Prayer No.2 in the W.P.(C) No.340 of 2011 was as follows :

> "Issue a writ of mandamus or any other appropriate writ, order or, direction to quash and declare void constitution of sub-committee of the Search-cum-Selection Committee under Shri U.K.Sinha, Chairman SEBI for conducting interview to the post of whole time members and proceedings/recommendation thereof."

24. This would clearly ensure that as soon as Mr. Sinha's appointment was declared void, Mr. Bhave would continue as a Chairman. This is evident from Prayer 5 which is as under :

> "Issue a writ of mandamus or any other appropriate Writ, order or direction to direct Respondent Nos.1 & 2 to act in accordance with the Government of India Notification No.2/106/2006-RE, dated 23rd July, 2009 which stipulates enhancement of the tenure of existing Chairman and Whole Time directors of SEBI from three (3) to five (5) years."

25. Similarly, Writ Petition (C) No.392 of 2011 again repeats the prayer which was made in the earlier writ petition. It was submitted by the learned Attorney General that the present writ petition is a camouflage for the earlier writ petitions which were dismissed. Learned Attorney General submitted that the submission of Mr. Bhushan that why a person who was earning crores, would expect a position y

to be paid lacs, is too absurd to be even taking cognizance of. Respondent No.4 accepted the Chairmanship of SEBI as a matter of national duty and as a matter of honour. Finally, learned Attorney General submitted that in the interest of justice the tendency among the petitioners to make wild allegations in public interest litigation needs to be curbed.

26. Mr. Harish Salve, learned senior counsel and Mr. Rajesh Dwivedi appearing for respondent No. 4 have also raised a preliminary objection on the ground of maintainability. According to Mr. Salve, the writ petition is not maintainable because it is not filed in public interest. In fact, the writ petition has been filed as surrogate litigation on behalf of an individual who was very anxious to continue as Chairman, SEBI, namely Mr. C.B. Bhave. Secondly, Mr. Salve submits that the writ petition is liable to be dismissed as it does not make a candid disclosure of all the facts which are relevant for the adjudication of the issues raised. Learned senior counsel submits that a litigant is duty bound to make full and true disclosure of the facts without any reservation, even if they seem to be against them. In support of this proposition, he relies on *State of Madhya Pradesh Vs. Narmada Bachao Andolan & Anr.*[2] and *K.D. Sharma Vs. Steel Authority of India Limited & Ors.*[3]. The factual basis for the aforesaid submission is that the petitioner had filed a writ petition in the Delhi High Court against the then Chairman, SEBI, Mr. D.R. Mehta, which was dismissed with cost. A Special Leave Petition against the same was dismissed. However, this Court reduced the cost. This fact is deliberately suppressed. Writ Petition No. 340 of 2011 on the same issue was dismissed by this Court. Dismissal of these petitions has also been suppressed by the petitioner. Mr. Salve reiterates the submissions of the Attorney General that public interest litigation is founded on the principle of uberrima fide, i.e., the utmost good faith of the petitioner. To buttress his submission, learned senior counsel relied on *S.P. Gupta's*

2. (2011) 7 SCC 639.

3. (2008) 12 SCC 481.

case. This petition is motivated by ill will, and the moving spirit behind the petition is Mr. C.B. Bhave. He reiterated the submissions of the Attorney General that Mr. C.B. Bhave and the Whole Time Member Dr. K.M. Abraham were aggrieved by the non-grant of extension to them, on the posts occupied by them, in the light of change in the rules. In fact, the petitioner, in his submission, has made detailed reference to the motivated complaint made by the Whole Time Member Dr. K.M. Abraham about the functioning of the new Chairman, i.e., Mr. U.K. Sinha. This was only because Mr. Bhave and Mr. Abraham were upset about the non-extension of tenure of Mr. Bhave. Apart from the change of rules, the extension was not granted to Mr. Bhave for his lapses in dealing with the IPO Scam of 2005 when he was the Chairman of NSDL.

Conclusions:

27. We have considered the submissions made by the learned counsel for the parties. Although all the respondents have raised the preliminary issue about the maintainability of the writ petition, we shall consider this submission after we have considered the issue on merits. The foremost issue raised by the petitioner and emphasized vehemently by Mr. Parshant Bhushan is that respondent No.4 lacks the integrity and does not meet the eligibility conditions laid down in sub-section (5) of Section 4 of the SEBI Act. Additionally, respondent No.4 does not fulfil the conditions contained in communication of the government dated 10th September, 2010 which emphasizes, keeping in view the role and importance of SEBI as a regulator, that it is desirable that only a person with high integrity and reputation should be appointed as Chairman of SEBI.

28. We have narrated the sequence of events relied upon by the petitioner to establish that respondent No.4 is not a man of high integrity. We have also narrated how the respondents have, with equal vehemence, countered the submissions made on behalf of the petitioner. All the respondents have submitted that the writ petition filed by the petitioner is motivated and

on the ground of maintainability alone. As noticed earlier, we shall consider the preliminary objections later.

29. We agree with Mr. Bhushan that SEBI is an institution of high integrity. A bare perusal of the SEBI Act makes it apparent that SEBI was established to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. In fact, the SEBI Act gives wide ranging powers to the Board to take such measures as it thinks fit to perform its duty to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. These measures may provide for regulating the business in stock exchanges and any other securities markets. Further measures are set out in Sections 11(1), (2)(a to m) to enable SEBI to perform its duties and functions efficiently. Section 11(2)(a) provides that the Board may take measures to undertake inspection of any book, register, or other document or record of any listed public company or a public company which intends to get its securities listed on any recognised stock exchange. The Board can exercise its power where it has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market. To enforce its directions, the Board has powers under Section 11(4) to issue any suspension/restraint orders against the persons including office bearers of any stock exchange or self regulatory organisation. It can impound and retain the proceeds or securities in respect of any transaction which is under investigation. The wide sweep of the powers of SEBI leaves no manner of doubt that it is the supreme authority for the control and regulations and orderly development of the securities market in India. It would not be mere rhetoric to state that in this era of globalisation, the importance of the functions performed by SEBI are of paramount importance to the well being of the economic health of the nation. Therefore, Mr. Bhushan is absolutely correct in emphasising that the Chairman

of SEBI has to be a person of high integrity. This is imperative and there are no two ways about it. The importance of the functions performed by SEBI has been elaborately examined by this Court in the case of *Sahara India Real Estate Corporation Ltd. & Ors. Vs. Securities and Exchange Board of India & Anr.*[4] Justice Radhakrishnan, upon examination of the various provisions of the SEBI Act, has observed that it is a special law, a complete code in itself containing elaborate provisions to protect interest of the investors. The paramount duty of the Board under the SEBI Act is to protect the interest of the investors and to prevent unscrupulous operators to enter and remain in the securities market. It is reiterated in paragraph 67 that SEBI is also duty bound to prohibit fraudulent and unfair trade practice relating to securities markets. Similarly, Justice Khehar in the concurrent judgment has emphasised the importance of the functions performed by SEBI in exercise of its powers under Section 11. In paragraph 303.1, it is observed as follows :-

> "303.1. Sub-section (1) of Section 11 of the SEBI Act casts an obligation on SEBI to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, "by such measures as it thinks fit". It is therefore apparent that the measures to be adopted by SEBI in carrying out its obligations are couched in open-ended terms having no prearranged limits. In other words, the extent of the nature and the manner of measures which can be adopted by SEBI for giving effect to the functions assigned to SEBI have been left to the discretion and wisdom of SEBI. It is necessary to record here that the aforesaid power to adopt "such measures as it thinks fit" to promote investors' interest, to promote the development of the securities market and to regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been

4. 2013 (1) SCC 1.

given overriding effect over sub-section (1) of Section 11 of the SEBI Act."

In sub-paras 303.2, 303.3 and 303.4, the powers of SEBI under Section 11(2), 11(3) and 11(4) have been analysed and elaborately explained.

30. It becomes clear from the above that the functions performed by SEBI are such that any malfunctioning in the performance of such functions can disturb the economy of our country. Keeping in view the aforesaid scope and ambit of the discretionary powers conferred on the Members of the SEBI Board, there is little doubt in our mind that only persons of high integrity would be eligible to be appointed as Chairman/ Member of the SEBI. Section 4(5) inter alia stipulates that the Chairman and other Members of the SEBI shall be persons of "ability, integrity and standing who have shown capacity in dealing with problems relating to securities market." Statutorily, therefore, a person cannot be appointed as Chairman/Member of the SEBI unless he or she is a person of high integrity. We, therefore, have no hesitation in accepting the submission of Mr. Bhushan that the selection and appointment of respondent No.4 could be challenged before this Court in a writ petition under Article 32 of the Constitution of India on the ground that he does not satisfy the statutory requirements of a person of high integrity.

31. Since Mr. Bhushan has relied on the judgment of this Court in *Centre for PIL & Anr.* (supra), it would be appropriate to notice the observations made in that judgment by S.H. Kapadia, C.J. in paragraph 2 of the judgment, it has been observed as follows :-

"2. The Government is not accountable to the courts in respect of policy decisions. However, they are accountable for the legality of such decisions. While deciding this case, we must keep in mind the difference between legality and merit as also between judicial review

and merit review. …. If a duty is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision-making process is got to ensure that the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of the law."

In our opinion, these observations are relevant as the procedure prescribed for the appointment of Chairman, SEBI is similar to the procedure which was prescribed for the selection on the post of Central Vigilance Commissioner. This apart, it has been emphasised that CVC is an integrity institution. The reasons for the aforesaid view are stated in paragraph 39, it has been observed as follows :-

"39. These provisions indicate that the office of the Central Vigilance Commissioner is not only given independence and insulation from external influences, it also indicates that such protections are given in order to enable the institution of the CVC to work in a free and fair environment. The prescribed form of oath under Section 5(3) requires the Central Vigilance Commissioner to uphold the sovereignty and integrity of the country and to perform his duties without fear or favour. All these provisions indicate that the CVC is an integrity institution. The HPC has, therefore, to take into consideration the values, independence and impartiality of the institution. The said Committee has to consider institutional competence. It has to take an informed decision keeping in mind the abovementioned vital aspects indicated by the purpose and policy of the 2003 Act."

32. Elaborating further, Kapadia, C.J., has further observed:

"43. Appointment to the post of e

Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision-making process of the recommendation..."

33. In paragraph 44, it was clarified that *"we should not be understood to mean that personal integrity is not relevant. It certainly has a co-relationship with institutional integrity."*

34. Keeping in view the aforesaid observations and the ratio of the law laid down, let us now examine the issue with regard to the validity of the recommendation made for the appointment of Mr. Sinha together with the issue as to whether Mr. Sinha does not fulfil the statutory requirement to be appointed as the Chairman of SEBI.

DEPUTATION : Was it irregular, illegal or vitiated by colourable exercise of power?

35. It is a matter of record that respondent No.4 was on deputation with UTI AMC since the year 2005. His deputation was duly approved by the Ministry of Finance, DOPT and the Government of Bihar, wherever applicable. Respondent No.4 was first appointed as CEO, UTI AMC by order dated 30th October, 2005. He was initially on deputation under Rule 6(2)(ii) and subsequently under Rule 6(2)(i) of the IAS Cadre Rules. The terms and conditions of service of respondent No.4 at UTI AMC were settled on 16th April, 2007. This was in conformity with the letter dated 31st October, 2005 written by the DOPT accepting the request made by the Government of Bihar in its letter dated 28th October, 2005 for approval of deputation of respondent No.4 with UTI AMC for a period of two years under Rule 6(2)(ii) of IAS Cadre Rules. The letter further indicated that terms and conditions applicable in the aforesaid deputation were under examination and would be communicated shortly. The deputation was converted from Rule 6(2)(ii) to Rule 6(2)(i), upon clarification of the applicability of the appropriate rule. This fact is noticed by the petitioner himself whilst stating that although on 6th November, 2007, the proposal for extension of

deputation of Mr. Sinha was for two years, but the extension was granted only for a period of three months until 2nd February, 2008, as an interim measure. This, according to the petitioner himself, was because some general issue regarding deputation under Rule 6(2)(ii) of IAS (Cadre) Rules, 1954 was being examined. Therefore, we are unable to accept the submission of Mr. Bhushan that respondent No.4 was in any manner responsible for being sent on deputation initially under Rule 6(2)(ii) and subsequently under Rule 6(2)(i). The "Final Consolidated Deputation Guidelines for All India Service" issued on 28th November, 2007 would also indicate that respondent No.4 cannot be said to be, in any manner, responsible for being sent on deputation under Rule 6(2)(ii). Nor can it be said that any individual officer aided Mr. U.K. Sinha to gain any unfair advantage. Therefore, it cannot be said that his deputation under Rule 6(2)(ii) was approved in colourable exercise of power.

"False Declaration in Form L"

36. A perusal of Office Memorandum dated 1st May, 2008 sent by the Department of Economic Affairs in reference to the letter sent by DoP&T seeking comments of DEA under Rule 26(3) of All India Services (Death-cum-Retirement Benefits) Rules, 1958 would show that necessary facts relating to the service of respondent No.4 in the six years prior to the response dated 1st May, 2008 had been faithfully set out. The Memorandum records the following facts:-

"Shri U.K. Sinha had been working as Joint Secretary (Capital Markets) in DEA from 2nd June, 2002 to 29th October, 2005. Before joining DEA (Main) he had been Joint Secretary in the erstwhile Banking Division (presently Department of Financial Services) from 30th October, 2000 to 1st June, 2002.

- With the approval of the competent authority, he has been on deputation to U[illegible]et

Management Company (UTI AMC) as its CMD since 3rd November, 2005, and his term there expires on 31st May, 2008. Going by his experience and qualifications, the name of Shri Sinha had been unanimously shortlisted by the Chairmen of the sponsors of UTI AMC [State Bank of India (SBI), Life Insurance Corporation of India (LIC), Bank of Baroda (BoB) and Punjab National Bank (PNB)]. The Government has approved his deputation to UTI AMC, in public interest.

- UTI AMC is a company formed by SBI, PNB, BoB and LIC, each having equal shareholding. It is registered with Securities and Exchange Board of India (SEBI) and is engaged in activities pertaining to mutual fund, portfolio management, venture fund management, pension fund and offshore fund management. The UTIAMC is managing the 'financial assets of over Rs. 50,000/- crores.

- Considering the challenges that UTI AMC faces in the prevailing market conditions and the need for continuity necessitated by the structural changes undertaken in the Company, the Chairman of SBI, in consultation with other stakeholders of UTI AMC (viz. LIC, BoB and PNB) has offered to Shri Sinha a four year tenure as CMD of UTIAMC w.e.f. 1st June, 2008, or earlier without break of continuity on the understanding that Shri Sinha will take voluntary retirement from Government service and that Shri Sinha will be entitled for salary and perquisites decided by the Compensation Committee of the Board of the Company from time to time. Hon'ble Finance Minister has approved this proposal.

2. The Department of Economic Affairs supports the request of Shri U.K. Sinha for post retirement commercial employment with UTI AMC as its CMD and certify the

following:

- The proposed employment of Shri U.K. Sinha with UTIAMC as its CMD is in public interest and has the approval of Hon'ble Finance Minister.

- There is no conflict of interest between the Government of India and the UTIAMC.

- UTIAMC, formed by SBI, PNB, BoB and LIC, is neither involved in activities prejudicial to India's foreign relations, national security and domestic harmony nor is undertaking any form of intelligence gathering prejudicial to India.

- In the prevailing financial markets condition, the fixed pay of Rs. 1 crore per annum, along with performance related payouts and other usual perks, offered by UTIAMC to Shri Sinha is considered reasonable.

- As per the information available in DEA, the service record of Shri U.K. Sinha is clear, particularly with respect in integrity and dealings with NG0s.

3. Department of personnel &, Training is accordingly requested kindly to grant requisite permission to Shri U.K. Sinha, under intimation to this Department.

4. This issues with the approval of Hon'ble Finance Minister.

(S.K. Verma)
Director to the Government of India…"

37. Keeping in view the aforesaid, we are not satisfied that the petitioner has made any false declaration in 'Form L', Clause 9 read with Rule 26(3) of All India S[illegible]-

Retirement Benefits) Rules, 1958, while working in his previous job as Chairman, UTI AMC. Mr. Bhushan has pointed out the following mis-statements and opinions :-

i. In Serial-5, pay scale for the post of Addl. Secretary was mentioned although respondent No.4 was drawing the higher pay scale approved by UTI AMC.

ii. In Serial 9, the 2nd declaration was false as respondent No.4 was working as CEO cum CMD of UTI AMC during the last 3 years on deputation and therefore he was privy to sensitive or strategic information relating to areas of interest or work of UTI AMC.

iii. A mis-statement had been made that generally such posts are not advertised and that was against the JPC Recommendation.

38. In our opinion, the respondents have rightly pointed out that respondent No.4 was on deputation in UTI AMC when he filled up Form `L'. At that time, he held lien on the post of Additional Secretary, Government of India. His application for voluntary retirement had been processed. He was, however, required to obtain approval under Rule 26 for commercial employment-post retirement. Sr.No.5 of Form `L' requires the person seeking approval to state the pay scale of the post and pay drawn by the Officer at the time of retirement. Undoubtedly, respondent No.4 was drawing the pay scale of Rs.22400-525-24500. He also stated his present pay to be Rs.23,450/-. There is no legal infirmity in the aforesaid statement by respondent No.4. It is a settled proposition of law that deputationist would hold the lien in the parent department till he is absorbed on any post. The position of law is quite clearly stated by this Court in *State of Rajasthan & Anr. Vs. S.N.Tiwari & Ors.*[5]

5. (2009) 4 SCC 700.

"18. This Court in Ramlal Khurana v. State of Punjab observed that: (SCC p. 102, para 8)

> "8. … Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed."

19. The term "lien" comes from the Latin term "ligament" meaning "binding". The meaning of lien in service law is different from other meanings in the context of contract, common law, equity, etc. The lien of a government employee in service law is the right of the government employee to hold a permanent post substantively to which he has been permanently appointed."

39. Similarly, in the case of *Triveni Shankar Saxena Vs. State of U.P. & Ors.*[6], it has been held as under:-

"24. A learned Single Judge of the Allahabad High Court in *M.P. Tewari v. Union of India* following the dictum laid down in the above *Paresh Chandra* case and distinguishing the decision of this Court in *P.L. Dhingra v. Union of India* has observed that "a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier", with which view we are in agreement."

40. In response to Column No.7 of the same Form, respondent No.4 has quite clearly mentioned that he has been offered a fixed pay of Rs. 1.00 crore per annum alongwith performance related payment and other usual perks. The letter containing the offer was enclosed with the Form. The letter clearly states that the Board of Directors, UTI AMC, after going through the prevailing practice in the Industry, has fixed a compensation of Rs.1.00 crore per annum alongwith performance related perks and other usual prerequisites. The shareholders of the UTI AMC have also indicated their

6. 1992 Supp. (1) SCC 524.

concurrence to the above compensation. It must be noticed that respondent No.4 had sought retirement from the IAS w.e.f. 15th May, 2008 to enable him to join UTI AMC on a regular basis as its CMD. Therefore, it cannot be said that at the time when he filled the Form for seeking VRS, respondent No.4 was not drawing the pay scale stated by him. We do not find much substance in the allegation that respondent No.4 had deliberately suppressed the information regarding his salary. The fact that emoluments paid to respondent No.4 w.e.f. 27th December, 2006 would not affect the statement made by respondent No.4 in Form `L' filled on 15th April, 2008. The Board of UTI AMC by resolution dated 12th April, 2008 approved that the CMD can draw revised compensation w.e.f. 27th December, 2006. Till that date, he was still placed in the scale of Additional Secretary, Government of India.

41. The next submission of Mr. Bhushan is that Mr. Sinha had wrongly stated in reply to Sr. No. 9(ii) in Form `L' that he was not privy to any sensitive or strategic information in the last three years of service. This submission of the petitioner is based only on assumption and cannot be accepted without any supporting material. Respondent No.4 in his capacity as a Joint Secretary/Additional Secretary to Government of India was required to state whether he was privy to any sensitive information in his official capacity. The information would be required if the Officer was in receipt of information whilst working as Officer in the Government and is aware of the sensitive proposals or other decisions which are not otherwise known to others and which can be used for giving undue advantage to the Organization in which he is seeking a future position. In the case of respondent No.4, he was already working as CMD-cum-CEO in the UTI AMC. Therefore, there was no question of respondent No.4 having been privy to any sensitive information with regard to UTI AMC at the time when he was posted as Joint Secretary/Additional Secretary in the Government of India. In fact, respondent No.4 in the same Form No. L at Sr.No.7-C had stated that he was earlier working as Director in UTI AMC and

was appointed as CEO cum MD from 3rd November, 2005 and CMD from 13th January, 2006. The declaration is in fact in conformity with the 3rd proviso to Rule 26 of All India Service (DCRB) Rules which envisages that an Officer in deputation of an Organization under Cadre rules can be absorbed in the same Organization post VRS. The word "Service" in Sr. No. 9(ii) in Form L is in contrast to the work of proposed Organization.

42. We are also not much impressed by the submission on behalf of the petitioner that the deputation was in violation of policy of not allowing deputation to an Officer who has over-seen the Organization to which he was being deputed. As noticed earlier, respondent No.4 had no role to play in the grant of approval of deputation, once he fully disclosed that he had been working as Joint Secretary Banking. He had no further role to play. It is a too farfetched submission that whilst respondent No.4 worked as Joint Secretary Banking that he can be said to have over-seen the Organization of UTI AMC. The petitioner had unnecessarily and without any basis tried to confuse that respondent No.4 would be disqualified for deputation in UTI AMC as he would have been privy to receiving some sensitive information with regard to its functioning. As noticed earlier, Rule 36 of All India Service (DCRB) Rules envisages that an Officer on deputation to an Organization can be absorbed in the same Organization after seeking voluntary retirement.

43. We may also notice here that even the petitioner has not pleaded that UTI AMC is a Government owned Company under Section 617 of the Companies Act. Mr. Bhushan tried to establish that it is a Government controlled company as the shares are all held by instrumentalities of the State. In our view, UTI AMC can not be said to be a Government company. It was for this very reason that respondent No.4 had to make a request for VRS to seek re-employment in a Commercial Organization. We are also not much impressed by

petitioner that the deputation of respondent No.4 was contrary to the recommendation of JPC. Subsequent to the recommendation of JPC, the Parliament had passed UTI (Transfer of Undertaking and Repeal) Act, 2002 which was gazetted on 17th December, 2002 and came into force w.e.f. 29th October, 2002. Under the Act, UTI was bifurcated into SUUTI and UTI Mutual Fund, managed by UTI AMC. The Central Government transferred its entire share holding in UTI AMC to Life Insurance Corporation, Punjab National Bank, Bank of Baroda and SBI. The entire consideration for the aforesaid transfer was received by the Central Government. Therefore, it becomes quite evident that UTI AMC is not a "Government Company" under Section 617 of the Companies Act. In the affidavit filed, this has been the consistent stand taken by the Central Government and the CAG in various writ petitions filed by the petitioner. In a company like the UTI AMC, it is for the shareholder on the Board to decide what process to follow and whom to appoint. When the selected candidate is not a government employee having a lien on a government job, then the government would have nothing to do with the selection process. In this case, the shareholders made a request to the Government for the deputation of respondent No.4. They again made a request for extending his deputation beyond two years. In April 2008, respondent No.4 was offered commercial employment provided he took VRS. At each stage, permission was duly granted by the competent authority after duly following the prescribed procedure as per the rules of executive business. Therefore, we do not find any justifiable reason to doubt the legality of the manner in which respondent No.4 continued to work in UTI AMC since he initially came on deputation in October, 2005.

44. Mr. Bhushan has vehemently argued that respondent No.4 had deliberately concealed or distorted the information in his application for voluntary retirement. We have already noticed that in filling up the Form `L', respondent No.4 had correctly stated the pay scale of the post at the time of seeking voluntary

retirement. We have also earlier held that respondent No.4 cannot be said to have been privy to any sensitive information relating to areas of interest of work of UTI AMC whilst he was holding the post of Joint Secretary. In fact in reply to Column No. C of Form `L' i.e. "Whether the Officer had during the last three years of his official career, any dealing with the Firm/ Company/Cooperative Society etc?" Respondent No.4 had clearly stated that in his capacity as Joint Secretary in the Department of Economic Affairs, Capital Market of his Division, he was also inducted as a Director on the Board of UTI AMC. In the meanwhile, he was appointed as MDMCU and CMD w.e.f. 3rd November, 2005 and 13th January, 2006, respectively by the Board of Directors of UTI AMC.

45. The next grievance of the petitioner is that respondent No.4 had made a mis-statement in Column No.7F of Form `L' whilst giving information as to whether the post which has been offered to him was advertised, if not, how was offer made? In reply to the aforesaid question against, respondent No.4 categorically stated that such higher-level posts are generally not advertised. Keeping in mind the contribution made by him and the needs of the Company, the shareholders had made the offer to him. Alongwith this reply, respondent No.4 had attached copy of the letter dated 3rd April, 2008. We have already noticed that UTI AMC is a company incorporated under the Companies Act. As such all the decisions are made by the Board of Directors. The shareholders are Life Insurance Corporation, PNB, BOP and SBI. We have earlier noticed that respondent No.4 was initially on deputation with UTI AMC since 2005. In 2008, he was offered the post of CMD on contractual basis. Consequently, according to the service rules, he sought his voluntary retirement from the parent cadre, Bihar. This was duly processed by the State of Bihar and approved by the Central Government. UTI AMC is managed on a commercial basis. Therefore, in a commercial company as a part of good governance, it is the responsibility of the Board to ensure succession planning at the top. As[illegible],

nominations are made by the Board and share-holders, either directly or through a search firm and the post is rarely advertised. In any event, it would be the decision to be taken by the Board of Directors. Respondent No.4 would clearly have no say in the matter.

46. We are also of the opinion that there is nothing so outlandish or farfetched in the statement made by respondent No.4 that "such higher-level posts are generally not advertised". It is a matter of record that previously Shri M. Damodaran, an IAS Officer of the rank of Additional Secretary, the post was not advertised. Subsequently also, the appointment of Mr. S.B. Mathur and Administrator Mr. K.N. Tripathi Raj was made without any advertisement. In fact, both the appointments were made without even resorting to the Search-cum-Selection Process. The erstwhile Chairman of SEBI was also appointed without any advertisement. It is also a matter of common knowledge that the posts such as the Government of Reserve Bank of India are hardly ever advertised. Similarly, the post of Chairman, SEBI was advertised for the first time in 2008. Prior to that, it was not advertised. The statement made by respondent No.4 that such higher posts are generally not advertised, cannot be said to be a misleading or a false statement. It is a statement setting out general practice of appointments in the commercial world on such posts.

47. We also do not find much substance in the submission of Mr. Bhushan that in order to facilitate the appointment of respondent No.4, the recommendations of the JPC that the post should be advertised, was deliberately concealed. A perusal of paragraph 21.9 of the recommendations dated 12th December, 2002 would show that the Government had stated that a professional Chairman and Board of Trustees would manage UTI II. It was also stated that advertisement for the appointment of professional Manager will be issued. The Committee also recommended that it should be ensured that the selection of the Chairman and Professional Managers of

UTI should be done in a transparent manner whether they are picked up from the public or private Sectors. It was further pointed out that if an official from the public sector is selected, in no case the deputation from the parent organization be allowed and the person chosen should be asked to severe all connections with the previous employer. This, according to the Government, was imperative because under no circumstances should there be any public perception that the mutual fund scheme of UTI-II are subject to guarantee by the Government and would be bailed out in case of losses. In the affidavit filed by UOI, the entire service history of respondent No.4 has been set out from the time he joined erstwhile banking division of the Department of Economic Affairs (DEA) as Joint Secretary w.e.f. 30th October, 2000. Thereafter, he was posted as DEA (Main) on 2nd June, 2002; he was assigned the charge of CM Division and was relieved by DEA on 28th October, 2005 on completion of his Central Deputation. At that time a proposal was received in DEA from Chairman, SBI on behalf of the shareholders of UTI AMC regarding initial appointment of respondent No.4 as CEO, UTI AMC for a period of two years. This was forwarded by the DEA to the Department of Personnel and Training (DOPT) with the approval of the then Finance Minister. The deputation of respondent No.4 was considered under Rule 6(2)(ii) which provides for deputation of a cadre Officer under an international organization, an autonomous body not controlled by the Government or a private body. The aforesaid deputation can be made only in consultation with the State Government on whose cadre the Officer is borne. We had earlier noticed that due procedure was followed when respondent No.4 was sent on deputation. However, at the risk of repetition, since the petitioner has made such a grievance about the same, it will be apt to notice that DOPT had agreed with the proposal of DEA with the consent of Government of Bihar for deputation of respondent No.4 for a period of two years under Rule 6(2)(ii) and conveyed to the Government of Bihar, Department of Economic Affairs through Letter No.14017/26/2005-AIS-(II) dated 31s

noticed earlier, the deputation of respondent No.4 as CEO, UTI was conveyed to UTI vide DOPT letter dated 16th April, 2007. The terms and conditions clearly provided that the Officer could draw the pay of the organization or the government pay scale which was beneficial to respondent No.4. Respondent No.4 had made a representation to DOPT vide his application dated 29th January, 2007 requesting to allow him to draw the pay in the scale of Additional Secretary to the Government of India as he had already been empanelled to the said post or the pay of CMD of UTI AMC whichever is beneficial to him. The competent authority approved the release of pay of Additional Secretary to respondent No.4 w.e.f. 10th February, 2007, the information was duly communicated to UTI. Furthermore, DEA by its letter dated 19th July, 2007 had requested DOPT for extension of deputation of respondent No.4 as CMD of UTI AMC for a further period of two years beyond 2nd November, 2007 under Rule 6(2)(ii) of the IAS Cadre Rule 1954 on the same terms and conditions. However, the deputation was extended only for a period of three months beyond 2nd November, 2007, as an interim measure till the issue of deputation of IAS Officer under Rule 6(2)(ii) of IAS Cadre Rules 1954 was finalized. Therefore, the deputation was extended upto 2nd February, 2008. Thereafter the matter was again taken up by the DEA, DOPT for consideration of the case of respondent No.4 under Rule 6(1) of the IAS Cadre Rules under which an Officer may be deputed to service under the Central Government or under State Government or under a Company, Organization, Body of Individuals whether incorporated or not, which is wholly substantially owned or controlled by the Central Government or by any other State Government. Therefore, ultimately, according to the consolidated guidelines, the deputation of respondent No.4 was covered under Rule 6(1)(i) of the IAS Cadre Rules.

48. There is not much substance in the submission that just for the sake of accommodating respondent No.4, the recommendations of the JPC were concealed from the Government. This submission is fallacious on the face of it as

the recommendations of the JPC were placed before the Parliament and Government of India directly. Respondent No.4 had no role to play in that procedure. In fact, the Government of India submitted action taken report in context of the recommendations from time to time and was fully aware of it. The Government of India never adopted the policy of not sending IAS Officer on deputation to UTI AMC and informed the Parliament in its 3rd action taken report submitted in December, 2004. The decision to grant approval of commercial employment post retirement under Rule 26 was taken by the Government of India. The post was filled up by Board of Directors and shareholders of UTI AMC. It was entirely for them to adopt such policy of appointment as they deem fit. We fail to understand that even upon respondent No.4 complying with all the conditions of deputation, it would render him a person of not high integrity. We may notice here that the Appointment Committee of the Cabinet (ACC) had approved the extension of tenure of respondent no.4 as CMD UTI AMC till 31st may, 2008.

49. This takes us past the alleged irregularities regarding deputation of respondent No.4, the alleged misstatement/non-disclosure about his pay scale/sanctioned emoluments as disclosed in the letter dated 16th April, 2007; the alleged appointment of respondent No.4 is contrary to recommendations made by the AAPTE Committee on July, 2007; the alleged false declaration under Rule 26(3)(ii) of AIS Death-cum-Retirement Rules that in the last three years of his career he had not been privy to sensitive and strategic information of UTI AMC; the alleged false statement about higher-level posts are generally not advertised.

Was the recommendation and appointment of Mr. U.K. Sinha vitiated by MALA FIDE exercise of powers?

50. Mr. Bhushan submitted that the appointment of Mr. Sinha, as Chairman, SEBI was made mala fide. Undoubtedly,

if the allegations of mala fide are established, it would vitiate the selection procedure, recommendation and the appointment of Mr. U.K.Sinha as the Chairman, SEBI. But the burden of proving the allegations of mala fide would lie very heavily on the petitioner. The law in relation to the standard of proof required in establishing a plea of mala fide has been repeatedly stated and restated by this Court. Mr. Salve had relied on the three judgments of this Court viz., *Purushottam Kumar Jha Vs. State of Jharkhand & Ors.,*[7] *Indian Railway Construction Co. Ltd. Vs. Ajay Kumar,*[8] and *Saradamani Kandappan Vs. S. Rajalakshmi & Ors.*[9] The law concerning the aforesaid issue is so well settled that it was hardly necessary to make any reference to previous precedent. We may, however, notice the observations made by this Court in the aforesaid three cases. In *Purushottam Kumar Jha's* case (supra), this court held that :

> "23. It is well settled that whenever allegations as to mala fides have been levelled, sufficient particulars and cogent materials making out prima facie case must be set out in the pleadings. Vague allegation or bald assertion that the action taken was mala fide and malicious is not enough. In the absence of material particulars, the court is not expected to make "fishing" inquiry into the matter. It is equally well established and needs no authority that the burden of proving mala fides is on the person making the allegations and such burden is "very heavy". Malice cannot be inferred or assumed. It has to be remembered that such a charge can easily be "made than made out" and hence it is necessary for the courts to examine it with extreme care, caution and circumspection. It has been rightly described as "the last refuge of a losing litigant". (Vide *Gulam Mustafa v. State of Maharashtra; Ajit Kumar Nag v. GM (PJ), Indian Oil Corpn. Ltd.*)"

7. (2006) 9 SCC 458.
8. (2003) 4 SCC 579.
9. (2011) 12 SCC 18.

51. In *Indian Railway Construction Co. Ltd. Vs. Ajay Kumar* (supra), this court reiterated the law laid down in *S. Partap Singh Vs. State of Punjab* and *E.P. Royappa Vs. State of T.N.* on the standard of proof required to establish the plea of mala fide in the following words:-

> "It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P. Royappa v. State of T.N. courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration."

52. Further, in *Saradamani Kandappan's* case (supra), this court again emphasized that the contention of fraud has to be specifically pleaded and proved.

53. Keeping in mind the aforesaid observations, we shall now examine the material placed before us by the petitioner to establish the allegations of mala fide exercise of power.

54. The first instance of mala fide relied upon by Mr. Bhushan that number of steps were taken deliberately to deny extension to the earlier Chairman. According to Mr. Bhushan, the moving spirit in the strategic plan to deny the extension to Mr. C.B. Bhave was respondent No.6. The allegations made by the petitioner have been emphatically denied by UOI, Mr. Sinha, respondent No.4 and Ms. Omita Paul, respondent No.6. As far as the grievance of the petitioner that Mr. C.B. Bhave was denied extension just to accommodate respondent No. 4 is concerned, we are inclined to accept the submission of Mr. Mohan Parasaran, learned Solicitor General, that there was no mala fides involved in taking that decis or

General pointed out that in 2009 when the name of Mr. Bhave was being considered for an extension, serious controversies came to be unearthed with regard to the entire NSDL issue relating to the IPO scam during which Mr. Bhave was the CMD of NSDL. A two member "Special Committee" consisting of Dr. G. Mohan Gopal and Mr. V. Leeladhar that was appointed by SEBI to look into the matter passed three orders. In one of these orders, there was a serious indictment of NSDL. The media reports published in connection with this controversy adversely commented upon the role of Mr. Bhave as CMD of NSDL. Even Mr. J.S. Verma, former CJI, had voiced his concern about possible shielding of Mr. Bhave by SEBI. Dr. G. Mohan Gopal wrote a letter dated 8th April, 2009, wherein he criticized the action of SEBI on the role played by Mr Bhave. According to Mr. Parasaran, the then Finance Minister perused some of the relevant documents cited above before making the note on 22nd December, 2009, that led to denial of extension to Mr. Bhave. In these circumstances, the noting made by the Finance Minister that led to denial of extension to Mr. Bhave cannot ever be considered unreasonable, let alone mala fide. Thus, we are inclined to accept the submission of Mr. Parasaran that there is no mala fides involved in denying an extension of Mr. Bhave.

55. The learned Attorney General, in our opinion, rightly pointed out that no illegality was committed in making the amendment in the rules pertaining to the selection of Chairman/ WTM of SEBI. It is borne out from the record that prior to 23rd July, 2009, there was no rule on the procedure to be followed in the selection of Chairman/whole time Member of SEBI. The selection procedure for the Chairman of SEBI in 2008 was approved by the Finance Minister on 2nd November, 2007. This procedure envisaged that the selection has to be made on the recommendation of the high powered Search Committee. The composition of the Search Committee was changed on the orders of the Finance Minister. The learned Attorney General also pointed out that the amendment of the rules had no

relevance to the consideration of recommendation of Mr. Sinha to be appointed as Chairman of the SEBI. The Attorney General had also pointed out that in spite of the change in the Selection Committee and in spite of Mr. Sinha having been short-listed at No.1 by the Search-cum-Section Committee in its meeting held on 29th November, 2008, it was Shri C.B. Bhave who was appointed Chairman, SEBI on 15th February, 2008. We also find substance in the submission of learned Attorney General that the amendment in Rule 3 of the Security Exchange Board of India (Terms and Conditions of Service and Members) Rules, 1992 was to provide for more participation by the expert members. Therefore, sub-rule (5) of the aforesaid rules was incorporated which requires that recommendation of Search-cum-Selection Committee will consist of Cabinet Secretary, Department of Economic Affairs, Chairman, SEBI for selection of WTM and two expert eminent from relevant field. We have also been taken through the necessary correspondence for the inclusion of Shri Suman Berry and Shekhar Chaudhary, two experts of eminence from the relevant filed for the selection of Chairman, SEBI in 2010. But it was noticed that inclusion of Secretary Finance Services was not within the rules as amended on 23rd July, 2009. Upon discussion with the Ministry of Law, it was decided that the amendment in the rules could be made in line with the rule prevalent for the selection made to the Income Tax Appellate Tribunal. In view of the record produced in this court, we are of the opinion that the submission made on behalf of the petitioner is not correct. Learned Attorney General submitted that the Search-cum-Selection Committee, after scrutinizing the qualification and experience of the short-listed candidates unanimously placed respondent No.4 first in the merit list. We have also perused the record and it appears that respondent No.4 was unanimously placed at Sr.No.1 by the Search-cum-Selection Committee. It has wrongly been submitted on behalf of the petitioner that respondent No.4 was placed at No.2 and yet he was appointed ignoring the person who was placed at No.1.

56. Mr. Salve has made very detailed submissions on behalf of respondent No.4. Giving us the entire sequence of how the rules were amended. Mr. Salve has rightly pointed out that the petitioner has falsely contended that rules concerning the constitution of Search-cum-Selection Committee amended through notification dated 7th October, 2010 were to ensure the selection of Mr. Sinha. The applications for filling up the post of SEBI Chairman were invited on 10th September, 2010. It is noteworthy that Mr. Sinha did not apply in response to the invitation. Further more, the rules were amended in exercise of the powers conferred on the Finance Minister under Section 29 of the SEBI Act. The aforesaid notification issued by the Finance Ministry has not been challenged by the petitioner. We also notice here that prior to the amendment, the procedure for selection of Chairman, SEBI was determined by the Finance Minister. Having perused the entire record, we are not satisfied that the petitioner has made out a case of mala fide to vitiate the proceedings of the Search-cum-Selection Committee. The first meeting of the Search-cum-Selection Committee was held on 2nd November, 2010. Upon deliberations, the Committee decided to invite Mr. Sinha alongwith five others. We may notice here that Shri Suman Bery did not attend the meeting. The suitability of respondent No.4 had to be determined by the Search-cum-Selection Committee. We are unable to discern any illegality in the procedure adopted by the Search-cum-Selection Committee. We also find substance in the submission of Mr. Salve that the petitioner has made much a do about the non-mention of the pay scale of the petitioner in the Performa sent to the ACC which was enclosed with the Confidential Letter No. DO No.2/23/2007-RE dated 13th December, 2010. The letter clearly mentions that Search-cum-Selection Committee was constituted under Rule 3 of the SEBI Rules, 1992. The Search-cum-Selection Committee consisted of :-

1. Shri K.M.Chandrasekhar, Cabinet Secretary - Chairman

2. Shri Ashok Chawla, Finance Secretary - Member

3. Shri R.Gopalan, Secretary (DFS) - Member

4. Shri Devi Dayal, Former Secretary (Banking) - Member

5. Prof. Shekhar Chaudhuri, Director, IIM Kolkata - Member

6. Dr. Suman K.Bery, Director General, NCAER - Member

57. Applications were invited by circulating the vacancy position to all cadre controlling authorities in the Government of India and States on 10th September, 2010. The vacancy was simultaneously put on the Website of the Ministry of Finance, Department of Personnel and Training. It was also advertised in three largest circulating English Newspapers of the country on 18th September, 2010. It is clearly mentioned that out of the 19 applicants, who were respondents to the advertisement in the first meeting of the Committee held on 2nd November, 2010, five were short listed. In addition, the Search-cum-Selection Committee also decided to invite Mr. Sinha CMD, UTI AMC for interaction. The Search-cum-Selection Committee based on the qualification, experience and personal interaction with the short listed candidates, recommended the names of Mr. U.K. Sinha and Mr. Himadri Bhattacharya in that order of merit, for being considered for appointment as Chairman SEBI. The letter further mentions that the Finance Minister proposed the appointment of Mr. U.K. Sinha as Chairman, SEBI, for an initial period of three years from the date he resumes the charge or till he attain the age of 65 years, whichever is earlier. It is noted that willingness of Mr. Sinha has been obtained and was enclosed with the letter. On this basis, it was requested that approval of the ACC be obtained for the appointment of Mr. Sinha as Chairman, SEBI. The letter also notes that the prescribed Performa, duly filled in, is also enclosed. We fail to see what role Mr. Sinha had to play in the whole procedure except for accepting the invitation of the Search-cum-Selection Committee for interaction. Even if the pay scale has not been mentioned, it cannot cast a shadow on the integrity of the proceedings held by the Search-cum-S It

is also to be noticed that the proposal was sent to the ACC on the express approval of the then Finance Minister. It is noteworthy that the then Finance Minister was Mr. Pranab Mukherjee. He is renowned for his transparency in the performance of his official functions. He is at present the President of India.

58. Mr. Salve, in our opinion, has also rightly submitted that there is nothing surprising in respondent No.4 accepting the post of Chairman, SEBI which carried much lesser emoluments than he enjoyed as Chairman, UTI AMC. It is not abnormal for people of high integrity to make a sacrifice financially to take up the position of honour and service to the nation. In any event, we are of the opinion, the acceptance by Mr. Sinha of lesser salary as Chairman of SEBI cannot ipso facto lead to the conclusion that he accepted the position for the purpose of abusing the authority of Chairman, SEBI. Adverting to the allegation of non-disclosure of ESOP, in our opinion, Mr. Salve has rightly submitted that it was not done to avoid any investigation by the ACC into the question as to why respondent No.4 would wish to join Chairman, SEBI when he was drawing much higher emoluments as Chairman, UTI AMC. This non-mention cannot lead to the conclusion that if the same had been mentioned, respondent No.4 would not have been selected as Chairman, SEBI on the ground that it would have been illogical for a person drawing higher emoluments on one post to join another post having lesser emoluments. Mr. Salve has rightly reiterated that there was nothing abnormal; in the course adopted by respondent No.4. No material has been placed on record to show that respondent No.4 was in receipt of ESOP illegally. It has been pointed out that under ESOP, an employee is given an option by the company to buy its shares upto the given quantity allotted to him which can be exercised after a specified time. In the case of UTI AMC, the stock option was to vest after a period of three years. Secondly, an employee could not exercise 100% of the option in one go. It was spread over four years, 10% in the 4th year, 20% in the 5th year, 30%

in the 6th year and last 40% in the 7th year. After vesting of each trench, the employee had one year to make up his mind whether to exercise his option or to let it go by. In UTI AMC, ESOP was approved by the shareholders. The HR Committee of the Board and the Board, the decision by the Board was taken on 27th December, 2007. The minutes of the meeting of the Board dated 12th April, 2008 clearly shows that the stock option was exercised by respondent No.4 in accordance with due procedure. However, even though the decision had been taken by the Board of Directors on 17th September, 2007 to grant respondent No.4 market based compensation, the matter was pending with the share holders. It was only on 12th April, 2008 that the Board took a decision to release the market based compensation to respondent No.4. The actual allocation of ESOP was made to respondent No.4 on 17th May, 2008 through the letter of head of HR Committee of the Board. In fact in 2011 after respondent No.4 got appointment in SEBI and had to leave UTI AMC on 31st January, 2011, he surrendered his entire ESOP and rescinded all his rights to exercise his option in future. We, therefore, find no substance in the submission of the petitioner that there was any ulterior motive involved in non-disclosure of the information with regard to ESOP to the ACC.

59. This brings us to the issue whether there was a conspiracy hatched to ensure the selection of respondent No.4 as Chairman, SEBI. The petitioner stated that the conspiracy involved taking seven steps, namely:-

i. Mr.Sinha would seek voluntary retirement from IAS.

ii. SBI Chairman would move to make a fresh offer.

iii. Mr.Sinha would seek approval for post retirement commercial employment.

iv. Ministry of Finance would recommend commercial employment.

v. DOPT would approve the

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waiting period.

vi. All concerned persons in the decision making process would designate the employment with UTI AMC as commercial employment.

vii. File would not be sent to the PMO/ACC for information or approval.

60. We have already considered all the points raised by the petitioner in the earlier part of the judgment. Therefore, it is not necessary to repeat the same. This, apart, the charge of conspiracy has to be taken seriously as it involves the commission of very serious criminal offence under Section 120-B of the IPC. Such a charge of criminal intent and conduct had to be clearly pleaded and established by evidence of very high degree of probative value. No notice of such allegations can be taken based only on pure conjectures, speculations and interpretation of notings in the official files.

61. The observations made by this Court in the judgments noticed earlier make it clear that it was incumbent on the petitioner not only to make specific allegations, but to produce very strong evidence to lead to a clear conclusion that the selection was actuated by mala fide. The 7 steps relied upon by the petitioner to establish conspiracy per se do not amount to conspiracy to mislead the ACC. It is unbelievable to expect such a coordinated overt and covert operation to have been even conceived, let alone successfully executed just to have Mr. U.K. Sinha appointed as Chairman, SEBI. The appointment of Mr. Sinha is strictly in conformity with the procedure prescribed by service rules, i.e, Rules 16 and 26 of the AIS (DCRB) Rules, 1958. The files were sent to PMO as and when required by rules of business. In matter of VRS and post retirement commercial employment, there is no requirement under the rules of business of sending the file to PMO/ACC. We find substance in the submission of Mr. Salve that the petitioner has not placed on record any material to establish that any

conspiracy was hatched to ensure the selection of respondent No.4.

62. The submissions made by the learned Attorney General and Mr. Salve have also been supported by learned Solicitor General appearing on behalf of respondent No.6. Mr. Prasaran submitted that baseless allegations have been made against respondent No.6. She was neither the recommending authority nor the appointing authority for the post of SEBI. She was appointed as Advisor to the Finance Minister on 26th June, 2009. Mr. Prasaran, in our opinion, has rightly made a grievance that all the actions taken by respondent No.6 in the execution of her duty have been deliberately warped and distorted to unnecessarily involve her in the trumped up controversy. Her role as Advisor was limited to advising/ assisting the Finance Minister on the work assigned to her. The nature of work was, therefore, different from the role of a functionary who performed an assigned line of functions. She could have neither recommended respondent No.4 for appointment nor negated any recommendation. By making a detailed reference to the official record, Mr. Prasaran has pointed out that the Chairman, SEBI is appointed by the Central Government by following an established process by the ACC headed by the Prime Minister. This is done on the basis of Search-cum-Selection Committee of the Government of India. The opinion of other independent and reputed experts in the field of Economics, Finance and Management is also taken through an institutional mechanism approved by the DOPT. We are inclined to accept the submission of the learned Solicitor General that the allegations made against respondent No.6 are imaginary and based on a distorted interpretation of the official notes appended with the writ petition. With regard to the non-extension of Mr. C.B. Bhave, the learned Solicitor General relied upon the averments made in the counter affidavit filed by the UOI in Writ Petition No.391 of 2011. The aforesaid affidavit has been attached as Annexure R-4 to the counter affidavit filed by respondent No.6 in the

the aforesaid affidavit, it has been set out that prior to July, 2009; selections were made by the Committee as decided by the Finance Minister from time to time. As noticed earlier, the name of Dr. S.A. Dave, Chairman, CMIE was added as an expert member of the high powered Selection Committee constituted by the Finance Minister for the selection of Chairman, SEBI in 2008. Even at that time, Mr. Sinha was short-listed and placed at Sr.No.1. Out of the two names short listed as noticed by us earlier in spite of the recommendations, it was C.B. Bhave who was appointed. In 2009, a statutory system was established for the selection of Chairman/Whole time Member of SEBI. In this back-ground, Rule 3 was amended by introducing sub-rule (5) which provided that the Chairman and every whole time member shall be appointed by the Central Government on the recommendation of the Selection-cum-Search Committee consisting of the (i) Cabinet Secretary as the Chairman, (ii) Secretary, Department of Economic Affairs, (iii) Chairman, SEBI (for selection of whole time members) (iv) two experts of eminence from the relevant field to be nominated by the Central Government. In 2010, it was decided to initiate action for a fresh selection for the post of Chairman, SEBI. Therefore, a note was initiated on 18th July, 2010 for the constitution of a Committee. Various names were suggested for inclusion as experts. While approving the constitution of the Selection Committee, the Finance Minister also observed that going by earlier precedent, the Committee should have composition that includes Secretary, Finance Services, who functionally deals with special critical aspects of the capital market. Thus, with the addition of the Secretary Finance Services, the number of nominees in the Search-cum-Selection Committee became five. Unlike in the past, the composition of the Selection Committee was sent to the DOPT for approval. However, on 23rd September, 2010, DOPT pointed out as noticed earlier that inclusion of Secretary Finance Services was not within the rules amended on 23rd July, 2009 which led to the amendment of the rules. To rectify this shortcoming, the amendment of the rules became

necessary. It was within the powers of the Central Government to make the aforesaid amendment, which was carried out in accordance with the rules. It is, therefore, difficult to accept the submission of the petitioner that the amendment in the rules was made to ensure the non-extension of Mr. C.B. Bhave as Chairman, SEBI. In fact, Mr. Bhave was not granted the extension for the reasons which have been given in detail by Mr. Prasaran in his submission, the same need not be reiterated. We are also unable to take the allegations made by Dr. Abraham seriously, as the same seem to be actuated by ulterior motive. It is a direct attack on the integrity of respondent No.4. The opinion expressed by Dr. Abraham, in his lengthy letter, cannot be given much credence unless it is supported by very convincing material. We are also not much impressed by the submission of Mr. Bhushan that the constitution of the Search-cum-Selection Committee was changed at the instance of respondent No.6. As narrated by the Solicitor General, the ultimate selection was made by a Selection Committee consisting of Members who were all serving Officers in the Government. Therefore, it is difficult to accept the submission that 3 out of 5 members were hand-picked by respondent No.6 to select Mr. Sinha. We are also unable to see any merit in the submission of the petitioner that the post of CMD, UTI AMC was kept vacant for 17 months to accommodate the brother of respondent No.6. In our opinion, the allegations are malicious and without any basis, and therefore, cannot be taken into consideration.

63. This now brings us to the preliminary objections raised by the respondents that the writ petition deserves to be dismissed on the ground that it is not a bona fide petition. According to the respondents, the petitioner has been set up by interested parties. We entirely agree with the submissions made by the learned Attorney General that the first requirement for the maintainability of a public interest litigation is the uberrimae fide of the petitioner. In our opinion, the petitioner has unjustifiably attacked the integrity n

process. It is virtually impossible to accept the submission that respondent No.6 was able to influence the decision making process which involves the active participation of the ACC, a high powered Search-cum-Section Committee with the final approval of the Finance Minister and the Prime Minister. The proposition is so absurd that the allegations with regard to mala fide could have been thrown out at the threshold. We have, however, examined the entire issue not to satisfy the ego of the petitioner, but to demonstrate that it is not entirely inconceivable that a petition disguised as "public interest litigation" can be filed with an ulterior motive or at the instance of some other person who hides behind the cloak of anonymity even in cases where the procedure for selection has been meticulously followed. The respondents have successfully demonstrated how the petitioner has cleverly distorted and misinterpreted the official documents on virtually each and every issue. In our opinion, the petition does not satisfy the test of utmost good faith which is required to maintain public interest litigation. We have been left with the very unsavoury impression that the petitioner is a surrogate for some powerful phantom lobbies. Respondent No.2-SEBI in its affidavit has stated that the petitioner is a habitual litigant. He files writ petitions against individuals to promote vested interest without any relief to the public at large. We are at a loss to understand as to how in the facts of this case, the petitioner can justify invoking the jurisdiction of this court under Article 32. This is not a petition to protect the Fundamental Rights of any class of down trodden or deprived section of the population. It is more for the protection of the vested interests of some unidentified business lobbies. The petitioner had earlier filed writ petition in which identical relief had been claimed and the same had been dismissed. The aforesaid writ petition is sought to be distinguished by the petitioner on the ground that three successive writ petitions were withdrawn as sufficient pleadings were not made for the grant of necessary relief. Even if this preliminary objection is disregarded, we are satisfied that the present petition is filed at the behest of certain interested

powerful lobbies. The allegations made in the letter written by Dr. Abraham are without any basis and clearly motivated. Further, a perusal of the record clearly reveals that several complaints were filed against Dr. Abraham, wherein some serious allegations have been made against him in relation to his tenure as the Whole Time Member (WTM), SEBI. Also, it was only after the Ministry of Finance decided not to extend his tenure as WTM, SEBI and advertisements for new appointments were issued that Dr. Abraham started complaining about interference of the Ministry of Finance in SEBI through the present Chairman. We may also notice here that the letter dated 1st June, 2011 written by Dr. Abraham to the Prime Minister, that the Petitioner seeks reliance upon, was written merely a month and a half before Dr. Abrham's tenure was to end. From the above, it is manifest that the letter written by Dr. Abraham was clearly motivated and espouses no public interest. The affidavit also narrates the action which has been taken by SEBI against very influential and powerful business Houses, including Sahara and Reliance. It is pointed out that the petitioner is a stool pigeon acting on the directions of these Business Houses. We are unable to easily discard the reasoning put forward by respondent No.4. It is a well known fact that in recent times, SEBI has been active in pursuing a number of cause celebre against some very powerful Business Houses. Therefore, the anxiety of these Business Houses for the removal of the present Chairman of SEBI is not wholly unimaginable. We make the aforesaid observations only to put on record that the present petition could have been dismissed as not maintainable for a variety of reasons. However, we have chosen to examine the entire issue to satisfy our judicial conscience that the appointment to such a High Powered Position has actually been made fairly and in accordance with the procedure established by law.

64. We find no merit in this petition which is accordingly dismissed.

R.P. W

ARUN KUMAR AGRAWAL
v.
UNION OF INDIA & ORS.
I. A. Nos. 3, 4 and 5 of 2013
In
(Writ Petition (Civil) No. 374 of 2012)

JANUARY 10, 2014

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

CONSTITUTION OF INDIA, 1950:

Art. 32 - Writ petition filed purporting to be in public interest - Judgment - I.A. filed praying for expunction of certain observations made in the judgment - Held: Expunging of remarks about bona fides of petitioner would not affect the decision in the writ petition - Prayer allowed - Public Interest Litigation - Expunction of remarks.

Art. 32 - Writ petition - Judgment - I. A. for directions - Held: The remarks have been made only for the purpose of decision of the writ petition and shall have no bearing on the service career of the applicant - Interlocutory application - Impleadment.

CIVIL ORIGINAL JURISDICTION : I.A. Nos. 3, 4 and 5 of 2013.

IN

Writ Petition (Civil) No. 374 of 2012

Under Article 32 of the Constitution of India.

Mohan Parasaran, SG, Sidharth Luthra, ASG, Shanti Bhushan, Rakesh Dwivedi, Altaf Ahmed, Prashant Bhushan, Rohit Kumar Singh, Kartik Seth, Govindjee Kamat, Devadatt

Kamat, Suruchi Suri, Simar Suri, Chanchal Kumar Ganguli, Vikramaditya, Senthil Jagadeesan, Govind Manoharan, Gopal Singh, Rupesh Kumar, Vikas Malhotra, Sushma Suri, Dr. Ashok Dhamija, V. Mohana, Supriya Juneja, B.V. Balaram Das, Bhargava V. Desai, Shreyas Mehrotra for the appearing parties.

The following Order of the Court was delivered

O R D E R

I.A. No. 3 and 4

The application for impleadment is dismissed.

So far as Dr. Abraham is concerned, we find that the remarks have been made only for the purpose of decision of the Writ Petition and shall have no bearing on the service carrier of Dr. Abraham.

With the above observation, the application for direction is disposed of.

I.A. No.5

This is an application filed by the petitioner for expunging certain remarks made in paragraph 63 of the judgment.

We have perused the application, which is supported by an affidavit, and heard Mr. Shanti Bhushan, learned senior counsel; Mr. Mohan Parasaran, learned Solicitor General, Mr. Rakesh Dwivedi, learned senior counsel and Mr. Siddharth Luthra, learned ASG.

It would appear to us that the observations made about the bonafides of the petitioner need to be expunged. Expunging of such remarks, in our opinion, would not affect the decision in the Writ Petition and this has also been specifically accepted by Mr. Prashant Bhushan, learned counsel for the petitioner. Accordingly, we expunge the remarks made that the petitioner

is "acting at the behest of some other interested parties". We also expunge the remarks that the petitioner may have filed the petition with an "ulterior motive at the interest of some other person". Furthermore, the remarks that the petitioner may be acting as a "surrogate for some powerful phantom lobbies shall also be expunged". The remarks that "the petitioner had earlier filed writ petitions, in which identical relief had been claimed and the same had been dismissed", shall also be expunged. Furthermore, the remark that the petitioner is a "stool pigeon" and acting on the directions of some business houses is also expunged.

With these observations, this application is disposed of.

R.P. Applications disposed of.

DINUBHAI BOGHABHAI SOLANKI

v.

STATE OF GUJARAT & ORS.

(Criminal Appeal No. 92 of 2014)

FEBRUARY 25, 2014

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

INVESTIGATION:

Transfer of investigation - In the instant case, a social activist had filed PIL for stopping illegal mining in which, name of appellant and his nephew emerged as the power behind illegal mining mafia - They were impleaded as respondents and served - Next day the social activist was brutally killed - Father of activist dissatisfied with the progress of investigation filed writ petition seeking transfer of investigation - High Court initially directed further investigation to be conducted by State under the supervision of the Special Commissioner of Police, Crime Branch - On submission of final report, High Court finding that even further investigation was not impartial, by impugned order, transferred the case to CBI - Transfer challenged by the State - Held: Appellant before the High Court was none other than the father of the deceased - It was a cry for justice made by a person whose son was brazenly murdered - High Court recorded that all the circumstances put together indicated that the investigation was controlled from the stage of registering the FIR and only the clues provided by the accused persons themselves were investigated to close the investigation by filing charge-sheet and further investigation had not served any purpose - Therefore, the investigation with the lapses and lacunae as also the unusual acts of omission and commission did not inspire confidence - After recording the said observation, it was noticed by High Court that the investigation was being transferred to CBI to instill confidence of the general public in the investigation,

keeping in mind the seriousness of the case having far reaching implications - No interference with the transfer of investigation to CBI.

Transfer of investigation - Rights of accused - Opportunity of hearing and impleadment of accused -Held: Fair, unbiased and transparent investigation is a sine quo non for protecting the accused - It is not necessary to give an opportunity of hearing to the proposed accused as a matter of course - If prior notice and an opportunity of hearing have to be given in every criminal case before taking any action against the accused person, it would frustrate the entire objective of an effective investigation - In the instant case, there was no obligation for High Court to either hear or to make appellant a party to the proceedings before directing that the investigation be conducted by CBI.

Transfer of investigation - Adverse remarks recorded by High Court while considering transfer of investigation to CBI - Expunction of - Instant appeal by appellant challenging the remarks made by High Court against him in impugned order on the ground that the said remarks would gravely prejudice his case at trial and praying for rehearing of writ petition and expunction of remarks - Held: High Court observed that investigation all throughout was far from fair, impartial, independent or prompt - Mere mention of the appellant as the prime suspect was not a conclusion reached by High Court - No categorical findings were recorded about the involvement of the appellant in the crime of conspiracy - It was clarified in the impugned judgment that the observations made were only for the limited purpose of deciding whether further investigation was required to be handed over to CBI, and they shall not be construed as expression of an opinion on any particular aspect of the investigation carried out - After recording the said clarification, it was noticed that the investigation was being transferred to CBI to instill confidence of the general public in the investigation, keeping in mind the

seriousness of the case having far reaching implications - Adverse remarks recorded by High Court are not expunged - However, trial court is directed to keep in mind that any observations made by High Court, which may appear to be adverse to appellant, were confined only to the determination of the issue as to whether the investigation is to be transferred to CBI.

ADMINISTRATION OF CRIMINAL JUSTICE: Held: Essence of criminal justice system is to reach the truth - The underlying principle is that whilst the guilty must not escape punishment; no innocent person shall be punished unless the guilt of the suspect/accused is established in accordance with law - All suspects/accused are presumed to be innocent till their guilt is proved beyond reasonable doubt in a trial conducted according to the procedure prescribed under law.

BAIL: Entitlement for - In the instant case, appellant was arrested when he appeared before the CBI in response to the summons - Since then he was in custody - Supplementary charge-sheet filed by the CBI - After the charge-sheet, the appellant was no longer required for further investigation - There was no likelihood of the appellant tampering with the evidence as the copies of all the sensitive statements were not supplied to the appellant - Keeping in view the fact that the CBI has submitted the supplementary charge-sheet and that the trial is likely to take a long time, it is deemed appropriate to enlarge the appellant on bail, subject to conditions of furnishing personal security.

A social activist filed a PIL against the State of Gujarat and others seeking direction to stop the illegal mining and destruction of biodiversity of natural habitat of Gir Forest. During the pendency of PIL, name of the appellant and his nephew emerged as the powers behind the illegal mining mafia. The appellant and his nephew were impleaded by the High Court as respondents on 6th July, 2010 and an order was served on t h

July, 2010. On 20th July, 2010, the activist who had filed PIL was brutally killed. The investigation was conducted.

Dissatisfied with the progress of investigation, the father of the activist, respondent no.6 filed Special Criminal Application before the High Court wherein he sought transfer of the investigation to an independent investigating agency. The High Court passed interim order directing further investigation to be conducted by the State of Gujarat under the supervision of Special Commissioner of Police (Crime branch). The report was submitted. However, the High Court by impugned order noted that the investigation by the Gujarat Police authority was not free from doubt and that to instill confidence in the public it was appropriate to transfer the investigation to CBI.

In the instant appeals challenging the order of the High Court, the grievance of the appellant was that the High Court has made unwarranted remarks against him which were bound to gravely prejudice his case at the trial; that he was not even impleaded as party before the High Court and, therefore, the writ petition should be reheard and decided on merits and the remarks against him be expunged.

Disposing of the appeals, the Court

HELD: 1. In the instant case, the appellant before the High Court was none other than the father of the deceased. It was a cry for justice made by a person whose son has been brazenly murdered. The father of the deceased had filed the petition on the grounds that the State is under the obligation to ensure the rule of law. It was stated that the rule of law can be maintained only by fair, impartial and independent investigation by the law and order enforcement agency, in every reported incidents of commission of offence. It was emphatically

stated that the investigation into the murder of his son was not taking place independently and impartially due to extra-legal and extraneous considerations. He had prayed before the High Court that his right to equality before the law guaranteed by Article 14 of the Constitution of India was being violated as the appellant was being protected by the investigating agency because he is a Member of Parliament, and he belonged to the political party that was in power in the State. [Para 38] [961-G; 962-A-D]

Divine Retreat Centre v. State of Kerala **(2008) 3 SCC 542: 2008 (4) SCR 701;** *D. Venkatasubramaniam v. M. K. Mohan Krishnamachari* **(2009) 10 SCC 488: 2009 (14) SCR 441;** *State of Punjab v. Davinder Pal Singh Bhullar & Ors.* **2012 Crl L.J. 1001;** *Ms. Mayawati v. Union of India & Ors.* **(2012) 8 SCC 106: 2012 (7) SCR 33 - held inapplicable.**

2. Undoubtedly, the essence of criminal justice system is to reach the truth. The underlying principle is that whilst the guilty must not escape punishment; no innocent person shall be punished unless the guilt of the suspect/accused is established in accordance with law. All suspects/accused are presumed to be innocent till their guilt is proved beyond reasonable doubt in a trial conducted according to the procedure prescribed under law. Fair, unbiased and transparent investigation is a sine quo non for protecting the accused. It is not necessary to give an opportunity of hearing to the proposed accused as a matter of course. If prior notice and an opportunity of hearing have to be given in every criminal case before taking any action against the accused person, it would frustrate the entire objective of an effective investigation. In the instant case, the appellant was not even an accused at the time when the impugned order was passed by the High Court. Finger of suspicion was pointed at the appellant by ind[illegible]s

as well as by the grieved father of the victim. The High Court had initially directed that the investigation be carried under the supervision of the Special Commissioner of Police, Crime Branch. It was only when the High Court was of the opinion that even further investigation was not impartial, it was transferred to the CBI. There was no obligation for the High Court to either hear or to make the appellant a party to the proceedings before directing that the investigation be conducted by the CBI. [Paras 42, 44, 45, 46] [963-E-G; 965-B-C, E-F; 966-F-G; 967-E-F]

Union of India v. W.N.Chadha **(1993) Supp. 4 SCC 260: 1993 (2) SCR 997;** *Central Bureau of Investigation & Anr. v. Rajesh Gandhi & Anr.* **(1996) 11 SCC 253;** *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P. & Ors.* **(1999) 5 SCC 740: 1999 (3) SCR 870 - relied on.**

3. The High Court had come to the prima facie conclusion that the investigation conducted by the police was with the motive to give a clear chit to the appellant, inspite of the statements made by the independent witnesses as well as the allegations made by the father of the deceased. [Para 47] [967-F-G]

Narender G. Goel v. State of Maharashtra & Anr. **(2009) 6 SCC 65: 2009 (8) SCR 1004;** *Mohd. Anis v. Union of India* **1994 Supp (1) SCC 145: 1993 (1) Suppl. SCR 263;** *Bank of India & Anr. v. K.Mohandas & Ors.* **(2009) 5 SCC 313: 2009 (5) SCR 118 - relied on.**

4. The High Court observed that the investigation all throughout was far from fair, impartial, independent or prompt. The High Court then noticed that according to the FIR, the deceased was killed at 20.40 hours on 20.7.2010 and the FIR was registered at 22.06 hours. Although the FIR itself mentioned address of the

deceased and his mobile phone was also found on the spot, no effort was made to either inform any member of his family available nearby or call them to the police station before registration of the FIR through police personnel. The High Court noticed that these facts would clearly strengthen the suspicion of respondent No.6 that the relatives and acquaintances of the deceased were deliberately prevented from naming anyone even as a suspected perpetrator of the crime in the FIR. Again the High Court, by making a reference to the FIR, has prima facie concluded that it seems to have been registered under the advice and guidance of the higher officers, who were present at the police station. The High Court also noticed from the affidavit of Superintendent of Police, that even during the further investigation, he was required to continuously inform and brief to his supervisory officer. The High Court also noticed that statements of father, wife, brothers, mother and friends of the deceased were recorded. These persons had given specific names of the suspects, but no arrests were made. In fact, the investigation did not appear to have made any progress. It was only after the order was passed by the High Court in a PIL on 02.08.2010, transferring the investigation that arrests began to be made. The High Court then noticed that efforts were made by the persons, who were arrested, to make statements to absolve the appellant of being involved in the conspiracy to kill the activist. From this, the High Court concluded that the progress of investigation clearly indicated that the investigators were relying more on the statements of the arrested person than the statements recorded earlier of the relatives and acquaintances of the deceased. The High Court then noticed the contents of case diary in which it was recorded that on 20.08.2010, the news about the police being in search of the nephew of the appellant were leaked in advance and spread through media and telecast, even then he could not b[illegible]f

enquiring into various secret sources and informants. The High Court also noticed that on 16.8.2010, when the High Court ordered the transfer of the investigation, one of the main accused persons was arrested and had practically dictated in great detail his motive, plan, execution and sufficiency of resources for arranging the elimination of the victim, without ever mentioning the name of the nephew of the appellant. His statements were recorded everyday from 18th to 30th August, 2010. During the course of custodial interrogation, on 19th August, 2010, he added that he had decided with the nephew of the appellant to kill the activist for which the nephew of the appellant was to provide the money. Thereafter, the High Court made a very important observation that although nothing can be treated or held to be proved at this stage, the sequence of events and the statements clearly indicated that even the name of the nephew of the appellant was being introduced in a careful and planned manner with leakage of sensitive information for the public including others involved in the offence. This observation clearly showed that all the observations were tentative, prima facie, to adjudge only the issues, as to whether the State Police had conducted a fair and unbiased investigation. No opinion was recorded, even prima facie of the guilt or otherwise of the appellant in the offence of conspiracy to murder the activist. The apprehension of the appellant that any of the observations made by the High Court would influence the trial were without any basis. The High Court further noticed that when the nephew of the appellant was arrested on 07.09.2010, his statements with a matching version were recorded everyday from 07.09.2010 to 20.09.2010 with details of his decision and understanding with the main accused to kill activist of his own motive and resources. But not once these accused persons appeared to have been asked even one question about the involvement of the appellant. In fact the nephew of the

appellant is stated to have clarified that, no one else was informed about his understanding with the main accused. The High Court further noticed that statement of appellant was recorded on 16.9.2010 when he claimed not only complete innocence but ignorance about even the activities of the deceased and the difficulties caused by him. In fact he urged for independent and deeper probe of the offence. The High Court then recorded the conclusion that this line of interrogation substantiated the submission that the investigating agency was following the clues offered by the arrested persons rather than the other independent information given by the father and witnesses. Taking into consideration all the said facts, the High Court concluded that the statements of the appellant recorded after apparently solving the mystery of the murder clearly appeared to be an empty formality at the convenience and invitation of the appellant. A fair, proper and prompt investigation in case of such a crime, by an ordinary police officer, would have inspired immediate custodial interrogation of the prime suspects; but in the facts of the present case, the investigating officer practically remained clueless for first 25 days after the murder and then suddenly, with first arrest and first statement of the arrestee on the first day of investigation, the case was practically solved. Here again, the conclusion of the High Court was in the context of the impartiality of the investigation. The same cannot be construed as any definite or even a prima facie conclusion as to the guilt of the appellant. The High Court thereafter noticed that the first person arrested was not named by any witnesses in any statement recorded till his arrest. The High Court, therefore, stated that how that first arrestee, not named till then by any witness or in any statement recorded till his arrest, was identified as a suspect and arrested on 16.8.2010 itself after the order to transfer the investigation. The High Court concluded that there was sufficient material [illegible]e

submission that the State police was controlling the investigation rather than carrying it out in a fair, impartial and prompt manner. The High Court also concluded that the said facts would lend credence to the allegation that the accused persons and the prime suspect had such influence in the higher echelons of police-power that the officers of the lower ranks would not dare to displease them. These observations again were general and were clearly necessary to state and to support the conclusion reached by the High Court that the investigation conducted by the State police was unsatisfactory and biased. Again no further conclusion was recorded about the guilt of any of the suspects, let alone the appellant, in particular. The High Court concluded that where no one appears to be an eye witness to firing on the deceased, not only the persons alleged to have assaulted the deceased, but identity of the persons who would have strong motive for eliminating the deceased ought to have been fully or properly investigated. Instead, the prosecution relied mainly on the persons, who were already arrested and practically stopped at them in spite of the order for carrying out further investigation in light of the averments and allegations made in the petition. The High Court only noticed the facts which tend to show that the investigation had not been conducted impartially and fairly. Although, the appellant was mentioned on a number of occasions, no specific conclusion was reached that the appellant was responsible for influencing or controlling the investigation. In fact, the finger was pointed only towards the higher echelons of the police, who seemed to have been under the influence of the accused persons. Mention of the appellant as the prime suspect was not a conclusion reached by the High Court. The appellant was referred to as the prime suspect in all the allegations made in the writ petitions and the statements of the relatives including the statement of the father of the deceased. Therefore, by recording the gist

of the allegations made, the High Court did not commit any error of jurisdiction. The High Court also recorded that since the appellant and his nephew were living together in a joint family and, therefore, must have conspired to kill activist. This is not a conclusion that the appellant and his the nephew of the appellant must have conspired. Similarly, the conclusion recorded by the High Court that the incorrect statements made by Superintendent of Police regarding past record of the appellant clearly indicated an attempt at somehow shielding the person who was the prime suspect, according to the statements of the relatives and associates of the deceased again only alludes to the statements of the relatives and witnesses. It cannot be said to be a conclusion reached by the High Court, about the guilt of the appellant. Therefore, the conclusion cannot be said to be unwarranted. [paras 53, 54] [972-E; 973-B-H; 974-A-B, D-E, F-H; 975-A-H; 976-A-H; 977-A-C, G-H; 978-A-B, F-H; 979-A-F, H; 980-A-C]

6. Ultimately, the High Court recorded the conclusion that all the circumstances put together indicated that the investigation was controlled from the stage of registering the FIR and only the clues provided by the accused persons themselves were investigated to close the investigation by filing charge-sheet and further investigation had not served any purpose. Therefore, the investigation with the lapses and lacunae as also the unusual acts of omission and commission did not and could not inspire confidence. It may not be proper and advisable to further critically examine the charge sheet already submitted by the police, as some of the accused persons were already arrested and shown as accused persons and even chare is yet to be framed against them. This conclusion also only recorded the reasons which persuaded the High Court to transfer the investigation to CBI. No categorical findings were e

involvement of the appellant in the crime of conspiracy. In fact, the High Court was well aware that the observations were made only for the limited purpose of reaching an appropriate conclusion as to whether the investigation had been conducted impartially. The High Court further clarified that while concluding that the investigation into murder of the son of the respondent no.6 was far from fair, independent, bona fide or prompt, it refrained from even remotely suggesting that the investigating agency should or should not have taken a particular line of investigation or apprehended any person, except in accordance with law. It was clarified that the observations made were only for the limited purpose of deciding whether further investigation was required to be handed over to CBI, and they shall not be construed as expression of an opinion on any particular aspect of the investigation carried out so far. After recording the said clarification, it was noticed that the investigation was being transferred to CBI to instill confidence of the general public in the investigation, keeping in mind the seriousness of the case having far reaching implications. None of the adverse remarks recorded by the High Court are expunged. However, the trial court is directed to keep in mind that any observations made by the High Court, which may appear to be adverse to the appellant, were confined only to the determination of the issue as to whether the investigation is to be transferred to CBI. [Paras 55 to 58] [980-C-F, G-H; 981-A-F]

7. As regards the bail of the appellant, the appellant was arrested on 5th November, 2013, when he appeared before the CBI in response to the summons. Since then the petitioner-appellant has been in custody. The supplementary charge-sheet has been filed by the CBI in the Court of ACJM, Ahmedabad in January, 2014. After the charge-sheet being filed, obviously, the petitioner-

appellant is no longer required for further investigation. There is no likelihood of the petitioner-appellant tampering with the evidence as the copies of all the sensitive statements have not been supplied to the petitioner-appellant. Further, no special treatment can be given to the petitioner-appellant simply on the ground that he is a sitting Member of Parliament. However, keeping in view the fact that the CBI has submitted the supplementary charge-sheet and that the trial is likely to take a long time, it is deemed appropriate to enlarge the petitioner-appellant on bail, subject to conditions of furnishing personal security in the sum of Rs.5 lacs with two solvent sureties, each of the like amount, to the satisfaction of the trial court. The petitioner-appellant shall appear in Court as and when directed by the court and shall make himself available for any further investigation/interrogation by the CBI as and when required. The petitioner-appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade that person from disclosing such facts to the court or to the investigating agency or to any police officer. [paras 60, 61] [982-A-C, E-H; 983-A-B]

Case Law Reference:

2008 (4) SCR 701	held inapplicable	Para 21
2009 (14) SCR 441	held inapplicable	Para 21
2012 Crl L J 1001	held inapplicable	Para 21
2012 (7) SCR 33	held inapplicable	Para 21
1993 (2) SCR 997	relied on	Para 21
(1996) 11 SCC 253	relied on	Para 26
1999 (3) SCR 870	relied on	Para 26
2009 (8) SCR 1004	relied on	Para 26
1993 (1) Suppl. SCR 263	relied	

2009 (5) SCR 118 relied on Para 50

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 492 of 2014.

From the Judgment and Order dated 25.09.2012 of the High Court of Gujarat at Ahmedabad in SCRLA No. 1925 of 2010.

Mukul Rohatgi, V.K. Bali, H.P. Raval, J.S. Attri, Manali Singhal, Saurabh Kirpal, Sanjay Agarwal, Alpesh Kogje, Aditya Soni, Anando Mukherjee, (for Nikhil Jain) Jesal (Hemantika Wahi), Kamini Jaiswal, Abhimanue Shrestha, Krishna Tiwari, T.A. Khan, Ranjana Narayan (for B.V. Balaram Das) for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This special leave petition impugns the judgment and order dated 25th September, 2012 passed by the Gujarat High Court at Ahmedabad in Special Criminal Application No.1925 of 2010. By the aforesaid judgment, the High Court has directed that the investigation into the death of Amit Jethwa (hereinafter referred to as 'Jethwa'), a Right to Information activist be investigated by the CBI authorities and further directing that the proceedings pursuant to the charge sheet submitted by the Gujarat Police shall remain stayed.

2. The facts leading to the filing of the special leave petition out of which the present criminal appeal arises are as under:

Jethwa had filed a Public Interest Litigation, SCA No.7690 of 2010, against the State of Gujarat and others with the following prayer:

"The appellant therefore prays that your Lordship may be pleased to:

a. Admit this petition.

b. Issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ order or direction directing the respondents to stop illegal mining within 5 kms radius from boundary of Gir Sanctuary."

3. In the aforesaid writ petition, Jethwa had given details of various activities of certain firms and individuals who were indulging in illegal mining and destroying the biodiversity of natural habitat of Gir forest in Gujarat. This, according to Jethwa, was having an adverse effect on the natural habitat of the Asiatic Lions. He was particularly concerned with illegal mining within 5 kms radius from the boundary of Gir Sanctuary Area. More than 50 mines in the names of different persons were mentioned in the writ petition wherein illegal mining was alleged. Enquiry into the allegations made by Jethwa was in progress in the aforesaid writ petition, when he was brutally murdered.

4. Jethwa was the President of the Gir Nature Youth Club at Khamba, Gujarat. He had been active in fighting against encroachment of forests and poaching. He was also instrumental in the successful prosecution of the actor Salman Khan for shooting an endangered Chinkara deer. He had also taken up cudgels against the actor Aamir Khan when a deer was used in a scene in the movie Lagaan. Apart from this, Jethwa rigorously campaigned against corruption among officers of the Indian Forest Service and opposed the mala fide application of Article 356 of the Constitution of India. In 2007, he had drawn attention to the mysterious death of lions in the Gir Forest, including three that were shot within a few hundred meters of the Babariya forest guard outpost. Jethwa had claimed that "such a thing cannot be possible without support of some forest officials". On that basis, he had sought suspension of a particular IFS Officer. The incident ultimately led to the uncovering of a large lion poaching gang. He later campaigned against shifting of lions [illegible]e

Sanctuary in Madhya Pradesh. According to him, his efforts were often blocked by forest officials by charging him with offences such as photographing a dead lion and trespassing. In 2007, Jethwa contested the State Assembly elections against the appellant herein, but lost. In 2008, Jethwa was very actively involved in spreading awareness about effectiveness of the Right to Information Act for addressing grievances, and conducted workshops on the procedure to file requests under RTI, to prevent corrupt practices and other mal-administration. In 2010, Jethwa had filed a Public Interest Litigation (writ petition) questioning the inaction of State Government over the appointment of Lokayukta. The High Court directed the Government to appoint Lokayukta. He had also spearheaded the campaign against rising case pendency in the Gujarat Information Commission due to lack of commissioners. It was on his petition that the High Court gave direction to the State Government to complete the appointments within a stipulated time. He again came to the rescue of RTI applicants by filing a writ petition in the High Court and made the Government accept Indian Postal Order as one of the modes of payment to deposit fees while filing the Right to Information applications.

5. We have narrated these facts just to indicate that Jethwa was a well known social activist interested in the protection of environment, generally and the biodiversity of Gir Forest, in particular. This, according to him, was urgently needed to protect the Asiatic Lions, apart from usual environmental issues.

6. During the pendency of the public interest litigation filed by Jethwa, the name of the appellant and his nephew emerged as the powers behind the illegal mining mafia. Therefore, by order dated 6th July, 2010, the appellant and his nephew Pratap Bhai Solanki were impleaded by the High Court as respondents. The order dated 6th July, 2010 was served on the appellant on 19th July, 2010.

7. It is the allegation of the father of Jethwa (hereinafter referred to as 'Respondent No.6') that the appellant was so incensed on being made a party in the Public Interest Litigation filed by Jethwa and the information that had surfaced during the course of hearing of that writ petition that he contracted/ conspired with some unknown persons to eliminate Jethwa. In pursuance of this conspiracy, Jethwa was shot dead on the very next day, i.e. 20th July, 2010.

8. According to the appellant, on the same date, i.e 20th July, 2010, the electronic media began broadcasting allegations of the Respondent No. 6 and some other interested parties that the appellant was behind the killing of Jethwa. Incidentally, it must be noticed at this stage that according to the version of Respondent No.6, the murder took place outside the Gujarat High Court whilst Jethwa was leaving the chambers of his lawyer at 8.30 at night. In fact, the Press Statement was given on 21st July, 2010 by Dhirsinh Barad, a rival Congress MLA that the appellant might be involved in the murder. Subsequently, when the statement of this MLA was recorded in the High Court on 26th February, 2012, wherein he has stated that on 20th July, 2010 he had communicated to Shri B.M.Mangukia, Advocate who incidentally was also a Secretary of Gujarat Congress, that as per his belief the appellant was involved in the murder of Jethwa. The investigation was conducted in accordance with the procedure prescribed in the Criminal Procedure Code.

9. It appears that the Respondent No 6 was not satisfied and he filed Special Criminal Application No.1925 of 2010 before the High Court. In this petition, Respondent No.6 sought transfer of the investigation in connection with FIR No. I-CR No.163/2010 dated 20th July, 2010 registered at Sola Police Station for commission of offences punishable under Sections 302, 114 of IPC read with Section 25(1) of Arms Act, to an independent investigating agency, preferably CBI or Special Investigation Team comprising IPS Off[illegible]e

cadre as well. On 19th October, 2011, the Gujarat High Court passed the interim order directing further investigation to be conducted by the State of Gujarat under the supervision of Special Commissioner of Police Crime Branch (of the rank of Additional Director General of Police) and to submit a final report of investigation by 28th November, 2011. In passing the aforesaid order, it is pointed out by the appellant herein that, no adverse remarks with any pre-drawn conclusions were made against him.

10. In pursuance of the aforesaid order, the investigation was handed over, on 11th November, 2011, to another officer, Shri Vatsa, Superintendent of Police. The final report was submitted on 16th March, 2012 under Section 173(8) Cr.P.C. It was pointed out by the appellant that nothing beyond mere suspicion had come on the record against the appellant so as to make him accused of any conspiracy to assassinate the deceased Jethwa. On 19th March, 2012, the final report of further investigation was filed before the High Court on behalf of the State Government. The appellant claims that in spite of extensive investigation, no circumstantial evidence pointing out any involvement of the appellant was gathered, despite the grave suspicion of the relatives of Jethwa and certain political rivals. However, due to the pressure exerted by the relatives of the deceased and certain political rivals, a third charge-sheet was filed in the FIR.

11. In the order impugned before us, the High Court upon consideration of the entire matter has come to the conclusion that investigation conducted by the Gujarat Police authority is not free from doubt and that to instill confidence in the public, it would be appropriate to transfer the investigation to CBI.

12. The present SLP was filed in this Court on 8th October, 2012. Notice was issued in the SLP on 15th October, 2012. The investigation by the CBI was not stayed. The State of Gujarat had filed SLP (Crl.) NO.8292 of 2012 also challenging the transfer of the investigation to CBI. This SLP was filed on

15th October, 2012. We may also notice here that Narendra Modi, who was then holding the portfolio of Home Ministry in Gujarat as well as being the Chief Minister, was also impleaded as appellant No.2 in SLP (Crl.) 8292 of 2012. However, subsequently, he was deleted from the array of parties, by order of this Court dated 9th November, 2012.

13. Leave granted.

14. Mr. Rohatgi, learned senior counsel appearing for the appellant after making extensive references to the relevant parts of the impugned judgment has submitted that the High Court has made unwarranted remarks against the appellant which are bound to gravely prejudice his case at the trial. These remarks have been made in the absence of the appellant. The High Court did not make him a party; and has given an ex-parte judgment against the appellant. It is per se illegal and, therefore, deserves to be set aside. He submits that the matter has to be remanded back to the High Court with the direction that the appellant be made a party in Writ Petition SCA No.1925 of 2010. Thereafter the writ petition be re-heard and decided on merits in accordance with law.

15. Mr. Rohatgi then submitted that the appellant had been summoned to appear as a witness before the CBI. Apprehending that the appellant will be arrested as soon as he appears before the CBI in response to the summons, Criminal Misc. Petition No.22987 of 2013 was filed by him seeking direction from this Court that the appellant will not be arrested in case he appears before the CBI. The actual prayer made in the Application was that this Court be pleased to "grant stay of any coercive action against the appellant prejudicing his life and personal liberty, pursuant to the impugned ex part judgment dated 25.09.2012 passed by the Gujarat High Court in SCA 1925 of 2010 wherein CBI was inter alia directed to investigate and file report within 6 months." This Court did not accept the prayer made by the appellant. As apprehended by the appellant, he was immediately arreste

before the CBI, in response to the summons to join the investigation.

16. This action of the CBI, according to Mr. Rohatgi, was wholly illegal. The appellant had been cooperating with the investigation throughout. The arrest of the appellant was politically motivated.

17. On 17th April, 2013, Status Report of the investigation by the CBI was produced before this Court by Mr. Sidharth Luthra, learned Additional Solicitor General. After perusal of the report, the court directed the same to be re-sealed and kept with the record. The matter was adjourned from time to time to enable the CBI to complete the investigation. Since his arrest, the appellant was initially remanded to police custody. Subsequently, however, he was placed in judicial custody. The appellant continues to be in jail till date. On 19th November, 2013 when the matter came up for further consideration, a submission was made on behalf of the CBI that "although the appellant is now not required for custodial interrogation, judicial custody needs to be continued as the investigation is still not complete." A request was made that the matter be adjourned for at least six weeks to enable the CBI to complete the investigation in relation to the appellant. Since the appellant had been in custody for a long time, it was prayed that he should be released from custody. It was pointed out that the appellant was required to perform his official duties as an elected member of the Parliament. However, the request of the appellant was rejected and CBI was granted some more time to complete the investigation. It was made clear by this Court that the aforesaid direction would not preclude the CBI to seek custodial interrogation of the appellant, as and when required. Thereafter, the matter was adjourned from time to time.

18. Mr. Rohatgi then submitted that in breach of the directions issued by this Court on 17th April, 2013, the CBI has filed a supplementary charge sheet in January, 2014, before the ACJM, Ahmedabad, instead of placing the report before

this Court in a sealed cover. Relying on these facts, Mr. Rohatgi has submitted that the action of the CBI is in disobedience of this order of this Court, and therefore, the charge sheet itself needs to be set aside, as it has been filed without the permission of this Court.

19. Mr. Rohatgi then submitted that in case the aforesaid submissions are not accepted, the prejudicial remarks made against the appellant need to be expunged as the remarks have been made without making him a party. He submitted that the remarks have damned the appellant as the main conspirator. Such adverse remarks, according to Mr. Rohatgi, can have no legal effect, having been made in breach of the Rules of Natural Justice i.e. the rule of audi alteram Partem. He pointed out that the appellant has also been referred to as accused No.1, without any justification.

20. Mr. Rohatgi emphasized that the judgment is replete with prejudicial remarks. He has been described as a person with criminal antecedents. He is stated to have been involved and named in several police complaints and FIRs for serious offences, including attempt to murder and murder. The High Court has also observed that many offences have been committed at the behest of the appellant. But almost all such complaints and FIRs have terminated in summary reports. A long list of the cases in which the appellant has been found to be not involved was placed before the High Court. The High Court has further observed that the crusade of the deceased Jethwa against the illegal empire of the appellant herein was the cause for the murder of Jethwa. The High Court also observed that the appellant herein was managing the entire investigation. The police did not even record the statements of numerous persons as the statements would have pointed an accusing finger at the appellant for being responsible for the death of Jethwa. Relying on the observations recorded in the judgment, Mr. Rohatgi submits that unless the same are expunged the appellant cannot possibly

21. Mr. Rohatgi has relied on the following judgments in support of his submission.

Divine Retreat Centre Vs. State of Kerala[1]*; D. Venkatasubramaniam Vs. M. K. Mohan Krishnamachari*[2]*; State of Punjab Vs. Davinder Pal Singh Bhullar & Ors.*[3]*; Ms. Mayawati Vs. Union of India & Ors.*[4]*; Union of India Vs. W.N.Chadha.*[5]

22. Lastly, it is submitted by Mr. Rohatgi that the appellant has been firstly in police custody and subsequently in judicial custody since the arrest on 5th November, 2013 till now. The appellant is a sitting Member of the Parliament and has to perform his duties as an MP in the Parliament, as well as his Constituency. The appellant has been cooperating with the investigation throughout. There is no likelihood of the appellant absconding as he has deep roots in society, particularly in the area that is represented by him as an MP in the Parliament. Learned senior counsel further submitted that although CBI has filed the charge sheet, copies of all the statements of witnesses have not been made available to the appellant, on the ground that it is a very sensitive matter. According to Mr. Rohatgi, the CBI has wrongly relied on Section 173(6) of the Cr.P.C. He reiterated that the arrest of the appellant was totally illegal as it is in disobedience of the orders passed by this Court on 15th March, 2013; 10th April, 2013 and 17th April, 2013. He has also reiterated the submission that the appellant has been arrested maliciously as a result of political vendetta. Mr. Rohatgi also submitted that apprehending the arrest, the appellant had moved Criminal Misc. Petition No. 22987 of 2013, but this Court had declined to give any directions.

1. (2008) 3 SCC 542.
2. (2009) 10 SCC 488.
3. 2012 Criminal Law Journal 1001.
4. (2012) 8 SCC 106.
5. (1993) Supp.4 SCC 260.

23. He also pointed out that the appellant has been elected as Member of Legislative Assembly, Gujarat for three terms. Thereafter, the appellant has successfully contested the Parliamentary election as an official candidate of the BJP. Therefore, as it was found by his political rivals that the appellant cannot be destabilized by a popular vote, he is being dragged into this case to cause maximum damage to his image and political career. Mr. Rohatgi further pointed out that the timing of issuance of summons by the CBI coincided not only with the Diwali festival but, also with the ensuing Parliamentary election, as well as the assembly election which had been declared in five States. He submitted that the appellant, therefore, reasonably apprehends that the opposition is trying to maliciously gain maximum political mileage, by getting him involved in the murder case.

24. Learned senior counsel further pointed out that on the one hand, the family of the appellant was grieving due to the death of his elder brother on 8th October, 2013; on the other hand, the letter of the CBI dated 25th October, 2013 was handed over to his younger brother asking the appellant to remain present on 29th October, 2013 at 11.00 a.m. before the Investigating Officer. The family members of the appellant on the date of the filing of the application, i.e. 28th October, 2013, were occupied with the after-death ceremonies of his deceased brother. At the same time, immediately with the issuance of the summons by the CBI, adverse media trial and propaganda had started in various news channels and the Newspapers against the appellant. It is also pointed out by Mr. Rohatgi that the CBI has commenced the investigation in October 2012 and since then the appellant has continued to be in active public life. He has also attended Parliament as a Member of the Parliament in the 13th, 14th and 15th Session of the Lok Sabha held on 4th September, 2013, 5th September, 2013 and 6th September, 2013. The appellant has also participated in various public welfare functions during this period. In spite of the aforesaid, the appellant has been i s

personal liberty and fundamental rights under Articles 14 and 21 of the Constitution of India. He reiterated that the appellant had made a prayer in Crl. M.P. No. 22987 of 2013 that no coercive steps be taken against the appellant. Since the prayer made by the appellant was not accepted, the CBI used this as an excuse to arrest the appellant. Given the entire fact situation as narrated above and the fact that the appellant has not been given copies of all the statements collected by the CBI, there is little likelihood of the appellant tampering with the evidence. Since the CBI has submitted the charge sheet, the investigation is complete. Therefore, it would be in the interest of justice that the appellant is now released on bail, during the pendency of the trial.

25. Mr. J.S. Attri, learned senior counsel, appearing for the CBI has submitted that the status report has been submitted to this Court. Upon completion of the investigation, the charge sheet has also been submitted in court. It is further submitted that there is no violation of the orders dated 15th March, 2013, 10th April, 2013 and the order dated 17th April, 2013, which directed that the report produced by the Additional Solicitor General be sealed and kept with the record. There is no direction to the CBI not to file the charge sheet without leave of the court.

26. Ms. Kamini Jaiswal appearing for respondent No.6 has submitted that the question as to whether the appellant was required to be heard before the investigation is transferred to the CBI is no longer res integra. She submitted that the State hierarchy was actively involved in influencing the investigation by the State Police, which is evident from the fact that Mr. Narendera Modi was Appellant No.2 in Criminal Appeal No. _____@ SLP (Crl.) No.8292 of 2012. He was subsequently deleted from the array of parties by an order of this Court. His removal from the array of parties makes no difference. Ms. Jaiswal has submitted that in fact the appellant has no locus standi to file the present appeal. At the most, according to her,

he is a proposed accused or a suspect. She submits that it is a settled proposition of law and criminal jurisprudence that an accused has no right to be heard at the stage of investigation. The appellant in the present case is a potential suspect. Therefore, he has no locus standi to challenge the judgment of the High Court, transferring the investigation to the CBI in exercise of its powers under Section 173(8) of the Cr.P.C. She submits that the High Court has come to a prima facie conclusion that the original investigation and the further investigation are far from satisfactory. Both investigations lacked transparency and, therefore, the Court has rightly concluded that the investigation conducted by the State Police did not inspire confidence. She submits that the High Court has committed no error in not making the appellant a party in the writ petition filed by respondent No.6 seeking transfer of the investigation from the State Police and the Special Commissioner, Crime Detection Branch, Ahmedabad to the CBI. The rule of audi alteram partem would not be applicable at that stage. She submits that the investigation has to be conducted in accordance with Sections 154 to 176 of the Cr.P.C., wherein no provision is made for the applicability of the concept of audi alteram partem. In other words, at no stage till the charge sheet is submitted the suspect or proposed accused can claim any constitutional or legal right to be heard. In support of her submissions, she relied on the judgment of this Court in *W. N. Chadha* (supra), *Central Bureau of Investigation & Anr. Vs. Rajesh Gandhi & Anr.*[6], *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs. State of A.P. & Ors.*[7], *Narender G. Goel Vs. State of Maharashtra & Anr.*[8] She also relies on the judgment in the case of *Divine Retreat* (supra).

27. She further submitted that even though the High Court has given elaborate details in support of the conclusions to

6. (1996) 11 SCC 253.
7. (1999) 5 SCC 740.
8. (2009) 6 SCC 65.

transfer the investigation to CBI, it does not mean that the remarks were not necessary for coming to such a conclusion. She submits that the facts in this case were glaring. Jethwa has relentlessly campaigned against illegal mining within the prohibited 5 km zone of the Gir Forest Sanctuary. This sanctuary is the only habitat of the Asiatic Lions. Jethwa had managed to uncover a deep rooted conspiracy to continue illegal mining in the prohibited zones. He was in possession of evidence which would have directly linked the appellant to the illegal mining. The appellant and his nephew were impleaded as parties in the public interest litigation, SCA No.7690 of 2010 by order dated 6th July, 2010. The aforesaid order was served on the appellant on 19th July, 2010. Within 24 hours Jethwa was killed whilst he was coming out of the chamber of his lawyer.

28. She further pointed out that a perusal of the judgment of the High Court would show that the investigation conducted by the State Police and subsequent further investigation was wholly tainted and one sided. Therefore, the High Court had rightly transferred the case to the CBI. She further submitted that the remarks made by the High Court were wholly justified for coming to the conclusion that the investigation must be transferred to the CBI to inspire confidence.

29. She next submitted that the investigation has been completed and the charge sheet has been filed. The appellant will have full opportunity to defend himself at the trial. She submitted that the present appeal deserves to be dismissed as having become infructuous.

30. Lastly, she submitted that although the appellant is an MP he is involved in several criminal cases. His influence is so pervasive that he has been declared to be innocent in all the other criminal cases, excepting one. It is only in the present case that he is sought to be put on trial. She has submitted that even the nephew of the appellant Shiva Solanki was only arrested on 7th September, 2010; he had been absconding for

45 days whilst the investigation was in progress. The further investigation conducted by Sh. Vatsa, IPS, Superintendent of Police has been found to be tainted by the Court. The High Court found that the facts stated by Sh. Vatsa in the final report did not inspire confidence as it did not even point out the close proximity of Shiva Solanki and the appellant. These reports also point out the interaction between the uncle and nephew before and after the crime. In fact, Vatsa never applied for custodial interrogation of the appellant. She further submitted that the High Court noticed that the police man who is the first informant can not be an eye witness to the incident. Surprisingly, the FIR was not recorded at the instance of any member of his family. She submits that the High Court has correctly come to the conclusion that the initial and further investigations suffered from so many lapses and lacunae that it could not possibly inspire confidence.

31. Opposing the prayer for bail, Ms. Jaiswal submitted that the appellant is a very powerful person, not only because he is an MP, but because he is a kingpin in the criminal mafia operating within the Gir Sanctuary which is meant for protection of the Asiatic Lions, apart from many other rare species of animal life as well as flora and fauna. In case, he is allowed out on bail the appellant is most likely to put pressure on the prosecution witnesses and weaken the case of the prosecution. She submits that the family of the deceased is entitled to the satisfaction that the brazen murder of the deceased was not only fairly investigated, but also a fair trial was conducted. She further submitted that earlier application of the bail of the appellant having been dismissed by the trial court no special treatment could be given to the appellant. His application for bail in this Court is not maintainable.

32. Mr. Rohatgi in reply has submitted that Narendra Modi had been made appellant No.2 by mistake. The mistake was corrected and his name was deleted from the array of parties on 9.11.2012 by the order of this

unnecessarily being mentioned in these proceedings.

33. We have considered the submissions made by the learned counsel for the parties.

34. Before we examine the submissions made by the learned counsel for the parties, it would be appropriate to notice the various authorities cited by them. In Divine Retreat Centre (supra), this Court held that considering the question as to whether even the High Court can set the law in motion against the named and unnamed individuals based on the information received by it without recording the reasons that the information received by it prima facie disclosed the commission of a cognizable offence. This Court observed that "the High Court in exercise of its whatsoever jurisdiction cannot direct investigation by constituting a special investigating team on the strength of anonymous petitions. The High Court cannot be converted into station houses." The observations made in para 51, on which heavy reliance has been placed by Mr. Rohatgi, show that the High Court had sought to turn the Divine Retreat Centre into an accused on the basis of an anonymous complaint in exercise of its power under Section 482. Keeping in view the peculiar facts of that case, it is observed as follows :

> "54. Here is a case where no information has been given to the police by any informant alleging commission of any cognizable offence by the appellant and the persons associated with the appellant institution. It is a peculiar case of its own kind where an anonymous petition is sent directly in the name of a learned Judge of the Kerala High Court, which was suo motu taken up as a proceeding under Section 482 of the Code. The High Court ought not to have entertained such a petition for taking the same on file under Section 482 of the Code."

35. It was for the aforesaid reason that this Court observed as follows:

> "51. The order directing the investigation on the basis of such vague and indefinite allegations undoubtedly is in the teeth of principles of natural justice. It was, however, submitted that the accused gets a right of hearing only after submission of the charge-sheet, before a charge is framed or the accused is discharged vide Sections 227 and 228 and 239 and 240 CrPC. The appellant is not an accused and, therefore, it was not entitled for any notice from the High Court before passing of the impugned order. We are concerned with the question as to whether the High Court could have passed a judicial order directing investigation against the appellant and its activities without providing an opportunity of being heard to it. The case on hand is a case where the criminal law is directed to be set in motion on the basis of the allegations made in anonymous petition filed in the High Court. No judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such order results in drastic consequences of affecting one's own reputation. In our view, the impugned order of the High Court directing enquiry and investigation into allegations in respect of which not even any complaint/information has been lodged with the police is violative of principles of natural justice."

36. These observations would not be applicable in the facts of this case. The criminal law has not been set in motion on the basis of an anonymous complaint. The investigation has been transferred to the CBI, in a petition under Article 226 of the Constitution filed by none other than the father of the victim who suspects that his son was murdered at the instance of the appellant herein. The facts have been elaborately narrated by the High Court as well as by us. It is apparent that the fact situation in Divine Retreat Centre is wholly distinguishable from the present case.

37. In *D. Venkatasubramaniam* (supra), again this Court was concerned with the erroneous exercise of its inherent powers under Section 482, Cr. P.C. by the High Court. This Court reiterated the observations made in *Divine Retreat Centre* (supra). It was inter alia observed as follows :

> "34. The High Court in the present case, without realising the consequences, issued directions in a casual and mechanical manner without hearing the appellants. The impugned order is a nullity and liable to be set aside only on that score.
>
> 35. We are not impressed by the submission made by the learned counsel for the respondent that the High Court did not issue any directions but merely disposed of the petition with the observations reminding the police of its duty. The question that arises for consideration is whether there was any occasion or necessity to make those "observations" even if they are to be considered to be observations and not any directions. It is not even remotely suggested that there was any deliberate inaction or failure in the matter of discharge of duties by the police. There was no allegation of any subversion of processes of law facilitating the accused to go scot-free nor is there any finding as such recorded by the High Court in its order."

38. From the above, it becomes apparent that the High Court had passed the order in a mechanical manner. Further more, it was not even remotely suggested that there was any deliberate inaction or failure in the matter of discharge of duties by the police. In the present case, the appellant before the High Court was none other than the father of the deceased. It was a cry for justice made by a person whose son has been brazenly murdered. Failure of the High Court to take notice on such a plea, in our opinion, would have resulted in injustice to the father of the victim who was only seeking a fair and impartial investigation into the circumstances leading to the murder of his son. The petition has been filed by the father seeking

redressal of the grievance under Articles 14, 21 and 226 of the Constitution of India. The father of the deceased had filed the petition on the grounds that the State is under the obligation to ensure the rule of law. It was stated that the rule of law can be maintained only by fair, impartial and independent investigation by the law and order enforcement agency, in every reported incidents of commission of offence. It was emphatically stated that the investigation into the murder of Jethwa was not taking place independently and impartially due to extra-legal and extraneous considerations. The Respondent No.6, father of the murdered victim, had prayed before the High Court that his right to equality before the law guaranteed by Article 14 of the Constitution of India was being violated as the appellant herein was being protected by the investigating agency because he is a member of Parliament, and he belongs to the political party that was in power in the State. In the light of the aforesaid, the ratio of judgment in *D. Venkatasubramanium* (supra), in our opinion, is also not applicable in the facts of this case.

39. *Davinder Pal Singh Bhullar* (supra) is a very peculiar case. This Court examined a situation where the High Court suo motu re-opened the proceedings which had been closed, and the High Court had become functus-officio. This Court after noticing the peculiar fact situation, observed as follows:

> "The impugned order dated 5.10.2007 though gives an impression that the High Court was trying to procure the presence of the proclaimed offenders but, in fact, it was to target the police officers, who had conducted the inquiry against Mr. Justice X. The order reads that particular persons were eliminated in a false encounter by the police and it was to be ascertained as to who were the police officers responsible for it, so that they could be brought to justice."

40. Clearly, therefore, in such circumstances this Court struck down the directions. This Court also notices that although the proceedings before the High Cou

procure the presence of the proclaimed offenders but in essence it was an enquiry to ascertain as to who were the police officers responsible for certain false encounters. It is well settled that the Court cannot order a roving enquiry and direct the investigation to be carried out by the CBI without any basis. This court was dealing with the cases where the investigators of the crime were sought to be converted into accused. Such are not the circumstances in the present case. Thus, the reliance placed upon *Davinder Pal Singh Bhullar's* case (supra) is misplaced.

41. In the case of *Ms. Mayawati* (supra), the question raised in the writ petition filed under Article 32 of the Constitution of India was as to whether the FIR registered against the appellant therein to investigate into the matter of alleged disproportionate assets of the appellant and other officers was beyond the scope of the directions passed by this Court in the order dated 18th September, 2003 in *M.C.Mehta Vs. Union of India.* Upon the examination of the entire situation, it was held by this Court that the FIR registered against the appellant therein was beyond the directions issued by this court in M.C.Mehta and, therefore, was without authority of law.

42. Undoubtedly, the essence of criminal justice system is to reach the truth. The underlying principle is that whilst the guilty must not escape punishment; no innocent person shall be punished unless the guilt of the suspect/accused is established in accordance with law. All suspects/accused are presumed to be innocent till their guilt is proved beyond reasonable doubt in a trial conducted according to the procedure prescribed under law. Fair, unbiased and transparent investigation is a sine quo non for protecting the accused. Being dissatisfied with the manner in which the investigation was being conducted, the father of the victim filed the petition seeking an impartial investigation.

43. Now we shall consider the judgments cited by Ms. Kamini Jaiswal.

44. In *W.N.Chadha* (supra), the High Court had quashed and set aside the order passed by the Special Judge, in-charge of CBI matters issuing the order rogatory, on the application of a named accused in the FIR, Mr. W.N.Chadha. The High Court held that the order issuing letter rogatory was passed in breach of principles of natural justice. In appeal, this Court held as follows :-

> "89. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all."

> "92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under Section 202 of the Code, the accused may [illegible]t

inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances."

"98. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."

These observations make it abundantly clear that it would not be necessary to give an opportunity of hearing to the proposed accused as a matter of course. The court cautioned that if prior notice and an opportunity of hearing have to be given in every criminal case before taking any action against the accused person, it would frustrate the entire objective of an effective investigation. In the present case, the appellant was not even an accused at the time when the impugned order was passed by the High Court. Finger of suspicion had been pointed at the appellant by independent witnesses as well as by the grieved father of the victim.

45. In *Rajesh Gandhi's* case (supra), this Court again reiterated the law as follows :

"8. There is no merit in the pleas raised by the first respondent either. The decision to investigate or the decision on the agency which should investigate, does not attract principles of natural justice. The accused cannot

have a say in who should investigate the offences he is charged with. We also fail to see any provision of law for recording reasons for such a decision……..There is no provision in law under which, while granting consent or extending the powers and jurisdiction of the Delhi Special Police Establishment to the specified State and to any specified case any reasons are required to be recorded on the face of the notification. The learned Single Judge of the Patna High Court was clearly in error in holding so. If investigation by the local police is not satisfactory, a further investigation is not precluded. In the present case the material on record shows that the investigation by the local police was not satisfactory. In fact the local police had filed a final report before the Chief Judicial Magistrate, Dhanbad. The report, however, was pending and had not been accepted when the Central Government with the consent of the State Government issued the impugned notification. As a result, the CBI has been directed to further investigate the offences registered under the said FIR with the consent of the State Government and in accordance with law. Under Section 173(8) of the CrPC 1973 also, there is an analogous provision for further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate."

The aforesaid observations would clearly support the course adopted by the High Court in this matter. We have earlier noticed that the High Court had initially directed that the investigation be carried under the supervision of the Special Commissioner of Police, Crime Branch, of the rank of the Additional Director General of Police. It was only when the High Court was of the opinion that even further investigation was not impartial, it was transferred to the CBI.

46. Again in *Sri Bhagwan Samardha* (supra), this Court observed as follows :

"10. Power of the police to conduct further investigation, after laying final report, is recognised under Section 173(8) of the Code of Criminal Procedure. Even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in Ram Lal Narang v. State (Delhi Admn.)1. The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the court and seek formal permission to make further investigation.

11. In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it, we would not burden the Magistrate with such an obligation."

These observations also make it clear that there was no obligation for the High Court to either hear or to make the appellant a party to the proceedings before directing that the investigation be conducted by the CBI.

47. We had earlier noticed that the High Court had come to the prima facie conclusion that the investigation conducted by the police was with the motive to give a clear chit to the appellant, inspite of the statements made by the independent witnesses as well as the allegations made by the father of the deceased. The legal position has been reiterated by this Court in the case of *Narender G. Goel* (supra):

"11. It is well settled that the accused has no right to be heard at the stage of investigation. The prosecution will however have to prove its case at the trial when the

accused will have full opportunity to rebut/question the validity and authenticity of the prosecution case. In Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P. this Court observed: (SCC p. 743, para 11)

"11. ... There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard."

12. The accused can certainly avail himself of an opportunity to cross-examine and/or otherwise controvert the authenticity, admissibility or legal significance of material evidence gathered in the course of further investigations. Further in light of the views expressed by the investigating officer in his affidavit before the High Court, it is apparent that the investigating authorities would inevitably have conducted further investigation with the`` aid of CFS under Section 173(8) of the Code.

13. We are of the view that what is the evidentiary value can be tested during the trial. At this juncture it would not be proper to interfere in the matter."

48. Again in the case of *Narmada Bai* (supra), this Court after reviewing the entire body of case law concluded as follows:

"64. The above decisions and the principles stated therein have been referred to and followed by this Court in Rubabbuddin Sheikh1 where also it was held that considering the fact that the allegations have been levelled against high-level police officers, despite the investigation made by the police authorities of the State of Gujarat, ordered investigation by CBI. Wit e

allegations levelled by either of the parties, we are of the view that it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that the accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them."

49. We may also notice here the observations made by this Court in *Mohd. Anis Vs. Union of India*[9], wherein this Court held as follows :

"5. … Fair and impartial investigation by an independent agency, not involved in the controversy, is the demand of public interest. If the investigation is by an agency which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to the public interest as well as the interest of justice." (SCC p. 148, para 5)

"2. … Doubts were expressed regarding the fairness of the investigation as it was feared that as the local police was alleged to be involved in the encounters, the investigation by an officer of the U.P. Cadre may not be impartial." (SCC p. 147, para 2)"

50. At this stage, we would like to reiterate the well known principles on the basis of a previous judgment can be treated as a precedent. The most important principles have been culled out by this Court in *Bank of India & Anr. Vs. K.Mohandas & Ors.*[10] as follows:

"54. A word about precedents, before we deal with the aforesaid observations. The classic statement of *Earl of Halsbury, L.C. in Quinn v. Leathem,* is worth recapitulating first: (AC p. 506)

9. 1994 Supp (1) SCC 145.

10. (2009) 5 SCC 313.

"… before discussing … Allen v. Flood and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

(emphasis supplied)

This Court has in long line of cases followed the aforesaid statement of law.

55. In *State of Orissa v. Sudhansu Sekhar Misra*[9] it was observed: (AIR p. 651, para 13)

"13. … A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."

56. In the words of Lord Denning:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In [illegible]s,

> one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

57. It was highlighted by this Court in *Ambica Quarry Works v. State of Gujarat*: (SCC p. 221, para 18)

> "18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

58. In Bhavnagar University v. Palitana Sugar Mill (P) Ltd. this Court held that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

59. This Court in Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani emphasised that the courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. It was further observed that the judgments of courts are not to be construed as statutes and the observations must be read in the context in which they appear to have been stated. The Court went on to say that circumstantial applicability, one additional or different fact may make a world of difference between conclusions in two cases."

51. Keeping in view the aforesaid principles, we are constrained to hold that the ratio of the judgment cited by the appellant would not be applicable in the facts and circumstances of this case.

52. We can now proceed to examine the factual situation in the present case.

53. We are not much impressed by the submissions made by Mr. Rohtagi that the High Court has unnecessarily cast aspersions of criminality on the appellant. In Paragraph 10 of the judgment, the High Court has observed as follows:-

> "All the above circumstances put together indicated that the investigation was controlled from the stage of registering the FIR and only the clues provided by the accused persons themselves were investigated to close the investigation by filing Charge-sheet No.158 of 2010 dated 10.11.2010 and further investigation had not served any purpose. Therefore, the investigation with the lapses and lacunae as also the unusual acts of omission and commission did not and could not inspire confidence. It may not be proper and advisable to further critically examine the charge-sheet already submitted by the police, as some of the accused persons are already arrested and shown as accused persons and even charge is yet to be framed against them. The facts and averments discussed in paragraphs 6 and 7 hereinabove also amply support the conclusion that the investigation all throughout was far from fair, impartial, independent or prompt."

54. In coming to the aforesaid conclusion, the High Court has relied on the following factors:-

(a) Prima facie, the deceased son of respondent No.6 was an RTI activist and sole appellant in the PIL, being SCA No. 7690 of 2010, wherein two persons were, recently before the murder, joined as respondents and one of them is already accused of the offence under Sections 302 and 120-B of IPC. The High Court also recorded that it is nobody's case that the deceased victim of the offence was a blackmailer or a busybody [illegible] n

spreading public awareness about environmental issues and taking legal remedies for preventing environmental degradation, particularly in and around the reserved forest and Gir Sanctuary.

(b) The High Court then notices that according to the FIR, the deceased was killed at 20.40 hours on 20.7.2010 and the FIR was registered at 22.06 hours. Although the FIR itself mentioned address of the deceased and his mobile phone was also found on the spot, no effort was made to either inform any member of his family available nearby or call them to the police station before registration of the FIR through police personnel. The High Court notices that these facts would clearly strengthen the suspicion of respondent No.6 that the relatives and acquaintances of the deceased were deliberately prevented from naming anyone even as a suspected perpetrator of the crime in the FIR.

(c) Again the High Court, by making a reference to the FIR, has prima facie concluded that it seems to have been registered under the advice and guidance of the higher officers, who were present at the police station. The High Court also notices from the affidavit of Superintendent of Police, Mr. Vatsa that even during the further investigation, he was required to continuously inform and brief Mr. Mohan Jha as his supervisory officer and Special Police Commissioner, Crime Branch, Ahmedabad. The High Court, therefore, formed an opinion that Mr. Mohan Jha continued to guide and control even the further investigation, which had been conducted on the directions of the High Court. The High Court also notices that Mr. Kundaliya who was in charge of the investigation, had recorded statements of father, wife, brothers, mother and friends of the

deceased. These persons had given specific names of the suspects, but no arrests were made. In fact the investigation did not appear to have made any progress. It was only after the order was passed by the High Court in a Public Interest Litigation on 02.08.2010, transferring the investigation that arrests began to be made. The High Court then recorded "However, although, name of Mr.DB was mentioned as the main suspect in at least 8 statements recorded till then and threats received by the deceased were also mentioned, he was neither approached for interrogation nor any notice was issued under Section 160 of Cr.P.C.". The High Court then notices that efforts were made by the persons, who were arrested, to make statements to absolve the appellant of being involved in the conspiracy to kill Jethwa. From this, the High Court concluded "thus the progress of investigation clearly indicated that the investigators were relying more on the statements of the arrested person than the statements recorded earlier of the relatives and acquaintances of the deceased. Even while filing the charge-sheet, statements dated 22.7.2010 and 28.7.2010 of independent and important witnesses, such as, learned advocate Mr. Anand Yagnik and Mr. Kanaksinh Parmar respectively were not annexed with the charge-sheet". The High Court then notices the contents of case diary in which it is recorded that on 20.08.2010, the news about the police being in search of Shiva Solanki were leaked in advance and spread through media and telecast, even then he could not be located in spite of enquiring into various secret sources and informants.

(d) The High Court also notic

when the High Court ordered the transfer of the investigation, one of the main accused persons namely Bahadursinh D. Vadher, was arrested and had practically dictated in great detail his motive, plan, execution and sufficiency of resources for arranging the elimination of Jethwa, without ever mentioning the name of Shiva Solanki. His statements were recorded everyday from 18th to 30th August, 2010. During the course of custodial interrogation, on 19th August, 2010, he added that he had decided with Shiva Solanki to kill Amit Jethwa for which Shiva was to provide the money. Thereafter, the High Court makes a very important observation which is as follows:-

"Although nothing can be treated or held to be proved at this stage, the sequence of events and the statements clearly indicated that even the name of Shiva Solanki was being introduced in a careful and planned manner with leakage of sensitive information for the public including others involved in the offence".

This observation clearly shows that all the observations were tentative, prima facie, to adjudge only the issues, as to whether the State Police had conducted a fair and unbiased investigation. No opinion is recorded, even prima facie of the guilt or otherwise of the appellant in the offence of conspiracy to murder Jethwa. It appears to us that the apprehension of the appellant that any of the observations made by the High Court would influence the trial are without any basis.

(e) The High Court further notices that when Shiva Solanki was arrested on 07.09.2010, his statements with a matching version were recorded everyday from 07.09.2010 to 20.09.2010 with details of his decision and understanding with Bahadursinh to kill Amit Jethwa of his own motive

and resources. But not once these accused persons appeared to have been asked even one question about the involvement of the appellant. In fact Shiva is stated to have clarified that, no one else was informed about his understanding with Bahadursinh.

(f) The High Court further notices that statement of appellant was recorded on 16.9.2010 when he claimed not only complete innocence but ignorance about even the activities of the deceased and the difficulties caused by him. In fact he urged for independent and deeper probe of the offence.

(g) The High Court then records the conclusion that this line of interrogation substantiates the submission that the investigating agency was following the clues offered by the arrested persons rather than the other independent information given by the father and witnesses. Taking into consideration all the aforesaid facts, the High Court concluded that "the statements of Mr.DB recorded after apparently solving the mystery of the murder clearly appeared to be an empty formality at the convenience and invitation of Mr.DB. A fair, proper and prompt investigation in case of such a crime, by an ordinary police officer, would have inspired immediate custodial interrogation of the prime suspects; but in the facts of the present case, the investigating officer practically remained clueless for first 25 days after the murder and then suddenly, with first arrest and first statement of the arrestee on the first day of investigation, the case was practically solved". Here again, the conclusion of the High Court is in the context of the impartiality of the investigation. The same cannot be construed as any definite or even a prima fac[illegible]e

guilt of the appellant.

(h) The High Court thereafter notices that the first person arrested was not named by any witnesses in any statement recorded till his arrest. The High Court, therefore, states that it is not clear "How that first arrestee, not named till then by any witness or in any statement recorded till his arrest, was identified as a suspect and arrested on 16.8.2010 itself after the order to transfer the investigation, is not clear. By a curious coincidence, the complainant who dictated the FIR under supervision of so-many higher officers and the first arrestee who offered complete solution to the investigating agency in his first statement before a special branch of the police, both happened to be serving police personnel serving under the higher officers under whom the investigation could otherwise hardly make any headway for 25 days." The High Court then notices the following facts "At both important points of registering and cracking the case, the common factor also was the same higher officer Mr. Mohan Jha, then in-charge of the City Crime Branch. He also supervised the further investigation as Special Commissioner of Police, Crime Branch, by virtue of a special order issued in this regard by the Director General of Police".

(i) On the basis of the numerous facts narrated in the judgment, the High Court concluded that "there was sufficient material to substantiate the submission that the State police was controlling the investigation rather than carrying it out in a fair, impartial and prompt manner." The High Court also concluded that the aforesaid facts would "lend credence to the allegation that the accused persons and the prime suspect had such influence in the

higher echelons of police-power, that the officers of the lower ranks would not dare to displease them." These observations again are general and were clearly necessary to state and to support the conclusion reached by the High Court that the investigation conducted by the State police was unsatisfactory and biased. Again no further conclusion has been recorded about the guilt of any of the suspects, let alone the appellant, in particular.

(j) The High Court thereafter notices the relationship of the appellant with Shiva Solanki and observed "The averments made by Mr.R.Vatsa, who conducted the further investigation, as related in Para 6 herein, did not inspire confidence insofar as close proximity of Shiva Solanki and Mr.DB and their interaction inter se before and after the crime, even to the extent discovered during the investigation, would have led an honest investigation to conclusions and inferences quite contrary to those drawn by the officer. He only made a weak attempt in proving his sincerity by applying for custodial interrogation of some of the accused and that attempt was simply smothered by the opinion of the District Government Pleader, as aforesaid."

(k) The High Court further concludes that where no one appears to be an eye witness to firing on the deceased, not only the persons alleged to have assaulted the deceased, but identity of the persons who would have strong motive for eliminating the deceased ought to have been fully or properly investigated. Instead, the prosecution relied mainly on the persons, who were already arrested and practically stopped at them in spite of the order for carrying out further invest

averments and allegations made in the petition.

(l) In our opinion, the High Court has only noticed the facts which tend to show that the investigation had not been conducted impartially and fairly. Although, the appellant is mentioned on a number of occasions, no specific conclusion is reached that the appellant was responsible for influencing or controlling the investigation. In fact, the finger is pointed only towards the higher echelons of the police, who seem to have been under the influence of the accused persons. Mention of the appellant as the prime suspect is not a conclusion reached by the High Court. Appellant has been referred to as the prime suspect in all the allegations made in the writ petitions and the statements of the relatives including the statement of the father of the deceased. Therefore, in our opinion, by recording the gist of the allegations made, the High Court has not committed any error of jurisdiction.

(m) Mr. Rohtagi has pointed out that the High Court has also recorded that since the appellant and his nephew were living together in a joint family and, therefore, must have conspired to kill Jethwa. The statement recorded by the High Court is as under:

"It has come on record that Mr.Shiva Solanki and Mr.DB were living together in a joint family and no investigator could have been easily satisfied with the statements that they did not interact in respect of the conspiracy to commit a capital crime, particularly when both of them were simultaneously joined as respondents in the PIL."

This, in our opinion, is not a conclusion that the appellant and his nephew Shiva Solanki must have conspired. The submission made by Mr. Rohtagi is not borne out from the

observations quoted above. Similarly, the conclusion recorded by the High Court that "The incorrect statements made by Superintendent of Police Mr. Vatsa regarding past record of Mr.DB as seen and discussed earlier in Para 3 herein, clearly indicated an attempt at somehow shielding the person who was the prime suspect, according to the statements of the relatives and associates of the deceased" again only alludes to the statements of the relatives and witnesses. It cannot be said to be a conclusion reached by the High Court, about the guilt of the appellant. Therefore, the conclusion cannot be said to be unwarranted.

55. Ultimately, the High Court records the following conclusion:

"All the above circumstances put together indicated that the investigation was controlled from the stage of registering the FIR and only the clues provided by the accused persons themselves were investigated to close the investigation by filing charge-sheet No.158 of 2010 dated 10.11.2010 and further investigation had not served any purpose. Therefore, the investigation with the lapses and lacunae as also the unusual acts of omission and commission did not and could not inspire confidence. It may not be proper and advisable to further critically examine the charge sheet already submitted by the police, as some of the accused persons are already arrested and shown as accused persons and even chare is yet to be framed against them. The facts and averments discussed in paragraph 6 and 7 hereinabove also amply support the conclusion that the investigation all throughout was far from fair, impartial independent or prompt."

56. This conclusion also only records the reasons which persuaded the High Court to transfer the investigation to CBI. No categorical findings are recorded about the involvement of the appellant in the crime of conspiracy. In fact, the High Court is well aware that the observations hav or

the limited purpose of reaching an appropriate conclusion as to whether the investigation had been conducted impartially. The High Court has itself clarified as follows :

> "In the facts and for the reasons discussed hereinabove, while concluding that the investigation into murder of the son of the petitioner was far from fair, independent, bona fide or prompt, this court refrains from even remotely suggesting that the investigating agency should or should not have taken a particular line of investigation or apprehended any person, except in accordance with law. It is clarified that the observations made herein are only for the limited purpose of deciding whether further investigation was required to be handed over to CBI, and they shall not be construed as expression of an opinion on any particular aspect of the investigation carried out so far."

57. After recording the aforesaid clarification, it was noticed that the investigation is being transferred to CBI to instill confidence of the general public in the investigation, keeping in mind the seriousness of the case having far reaching implications.

58. Although we have not expunged any of the adverse remarks recorded by the High Court, we emphasize that the trial court should keep in mind that any observations made by the High Court, which may appear to be adverse to the Appellant, were confined only to the determination of the issue as to whether the investigation is to be transferred to CBI. Undoubtedly, the trial of the accused will be conducted unaffected and uninfluenced by any of the so called adverse remarks of the High Court.

59. For the reasons stated above, we see no merit in both the appeals and the same are hereby dismissed.

Crl. M.P. No. 23723 of 2013 :-

60. We have already noticed the submissions of the

learned counsel for the parties on this application, seeking bail in the main judgment. The petitioner-appellant was arrested on 5th November, 2013, when he appeared before the CBI in response to the summons. Since then the petitioner-appellant has been in custody. The supplementary charge-sheet has been filed by the CBI in the Court of ACJM, Ahmedabad in January, 2014. After the charge-sheet being filed, obviously, the petitioner-appellant is no longer required for further investigation. Mr. Rohatgi has rightly pointed out that there is no likelihood of the petitioner-appellant tampering with the evidence as the copies of all the sensitive statements have not been supplied to the petitioner-appellant.

61. We are not much impressed by the submission of Mr. Rohatgi that the petitioner-appellant ought to be released on bail simply because he happens to be a sitting M.P., nor are we much impressed by the fact that further incarceration of the petitioner-appellant would prevent him from performing his duties either in the Parliament or in his constituency. So far as the court is concerned, the petitioner-appellant is a suspect/accused in the offence of murder. No special treatment can be given to the petitioner-appellant simply on the ground that he is a sitting Member of Parliament. However, keeping in view the fact that the CBI has submitted the supplementary charge-sheet and that the trial is likely to take a long time, we deem it appropriate to enlarge the petitioner-appellant on bail, subject to the following conditions:

(i) On his furnishing personal security in the sum of Rs.5 lacs with two solvent sureties, each of the like amount, to the satisfaction of the trial court.

(ii) The petitioner-appellant shall appear in Court as and when directed by the court.

(iii) The petitioner-appellant shall make himself available for any further investigation/interrogation by the CBI as and when required.

(iv) The petitioner-appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade that person from disclosing such facts to the court or to the investigating agency or to any police officer.

(v) The petitioner-appellant shall not leave India without the previous permission of the trial court.

(vi) In case the petitioner-appellant is in possession of a passport, the same shall be deposited with the trial court before being released on bail.

62. The trial court shall be at liberty to add/impose any further condition(s) as it deems necessary, in addition to the aforesaid.

63. The Criminal Misc. Petition is allowed in the aforesaid terms.

Crl.M.P.No.22987 of 2013 :

64. This Crl. Misc. Petition was filed by the petitioner on 28th October, 2013, seeking stay of any coercive action against him prejudicing his life and personal liberty, pursuant to the judgment dated 25th September, 2012 of the Gujarat High Court impugned in the present criminal appeals. In view of the order passed by us in Crl. Misc. Petition No.23723 of 2013, this Petition is dismissed as having become infructuous.

D.G. Appeals disposed of.

STATE BANK OF PATIALA AND ANOTHER
v.
RAM NIWAS BANSAL (DEAD) THROUGH LRS.
(Civil Appeal No. 239 of 2003)

MARCH 3, 2014

[H.L. GOKHALE AND DIPAK MISRA, JJ.]

SERVICE LAW:

Disciplinary proceedings - Punishment of dismissal from service on 23.4.1985 - Full Bench of High Court ordered reinstatement on the ground that non-supply of enquiry report had caused serious prejudice to the delinquent employee and on that basis set aside the order of punishment and directed the disciplinary authority to grant an opportunity to the employee to reply to enquiry report and pass appropriate orders after granting personal hearing to him - The Bank completed the disciplinary proceedings and passed an order of dismissal with retrospective effect - Challenged - Held: The direction of Full Bench of High Court for reinstatement was a direction for reinstatement for the purpose of holding a fresh enquiry from the stage of furnishing the report and no more - The Bank passed an order of dismissal on 22.11.2001 with effect from 23.4.1985 - On the face of the said order, it is absolutely unacceptable that the Bank in 2001 can pass an order with effect from 23.4.1985 which would amount to annulment of the earlier judgment of the Full Bench of High Court - When on the date of non-furnishing of the enquiry report, the delinquent officer was admittedly not under suspension, but was in service, he would continue in service till he is dismissed from service in accordance with law or superannuated in conformity with the Regulations - The order of removal cannot be made retrospective.

STATE BANK OF PATIALA (OFFICERS') SERVICE REGULATIONS, 1979:

Regulation 19(1), provisos - Date of superannuation - Entitlement to back wages - Whether till the date of superannuation or till the date of dismissal - Held: The first proviso to Regulation 19(1) states that the period of service can be extended by the discretion of the competent authority and such extension has to be desirable in the interest of the Bank - Unless an extension is granted by a positive or an affirmative act by the competent authority, an officer of the Bank retires on attaining age of 58 years or upon the completion of 30 years of service, whichever occurs first - Order of dismissal was passed on 22.11.2001 while the employee completed 30 years of service on 25.2.1992 - The claim for grant of full salary for the whole period till the order of removal is, therefore, not sustainable as the officer stood superannuated on completion of 30 years - His continuance by virtue of the order passed by the High Court has to be treated as a deemed continuance for the purposes of finalization of the disciplinary proceeding only.

The delinquent employee was bank officer in the appellant-bank. He was charge-sheeted in the year 1980 for certain financial irregularities. Two supplementary charge-sheet were also issued to him in 1981 and 1982. The Enquiry Officer submitted his report to the General Manager of the Bank holding that certain charges had been proved, some charges had been partly proved and some charges had not been proved. The disciplinary authority concurred with the findings recorded by the Enquiry Officer and gave recommendation for removal of the delinquent officer from the Bank's service to the appointing authority in accord with the terms of Regulation 68(1)(ii) of the State Bank of Patiala (Officers') Service Regulations, 1979. The appointing authority agreeing with the findings recorded by the Enquiry

Officer and the recommendations of the disciplinary authority, imposed the penalty of removal by order dated 23.4.1985. The order imposing punishment of removal and a copy of the enquiry report was sent to the delinquent who then unsuccessfully who filed an appeal under Regulation 70 of the 1979 Regulations. He then filed writ petition before the High Court.

On 22.5.1998, the Full Bench of the High Court held that non-supply of comments of the General Manager had caused serious prejudice to the delinquent officer and there was denial of fair and reasonable opportunity and on that basis set aside the order of punishment. However, it directed the disciplinary authority to grant an opportunity to the respondent to reply to the enquiry report and pass appropriate orders after granting personal hearing to him in accordance with law. The appellant-Bank challenged the said order before the Supreme Court. On 12.4.1999, Supreme Court directed stay of reinstatement of the respondent with the direction that the Bank would comply with the provisions of Section 17-B of the Industrial Disputes Act, 1947. It was further observed that the Bank and its functionaries would be at liberty to proceed with the enquiry in terms of the permission granted by the High Court and any decision taken would be without prejudice to the outcome of the appeal.

On 20.8.1999 the Bank filed application for modification of the order dated 12.4.1999 on the ground that Section 17-B of the Act was not applicable. On 6.12.1999, the Supreme Court, leaving the question of law open, dismissed the appeal of Bank. The Bank in compliance with the order dated 22.5.1998 passed by the Full Bench of the High Court, sent a copy of the enquiry report to the employee wherein it was mentioned that he should appear before the disciplin

date fixed for personal hearing. The respondent filed an application CM No. 1965 of 2001 seeking clarification of the order dated 22.5.1998 with a further direction to the Bank to reinstate him in service with full back wages. During the pendency of the said application in the writ petition the appointing authority passed the order of removal on 22.11.2001 with effect from 23.4.1985.

On 23.11.2001, CM No. 1965 of 2001 was disposed of by the Full Bench by the impugned order wherein it was held that the delinquent officer was never placed under suspension; that after the order of dismissal of his service dated 25.4.1985 was set aside by the Court on 22.5.1998, the disciplinary authority has neither concluded the disciplinary proceedings nor has it passed any other appropriate order for the reasons best known to the concerned authority.

The three issues for consideration in the instant appeal were, (i) whether the employer Bank could have, in law, passed an order of dismissal with retrospective effect; (ii) whether the delinquent officer stood superannuated after completion of thirty years as provided under the Regulations on 25.2.1992; and (iii) whether the legal heirs of the deceased-employee are entitled to get the entire salary computed till the actual passing of the order of dismissal, that is, 22.11.2001 or for that matter till the date of superannuation, that is, 25.2.1992.

Disposing of the appeal, the Court

HELD: 1. The judgment by Full Court passed on 22.5.1998 had attained finality inter se parties. The Full Bench took note of the fact that the report of the enquiry officer was not furnished to the delinquent officer as a result of which he was deprived of the benefit of knowing the contents of the report and submitting his version with

regard to the correctness of the findings of the enquiry report. The High Court opined that the delinquent officer had suffered serious prejudice. Thereafter, the Court referred to the order of punishment passed by the Managing Director which apparently showed that the recommendations of the General Manager (Operation) were taken into consideration. The said direction of Full Court for reinstatement is a direction for reinstatement for the purpose of holding a fresh enquiry from the stage of furnishing the report and no more. The direction for reinstatement was stayed by the Supreme Court. The Bank proceeded to comply with the order of the High Court from the stage of reply of enquiry. The High Court by the impugned order had directed payment of back wages to the delinquent officer from the date of dismissal till passing of the appropriate order in the disciplinary proceeding/superannuation of the petitioner therein whichever is earlier. The Bank has passed an order of dismissal on 22.11.2001 with effect from 23.4.1985. On the earlier round the punishment was set aside and direction for reinstatement was passed. Thus, on the face of the said order it is absolutely inexplicable and unacceptable that the Bank in 2001 can pass an order with effect from 23.4.1985 which would amount to annulment of the judgment of the earlier Full Bench. As has been held by the High Court in the impugned judgment that when on the date of non-furnishing of the enquiry report the delinquent officer was admittedly not under suspension, but was in service and, therefore, he would continue in service till he is dismissed from service in accordance with law or superannuated in conformity with the Regulations. The order of removal cannot be made retrospective. [para 27, 30] [1011-D-F; 1014-H; 1015-A-G]

Managing Director, ECIL, Hyderabad v. B. Karunakar and Ors. **(1993) 4 SCC 727: 1993 (2) Suppl. SCR 576** *R. Jeevaratnam v. State of Madras* **AIR 19**

404 - relied on.

The Gujarat Mineral Development Corporation v. Shri P.H. Brahmbhatt **(1974) 3 SCC 601: 1974 (2) SCR 128;** *P.H. Kalyani v. M/s. Air France, Calcutta* **AIR 1963 SC 1756 : 1964 SCR 104 ;** *M/s. Sasa Musa Sugar Works (P) Ltd. v. Shobrati Khan* **AIR 1959 SC 923: 1959 Suppl. SCR 836;** *Management of Ranipur Colliery v. Bhuban Singh* **AIR 1959 SC 833: 1959 Suppl. SCR 719;** *R. Thiruvirkolam v. Presiding Officer and Anr.* **(1997) 1 SCC 9: 1996 (8) Suppl. SCR 687;** *Gujarat Steel Tubes Limited and Ors. v. Gujarat Steel Tubes Mazdoor Sabha and Ors.* **(1980) 2 SCC 593: 1980 (2) SCR 146;** *Punjab Dairy Development Corporation Ltd. and Anr. v. Kala Singh and Ors.* **(1997) 6 SCC 159: 1997 (1) Suppl. SCR 235;** *Desh Raj Gupta v. Industrial Tribunal IV, U.P.* **(1991) 1 SCC 249: 1990 (1) Suppl. SCR 411;** *Vishweshwaraiah Iron and Steel Ltd. v. Abdul Gani and Ors.* **AIR 1998 SC 185 : (1997) 8 SCC 713;** *Vishweshwaraiah Iron and Steel Ltd. v. Abdul Gani and Ors.* **(2002) 10 SCC 437;** *Pradip Chandra Parija v. Pramod Chandra Patnaik* **(2002) 1 SCC 1: 2001 (5) Suppl. SCR 460 ;** *Engineering Laghu Udyog Employees' Union v. Judge,Labour Court and Industrial Tribunal and Anr.* **(2003) 12 SCC 1: 2003 (6) Suppl. SCR 253;** *Workmen v. Motipur Sugar Factory* **AIR 1965 SC 1803: 1965 SCR 588;** *Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.* **(1973) 1 SCC 813: 1973 (3) SCR 587;** *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and Ors.* **(2002) 2 SCC 244: 2002 (1) SCR 284;** *Punjab Beverages (P) Ltd. v. Suresh Chand* **(1978) 2 SCC 144: 1978 (3) SCR 370 - referred to.**

2.1. The first proviso to Regulation 19(1) states that the period of service can be extended by the discretion of the competent authority and such extension has to be desirable in the interest of the Bank. The second proviso provides that an officer who has joined the service of the bank either as an officer or otherwise on or after 19.7.1969

and attained the age of 58 years shall not be granted any further extension in service. By this proviso, the power of the competent authority in respect of officers who had joined as officers or otherwise after the cut-off date, i.e. 19.7.1969 and have attained the age of 58 years of service, is curtailed. The delinquent officer joined the service as a clerk in the Bank on 26.2.1962 and was promoted as Grade-II Officer in 1971 and as Grade-I Officer in 1977. Even if this provision is extended to him, he could not have been granted extension of service after completion of 58 years of age. The said officer attained the age of 58 years on 24.2.2002. Be that as it may, the grant of extension is dependent on satisfaction the conditions as laid down in the first proviso. As is seen from the earlier round of litigation, the Full Bench had quashed the punishment and directed for reinstatement. In the second round in CM No. 1965 of 2000 the High Court has directed that the employee shall continue till passing of the appropriate orders in the disciplinary proceedings or superannuated as per rules. It has not commented on the validity of superannuation in the year 1992 as pleaded by the Bank and left it to be agitated in appropriate proceeding. [Para 32] [1016-F-H; 1017-A-C]

2.2. Regulation 19(2) lays down that if the disciplinary proceedings have been initiated against an officer during the period when he is in service, the said proceedings can continue even after his retirement at the discretion of the Managing Director and for the said limited purpose the officer shall be deemed to be in service. In the case at hand, the disciplinary proceeding was initiated against the delinquent officer while he was in service. The first order of dismissal was passed on 23.4.1985. The said order of punishment was set aside by the High Court and the officer concerned was directed to be reinstated for the limited purpose, i.e., supply of enquiry report and to proceed in the disciplinary proceed[illegible].

The said order was not interfered with by this Court. The Bank continued the proceeding. The said continuance was in pursuance of the order of the Court. Under these circumstances, it has to be accepted that the concept of deemed continuance in service of the officer would have full play and, therefore, an order of removal could have been passed after finalization of the departmental proceeding on 22.11.2001. The said order would not have been made retrospectively operative, but that will not invalidate the order of dismissal but it would only have prospective effect. [Paras 34, 38] [1018-C-D; 1020-G-H; 1021-A-D]

2.3. For the purpose of deemed continuance, the delinquent officer would not be entitled to get any benefit for the simple reason, i.e., the continuance is only for finalisation of the disciplinary proceedings, as directed by the Full Bench of the High Court. Hence, the effect and impact of Regulation 19(1) of the Regulations comes into full play. On a seemly construction of the first proviso, it requires an affirmative act by the competent authority, for it is an exercise of power of discretion and further the said discretion has to be exercised where the grant of extension is deemed desirable in the interest of the Bank. As the facts would reveal, in the year 1992 the concerned officer stood removed from service and at that juncture to expect the Bank in law to intimate him about his date of superannuation or to pass an order would be an incorrect assumption. The conclusion which appears logical and acceptable is that unless an extension is granted by a positive or an affirmative act by the competent authority, an officer of the Bank retires on attaining age of 58 years or upon the completion of 30 years of service, whichever occurs first. The first proviso would have full play and it should be apposite to conclude that the delinquent officer stood superannuated on completion of 30 years of service on 25.2.1992. It is

because the conditions stipulated under the first proviso to the said Regulation deal with a conditional situation to cover certain categories of cases and require an affirmative act and in the absence of that it is difficult to hold that the delinquent officer did not retire on completion of thirty years of service. [Para 39] [1021-E-G, H; 1022-A-B, G-H; 1023-A-B]

UCO Bank and Anr. v. Rajinder Lal Capoor **(2007) 6 SCC 694: 2007 (7) SCR 543;** *Ramesh Chandra Sharma v. Punjab National Bank and Anr.* **(2007) 9 SCC 15: 2007 (7) SCR 585;** *State Bank of India v. Ram Lal Bhaskar and Anr.* **(2011) 10 SCC 249: 2011 (12) SCR 1036 - relied on.**

3. The order of removal from service would come into effect from the date of passing of the order, i.e., 22.11.2001 as it has to be prospectively operative and, therefore, as a natural corollary he remained in service from 23.4.1985 till he attained the age of superannuation, i.e., 25.2.1992 or till the end of February, 1992, being the last day of the month. The claim made by employee for grant of full salary for the whole period till the order of removal is not sustainable as the officer stood superannuated on completion of thirty years and his continuance by virtue of the order passed by the High Court has to be treated as a deemed continuance for the purposes of finalization of the disciplinary proceeding. During the continuance of the disciplinary proceeding the delinquent officer was not put under suspension. After the order of punishment passed by the disciplinary authority and affirmed by the appellate authority was quashed by the High Court on 22.5.1998, the concerned officer has to be treated to be in service from his date of first removal till his date of retirement. Had the Bank brought to the notice of the Full Bench about the legal position under the Regulations, in all probability, the matter would have been dealt with differently. Be that as it may, grant of salary in entirety [illegible]s

determined to be the period of continuance in service would not be apposite and similarly, the submission advanced on behalf of the Bank that payment of rupees five lacs would meet the ends of justice does not deserve acceptance. Ordinarily, the Bank would have been asked to pay fifty per cent of the back wages for the period commencing 23.4.1985 till the end of February, 1992, with some interest but to give quietus to the controversy and, the Bank is directed to deposit a further sum of rupees five lacs with the Registrar General of the High Court within two months hence and the respondents shall be entitled to withdraw the same. If the amount earlier deposited has not been withdrawn by the original respondent, the same shall also be withdrawn by the legal heirs. [Paras 40, 41] [1023-C-F; 1024-C-H; 1025-A]

C.L. Verma v. State of Madhya Pradesh and Anr. **1989 Supp (2) SCC 437;** *A.P. State Road Transport Corporation and Ors. v. Abdul Kareem* **(2005) 6 SCC 36: 2005 (1) Suppl. SCR 918;** *A.P. SRTC and Anr. v. B.S. David Paul* **(2006) 2 SCC 282: 2006 (1) SCR 2006;** *J.K. Synthetics Ltd. v. K.P. Agrawal and Anr.* **(2007) 2 SCC 433: 2007 (2) SCR 60 - relied on.**

Case Law Reference:

1993 (2) Suppl. SCR 576	**relied on**	**Para 9**
1966 SCR 404	**relied on**	**Para 15**
1974 (2) SCR 128	**referred to**	**Para 15**
1964 SCR 104	**referred to**	**Para 16**
1959 Suppl. SCR 836	**referred to**	**Para 16**
1959 Suppl. SCR 719	**referred to**	**Para 18**
1996 (8) Suppl. SCR 687	**referred to**	**Para 19**
1980 (2) SCR 146	**referred to**	**Para 19**

1997 (1) Suppl. SCR 235	**referred to**	**Para 20**
1990 (1) Suppl. SCR 411	**referred to**	**Para 20**
(1997) 8 SCC 713	**referred to**	**Para 21**
(2002) 10 SCC 437	**referred to**	**Para 22**
2001 (5) Suppl. SCR 460	**referred to**	**Para 22**
2003 (6) Suppl. SCR 253	**referred to**	**Para 23**
1965 SCR 588	**referred to**	**Para 23**
1973 (3) SCR 587	**referred to**	**Para 23**
2002 (1) SCR 284	**referred to**	**Para 25**
1978 (3) SCR 370	**referred to**	**Para 25**
2007 (7) SCR 543	**relied on**	**Para 34**
2007 (7) SCR 585	**relied on**	**Para 35**
2011 (12) SCR 1036	**relied on**	**Para 37**
1989 Supp (2) SCC 437	**relied on**	**Para 39**
2005 (1) Suppl. SCR 918	**relied on**	**Para 40**
2006 (1) SCR 2006	**relied on**	**Para 40**
2007 (2) SCR 60	**relied on**	**Para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 239 of 2003.

From the Judgment and Order dated 23.11.2001 of the High Court for the States of Punjab and Haryana at Chandigarh in CM No. 1965 of 2001 in C.W.P. No. 4929 of 1986.

WITH

T.C. (C) No. 79 of 2013.

Vikas Singh, Sanjay Kapur, Lekha a

Das for the Appellants.

P.S. Patwali (for Nikhil Nayyar) for the Respondent.

The Judgment of the Court was delvered by

DIPAK MISRA, J. 1. Ram Niwas Bansal, predecessor-in-interest of the respondents 1 to 4, the legal heirs who have been brought on record after his death during the pendency of this appeal, while posted as Accountant at the Narnaul Branch of the appellant-Bank in the Officer Cadre, was served with a charge-sheet dated 20.10.1980 for certain financial irregularities. Two supplementary charge-sheets dated 15.1.1981 and 8.1.1982 were also issued to the said officer. After explanation was offered by late Ram Niwas Bansal, the disciplinary authority appointed an Enquiry Officer who, after conducting the enquiry, submitted his report to the General Manager (Operations) of the Bank holding that certain charges had been proved, some charges had been partly proved and some charges had not been proved. The disciplinary authority concurred with the findings recorded by the Enquiry Officer and recommended for removal of the delinquent officer from the Bank's service to the appointing authority in accord with the terms of Regulation 68(1)(ii) of the State Bank of Patiala (Officers') Service Regulations, 1979 (for short "the 1979 Regulations") and the appointing authority, i.e., Managing Director, agreeing with the findings recorded by the Enquiry Officer and the recommendations of the disciplinary authority, imposed the penalty of removal vide order dated 23.4.1985. The order imposing punishment of removal from service along with a copy of the enquiry report was sent to late Bansal who preferred an appeal under Regulation 70 of the 1979 Regulations before the Executive Committee which, vide order dated 18.7.1986, rejected the appeal.

2. Being grieved by the aforesaid orders, he preferred CWP No. 4929 of 1986 before the High Court for issuance of a writ of certiorari for quashment of all the orders and for issue

of appropriate direction to reinstate him in service with full service benefits. On 1.10.1993 the learned single Judge referred the matter to the larger Bench and ultimately the matter was placed before the Full Bench.

3. The Full Bench, vide order dated 22.5.1998, ruled that non-supply of comments of the General Manager had caused serious prejudice to the delinquent officer and there was denial of fair and reasonable opportunity and on that basis set aside the order of punishment. However, it directed the disciplinary authority to grant an opportunity to the petitioner therein to reply to the enquiry report and pass appropriate orders after granting personal hearing to the petitioner therein in accordance with law.

4. Dissatisfied with the aforesaid judgment and order, the appellant-Bank preferred Special Leave Petition (C) No. 2442 of 1998 and after grant of leave the same was registered as Civil Appeal No. 773 of 1998. On 12.4.1999 this Court directed stay of reinstatement of the respondent therein with the direction that the Bank would comply with the provisions of Section 17-B of the Industrial Disputes Act, 1947 (for brevity, "the Act"'). It was further observed that the Bank and its functionaries would be at liberty to proceed with the enquiry in terms of the permission granted by the High Court and any decision taken would be without prejudice to the outcome of the appeal. It may be noted that this order was passed when a prayer for stay of the contempt proceeding that was initiated by said Bansal before the High Court was made before this Court. Be it stated, this Court directed stay of further proceedings of the contempt petition.

5. On 20.8.1999 the Bank filed Interlocutory Application No. 4 of 1999 for modification of the order dated 12.4.1999 on the ground that Section 17-B of the Act was not applicable. On 7.9.1999 the employee filed another Contempt Petition No. 396 of 1999 for non-implementation of the order passed by this Court. On 6.12.1999 this Court, leavir

open, dismissed the civil appeal as well as the contempt petition.

6. As the factual score would further unfold, on 10.7.2000 the Bank in compliance with the order dated 22.5.1998 passed by the Full Bench of the High Court, sent a copy of the enquiry report to the employee wherein it was mentioned that he should appear before the disciplinary authority on the date fixed for personal hearing. In the meantime, on 24.7.2000 the application for contempt was dismissed by the High Court on the foundation that there was no direction for payment of any salary to the employee or grant of any consequential benefits in the writ petition. Against the aforesaid order, the employee preferred Special Leave Petition (C) No. 15098 of 2000 and the same stood dismissed as withdrawn vide order dated 27.9.2000 granting liberty to the employee to approach the High Court for consequential reliefs.

7. On 14.10.2000 CM No. 1965 of 2001 was filed by the writ petitioner therein seeking clarification of the order dated 22.5.1998 with a further direction to the Bank to reinstate him in service with full back wages. During the pendency of the said application in the writ petition the appointing authority passed the order of removal on 22.11.2001 with effect from 23.4.1985.

8. On 23.11.2001 the CM No. 1965 of 2001 was disposed of by the Full Bench by the impugned order. A contention was raised by the Bank that the respondent-employee stood superannuated in the year 1992 after completion of thirty years of service. The Full Bench, after adverting to the facts in chronology and referring to the observations made by this Court in Special Leave Petition No. 15098 of 2000 and placing reliance on various decisions, took note of certain aspects which we think is necessary to be reproduced: -

> "Reverting back to the facts and circumstances of the present case, it is again not disputed before us that the delinquent officer was never placed under suspension. After the order of dismissal of his service dated 25.4.1985 was set aside by the Court on 22.5.1998, the disciplinary authority has neither concluded the disciplinary proceedings nor has it passed any other appropriate order till today, for the reasons best known to the concerned authority. The question before this Court is not whether the petitioner would or would not stand superannuated in February, 1992 after serving the Bank for a period of 30 years. This question, in any case, was beyond the purview and scope of the writ petition itself. Thus, the parties cannot call upon the Full Bench to decide this question in an application in this Writ Petition. The parties are free to agitate the question in this regard before the appropriate proceedings."

9. Thereafter, the Full Bench referred to the decision in *Managing Director, ECIL, Hyderabad v. B. Karunakar and others*[1] and came to hold that:

> "The Full Bench having decided in no uncertain terms that serious prejudice was caused to the petitioner in the departmental proceedings, the Bench set aside the order of dismissal and remanded the matter to the authorities concerned granting permission to proceed further in the departmental enquiry in accordance with law and to pass appropriate orders. The disciplinary authority has miserably failed, over a period of more than three years, to pass any appropriate orders. We are unable to understand this conduct on the part of the respondent-authorities. Though it has been contended that the petitioner has superannuated in the year 1992, but eventually, no copy of such order has been placed on record of this Court. The Hon'ble Apex Court had granted the interim stay during the pendency of the Special Leave Petition subject to compliance of provisions of Section 17-B of the Industrial Disputes Act, which itself indicates that

1. (1993) 4 SCC 727.

the respondent Bank was obliged to pay salary in terms thereof to the petitioner. Admittedly at no point of time, right from the commencement of the disciplinary proceedings till today, the petitioner was ever placed under suspension. Upon dismissal of the Special Leave Petition, the judgment of the Full Bench has attained finality at least interese the parties."

10. After so stating the Full Bench observed that on the date of non-furnishing of enquiry report to the delinquent officer he was admittedly not under suspension but was in service and, therefore, the inevitable conclusion was that he would continue in service till he was dismissed from service in accordance with law or superannuated in accordance with Rules. However, without adverting to the issue whether he stood superannuated in the year 1992 or not, was left to be agitated independently. Eventually, the application was allowed and the respondents therein were directed to pay back wages to the deceased-respondent from the date of dismissal till passing of the appropriate orders in the disciplinary proceedings or superannuation of the petitioner therein whichever was earlier. The said order is under assail in Civil Appeal No. 239 of 2003.

11. At this juncture, it is essential to state the facts in Transfer Case (C) No. 79 of 2013. Be it noted, when the Civil Appeal was listed for hearing on 16.1.2013, this Court, while hearing the appeal, was apprised about the subsequent development that had taken place in pursuance of which the original respondent No. 1 had preferred Civil Writ Petition No. 11412 of 2003 in the High Court of Punjab and Haryana, Chandigarh. Learned counsel for the respondents agreed for transfer of the writ petition to this Court and on that day learned counsel for the Bank took time to obtain instructions and, eventually, on 24.1.2013 agreed to the transfer of the writ petition to this Court to be heard along with the civil appeal. Thereafter, by virtue of order dated 30.4.2013 it has been registered as Transfer Case (C) No. 79 of 2013.

12. On a perusal of the writ petition it transpires that the petitioner therein referred to the order passed by the Full Bench on 23.11.2001 and thereafter stated about the disciplinary action taken against him after the initial judgment and order passed by the Full Bench on 22.5.1998 and receipt of the order dated 22.11.2001 along with a cover letter dated 26.11.2001 whereby the Bank had removed him from service with retrospective effect from 23.4.1985, i.e., the date of earlier removal. It was contended in the writ petition that the said order was unsustainable, because the order of termination could have not been given retrospective effect; that the conduct of the Bank was far from being laudable and replete with legal mala fide and colourable exercise of power; that the order of dismissal was violative of principles of natural justice and further the grounds mentioned in the order were totally unjustified; and that an attempt had been made by the Bank to overreach the judgment of the Full Bench. On the aforesaid basis, a prayer was made for quashing the order dated 22.11.2001 and directing the Bank to reinstate him in service with entire benefits with effect from 23.4.1985 along with interest and to pass such other orders as it may deem fit and proper in the facts and circumstances of the case.

13. We have heard Mr. Vikas Singh, learned senior counsel for the appellant bank and Mr. P.S. Patwalia, learned senior counsel for the legal heirs of the deceased-employee in the appeal as well as the in the transfer petition.

14. The three issues that eminently emerge for consideration are, (i) whether the employer Bank could have, in law, passed an order of dismissal with retrospective effect; (ii) whether the delinquent officer stood superannuated after completion of thirty years as provided under the Regulations on 25.2.1992; and (iii) whether the legal heirs of the deceased-employee are entitled to get the entire salary computed till the actual passing of the order of dismissal, that is, 22.11.2001 or for that matter till the date of superannua[illegible]2.

15. Regard being had to nature of controversy, we shall proceed to deal with first point first, that is, whether the order of removal could have been made with retrospective effect. Mr. Patwalia, learned senior counsel appearing for the employee, has submitted that the disciplinary authority could not have passed an order of removal by making it operational from a retrospective date. He has commended us to a three-Judge Bench decision in *R. Jeevaratnam v. State of Madras*[2]. In the said case, the appellant-therein instituted a suit for a declaration that the order of dismissal from service was illegal and void. The trial Court dismissed the suit and the said decree was affirmed in appeal by the High Court. One of the contentions raised before this Court that the order of dismissal dated October 17, 1950 having been passed with retrospective effect, i.e., May 29, 1949, was illegal and inoperative. This Court opined that an order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should ot be given the fullest effect. The said principle has been followed in *The Gujarat Mineral Development Corporation v. Shri P.H. Brahmbhatt*[3].

16. Mr. Vikas Singh, learned senior counsel has heavily relied on the Constitution Bench decision in *P.H. Kalyani v. M/s. Air France, Calcutta*[4], wherein the employee had challenged the order of the Labour Court relating to his dismissal by the employer, the respondent company therein. He was served a charge-sheet containing two charges of gross dereliction of duty inasmuch as he had made mistakes in the preparation of load-sheets on one day and a balance chart on another day, which mistakes might have led to a serious

2. AIR 1966 SC 951.

3. (1974) 3 SCC 601.

4. AIR 1963 SC 1756.

accident to the aircraft. An enquiry was fixed by the Station Manager. His authority was questioned by the appellant but his objection was overruled and the enquiry was held and completed. The enquiry officer forwarded the findings and his recommendations to the competent authority of the company, on the basis of which he was dismissed from service. The order of dismissal provided for payment of one month's wages for the appellant and also stated that an application was made before the industrial tribunal for the approval of the action taken, apparently as some industrial dispute was pending before the tribunal. In accordance with the order of dismissal, the respondent company filed an application before the Labour Court seeking approval of the action. The appellant thereafter filed an application under Section 33-A of the Act challenging the legality of the actions taken on many a ground. The grounds were considered by the Labour Court and all of them were substantially decided against the appellant. The Labour Court held that the dismissal of the appellant was justified and accordingly accorded approval to the order of dismissal passed by the Management. While dealing with various points raised by the appellant, the Labour Court held that the application under Section 33(2)(b) of the Act was validly made even though it had been made after the order of dismissal had been passed. It also opined that the case was not covered by Section 33(1) of the Act and it was not necessary to obtain the previous permission of the tribunal before dismissing the appellant, for he was not a protected workman. After dealing with the other legal facets, the Labour Court dismissed the application of the appellant-employee under Section 33-A of the Act. Before the Constitution Bench, it was urged that the domestic enquiry held by the employer was defective as no approval of the action taken in connection with enquiry and further the Labour Court, even if held that the dismissal was justified, it should have held that the order of dismissal would become operative from the date of the award. In support of the said submission, reliance was placed on *M/s. Sasa Musa*

Sugar Works (P) Ltd. v. Shobrati Khan[5] wherein it was observed as follows:-

> "...as the management held no inquiry after suspending the workmen and proceedings under Section 33 were practically converted into the inquiry which normally the management should have held before applying to the Industrial Tribunal, the management is bound to pay the wages of the workmen till a case for dismissal was made out in the proceedings under Section 33."

17. Referring to the said case, the Constitution Bench observed that in *Shobrati Khan* (supra), an application was made under Section 33(1) of the Act for permission to dismiss the employees and such permission was asked for though no enquiry whatsoever had been held by the employer and no decision was taken that the employees be dismissed and it was in those circumstances that a case for dismissal was made out only in the proceedings under Section 33(1) and, therefore, the employees were held entitled to their wages till the decision on the application under Section 33 of the Act. The Constitution Bench observed that the matter would have been different if in that case an enquiry had been held and the employer had come to the conclusion that dismissal was proper punishment and then they had applied under Section 33(1) for permission to dismiss and, in those circumstances, the permission would have related back to the date when the employer came to the conclusion after an enquiry that the dismissal was the proper punishment and had applied for removal of the ban by an application under Section 33(1).

18. The larger Bench, in that context, made a reference to the to the decision in *Management of Ranipur Colliery v. Bhuban Singh*[6] and thereafter held thus:-

5. AIR 1959 SC 923.
6. AIR 1959 SC 833.

> "The present is a case where the employer has held an inquiry though it was defective and has passed an order of dismissal and seeks approval of that order. If the inquiry is not defective, the Labour Court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bona fide conclusion that the employee was guilty of misconduct. Thereafter on coming to the conclusion that the employer had bona fide come to the conclusion that the employee was guilty i.e. there was no unfair labour practice and no victimisation, the Labour Court would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the Labour Court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made. The observations therefore in Messrs. Sasa Musa Sugar Company on which the appellant relies apply only to a case where the employer had neither dismissed the employee nor had come to the conclusion that a case for dismissal had been made out. In that case the dismissal of the employee takes effect from the date of the award and so until then the relation of employer and employee continues in law and in fact. In the present case an inquiry has been held which is said to be defective in one respect and dismissal has been ordered. The respondent had however to justify the order of dismissal before the Labour Court in view of the defect in the inquiry. It has succeeded in doing so and therefore the approval of the Labour Court will relate back to the date on which the respondent passed the order of dismissal. The contention of the appellant therefore that dismissal in this case should take effect from the [illegible]e

Labour Court's award came into operation must fail."

19. In this regard, we may refer to a two-Judge Bench decision in *R. Thiruvirkolam v. Presiding Officer and another*[7]. In the said case, the appellant was dismissed from service and a domestic enquiry was instituted on 18.11.1981 on proof of misconduct and he had challenged his dismissal before the Labour Court which found that the domestic enquiry to be defective and permitted the Management to prove the misconduct before it. On the basis of the evidence adduced before the Labour Court, it came to the conclusion that the misconduct was duly proved. When the matter travelled to this Court, leave granted in the appeal was confined only to the question: Whether the dismissal would take effect from the date of the order of the Labour Court, namely, 11.12.1985 or it would relate to the date of order of dismissal passed by the employer, namely, 18.11.1981. The Court distinguished the decision in *Gujarat Steel Tubes Limited and others v. Gujarat Steel Tubes Mazdoor Sabha and others*[8] on the basis of the principles stated in *P.H. Kalyani's* (supra).

20. At this stage, we may refer with profit to the authority in *Punjab Dairy Development Corporation Ltd. and another v. Kala Singh and others*[9] wherein a three-Judge Bench was dealing with a reference made by a Bench of three Judges to consider the correctness of the decision in *Desh Raj Gupta v. Industrial Tribunal IV, U.P.*[10]. The three-Judge Bench referred to the necessitous facts that the respondent therein, Kala Singh, was working as a Dairy Helper-cum-Cleaner for collecting the milk from various centres. He was charged with misconduct and after conducting due domestic enquiry, the disciplinary authority dismissed him from service. On reference, the labour court found that the domestic enquiry conducted by the employer-

7. (1997) 1 SCC 9.
8. (1980) 2 SCC 593.
9. (1997) 6 SCC 159.
10. (1991) 1 SCC 249.

appellant was defective. Consequently, opportunity was granted to the management to adduce evidence afresh to justify the order of dismissal and, accordingly, the evidence was adduced by the appellant and the delinquent-respondent. On consideration of the evidence the labour court found that the charge had been proved against the respondent and opined that the punishment was not disproportionate to the magnitude of misconduct of the respondent. In a writ petition the High Court set aside the award of the labour court to the extent of confirmation of the dismissal from service with effect from the date of the judgment of the labour court and not from any date earlier thereto. The three-Judge Bench noted that subsequent to the reference pertaining to correctness of the decision in *Desh Raj Gupta* (supra) the decision has been rendered by a two-Judge Bench in *R. Thiruvirkolam* (supra) and thereafter proceeded to state as follows: -

> "In the decision of the Constitution Bench in *P.H. Kalyani v. Air France,* this Court had held that once the labour court found the domestic enquiry to be defective and gave opportunity to the parties to adduce the evidence and also that the order of termination of the service or dismissal from service is valid, it would relate back to the original order of the dismissal. But a discordant note was expressed by the three-Judge Bench in *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha* which was considered by this Court in *Thiruvirkolam* case and it was held that in view of the judgment of the Constitution Bench, the three-Judge Bench judgment was not correct. *Desh Raj Gupta* case was also considered and it was held that it has not been correctly decided. Thus, we are relieved of reviewing the entire case-law in that behalf.
>
> In view of the aforesaid decisions and in view of the findings recorded by the Labour Court, we are of the considered opinion that the view expressed in *Desh Raj Gupta* case is not correct. It is a[illegible]d.

Following the judgment of the Constitution Bench, we hold that on the Labour Court's recording a finding that the domestic enquiry was defective and giving opportunity to adduce the evidence by the management and the workman and recording of the finding that the dismissal by the management was valid, it would relate back to the date of the original dismissal and not from the date of the judgment of the Labour Court."

21. At this juncture, we may notice what was the perception at the subsequent stage. In *Vishweshwaraiah Iron and Steel Ltd. v. Abdul Gani and others*[11], a two-Judge Bench observed as follows: -

"3. The moot question would arise whether the ratio of the Constitution Bench judgment in Kalyani case would almost automatically apply to such cases apart from the cases arising under Section 33 of the I.D. Act. We may, in this connection, mention that the decision of the three-Judge Bench of this Court in Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha wherein Krishna Iyer, J., spoke for the majority, was an authority on the question of leading evidence before the Industrial Court in proceedings under Section 10-A of the Act and on the question of relation back of ultimate penalty order passed by the arbitrator on the basis of evidence led by the management for justification of its action before such Tribunal. Therefore, the question would arise whether the ratio of this decision would still apply to a case where the proceedings relate to Section 10 or 10-A of the Act apart from Section 33 of the Act. The later decisions of this Court have applied the ratio of the decision in Kalyani case to matters arising under Sections 10 and 10-A of the Act. In our view, therefore, the dispute in the present proceedings could be better resolved by a Constitution Bench of this Court which can consider the scope and

11. AIR 1998 SC 185 : (1197) 8 SCC 713.

ambit of the decision of the earlier Constitution Bench judgment in Kalyani case which has been the sheet-anchor of the subsequent cases referred to earlier on which a strong reliance has been placed by learned counsel for the petitioner and which had nothing to do with proceedings under Section 33 of the Act. The later decisions of this Court will also, therefore, require a re-look."

22. Thereafter, it granted leave and directed the appeals to be placed for final disposal before a Constitution Bench. When the matter came before the Constitution Bench in *Vishweshwaraiah Iron and Steel Ltd. v. Abdul Gani and others*[12], the larger Bench, on 31.1.2002, passed the following order: -

"The order of reference was made to a Constitution Bench by a Bench of two learned Judges for the reason that they found some difficulty in coming to a conclusion as to whether an earlier Constitution Bench judgment and judgments of Benches of three learned Judges resolved this question. In our view, a Bench of two learned Judges cannot make a reference directly to a Constitution Bench; this has been laid down in the judgment in *Pradip Chandra Parija v. Pramod Chandra Patnaik*[13]. It is, therefore, that this Constitution bench will not decide the reference."

23. In this context, a reference to a three-Judge Bench decision in *Engineering Laghu Udyog Employees' Union v. Judge, Labour Court and Industrial Tribunal and another*[14] would be apt. In the said case a contention was canvassed on behalf of the workmen that the view taken by the High Court to the extent it held that the order of termination would relate back to the date of the original order of termination, was erroneous and to bolster the said submission reliance was placed on *Gujarat Steel Tubes Ltd.* (supra). The Court, after referring to

12. (2002) 10 SCC 437.
13. (2002) 1 SCC 1.
14. (2003) 12 SCC 1.

earlier decisions, opined that Section 11-A of the Act confers a wide power upon the Labour Court, Industrial Tribunal or the National Tribunal to give appropriate relief in case of discharge or dismissal of workman. While adjudicating on a reference made to it, the Labour Court, Tribunal or the National Tribunal, as the case may be, if satisfied that the order of discharge or dismissal was not justified, may, while setting aside the same, direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Only in a case where the satisfaction is reached by the Labour Court or the Tribunal, as the case may be, that an order of dismissal was not justified, the same can be set aside. So long as the same is not set aside, it remains valid. But once whether on the basis of the evidence brought on record in the domestic inquiry or by reason of additional evidence, the employer makes out a case justifying the order of dismissal the stand that such order of dismissal can be given effect to only from the date of the award and not from the date of passing of the order of punishment was not legally acceptable. The Court further ruled that the distinction sought to be made by this Court in some of the matters including Gujarat Steel Tubes was not based on a sound premise, particularly when the binding decisions of the Court in *Workmen v. Motipur Sugar Factory*[15] and *Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.*[16] had not been taken note of.

24. Thereafter, the three-Judge Bench referred to the decision in *Motipur Sugar Factory (P) Ltd.* (supra) and it was ruled that the employer has got a right to adduce evidence before the tribunal justifying its action, even where no domestic inquiry whatsoever has been held. Reference was also made to the decision in *Firestone Tyre & Rubber Co. of India (P) Ltd.* (supra) wherein the Court formulated the proposition of law

15. AIR 1965 SC 1803.

16. (1973) 1 SCC 813.

emerging from earlier decisions. The relevant propositions are as follows: -

> "32. From those decisions, the following principles broadly emerge:
>
> (1)-(3) * * *
>
> (4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.
>
> (5) * * *
>
> (6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.
>
> (7) It has never been recognised that the Tribunal should straight away, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.
>
> (8) * * *"

25. In *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and others*[17] the Constitution Bench reiterated the principles stated in *P.H. Kalyani* (supra) and overruled a three-Judge Bench decision rendered in *Punjab Beverages (P) Ltd. v. Suresh Chand*[18].

17. (2002) 2 SCC 244.

18. (1978) 2 SCC 144.

26. We have referred to the aforesaid line of judgments to highlight that these authorities pertain to the lis under the Act. The doctrine of "relation back" of an imposition of punishment in case of a labour court finding the domestic enquiry as defective and granting opportunity to the employer to substantiate the same either under Section 10A or proceedings under Section 33 of the Act, in our considered opinion, in the present case, need not be gone into as the nature of controversy is quite different. Suffice it to say, the aforesaid authorities have to be restricted to the disputes under the Act.

27. At this juncture, we think it appropriate to state in detail what the Full Bench had ruled on the first occasion on 22.5.1998. We have already stated as to what directions it had passed and how the civil appeal stood dismissed keeping the law open as far as applicability of Section 17B of the Act is concerned. The fact remains, the said judgment had attained finality inter se parties. The Full Bench took note of the fact that the report of the enquiry officer which ran into 68 pages was not furnished to the delinquent officer as a result of which he was deprived of the benefit of knowing the contents of the report and submitting his version with regard to the correctness of the findings of the enquiry report. The High Court opined that the delinquent officer had suffered serious prejudice. Thereafter, the Court referred to the order of punishment passed by the Managing Director which apparently shows that the recommendations of the General Manager (Operation) were taken into consideration. Proceeding further it expressed as follows: -

> "It is not disputed before us that the copy of the comments of General Manager as afore referred were never furnished to the delinquent officer, as such, he never had the occasion to see this document which apparently has been taken into consideration by the authorities concerned. The impugned order is the cumulative result of all the 3 charge sheets and the comments of the General Manager obviously related to the matter in issue. Non furnishing of such material document to the petitioner is also a flagrant violation of the principles of natural justice. By no stretch of imagination it could be accepted that a document prepared at the back of the petitioner, copy of which was admittedly not furnished to him, can be permitted to be a foundation of the order of punishment. Such an action would certainly be contrary to fair play."

And thereafter: -

> "Non supply of this document certainly caused definite prejudice to the case of the petitioner. The petitioner had every right to comment or meet the points raised in the recommendation of the General Manager. Thus, there is denial of fair and reasonable opportunity to the delinquent officer in the present case. The delinquent officer was not even aware as to what case he was to meet as projected in the report of recommendations of the General Manager which were considered by the authorities while imposing punishment on him.
>
> The cumulative effect of our above discussion is that the impugned orders of punishment dated 25.4.1985 and dated 18.7.1986 are liable to be quashed, which we do hereby quash without any hesitation. However, we would further direct the Disciplinary Authority to grant opportunity to the petitioner to reply to the enquiry report and pass appropriate orders after granting personal hearing to the petitioner in accordance with law."

28. In this context, it is instructive to reproduce the observations made by the Constitution Bench in *B. Karunakar* (supra) which adverted to the question that relates to the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. Answering the question, the Court observed that the answer to the s e

relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him and hence, to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. In case where even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits as it would amount to rewarding the dishonest and the guilty and stretching the concept of justice to illogical and exasperating limits.

29. After so stating the larger Bench proceeded to rule that in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. This Court further observed that since it is the Courts/Tribunals which

will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Thereafter, the Constitution Bench opined thus:-

> "Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

30. In the case at hand, the said stage is over. The Full Bench on the earlier occasion had already rendered a verdict that the serious prejudice had been caused and, accordingly, had directed for reinstatement. The said

and appreciated on the principles stated in *B. Karunakar* (supra), is a direction for reinstatement for the purpose of holding a fresh enquiry from the stage of furnishing the report and no more. In the case at hand, the direction for reinstatement was stayed by this Court. The Bank proceeded to comply with the order of the High Court from the stage of reply of enquiry. The High Court by the impugned order had directed payment of back wages to the delinquent officer from the date of dismissal till passing of the appropriate order in the disciplinary proceeding/superannuation of the petitioner therein whichever is earlier. The Bank has passed an order of dismissal on 22.11.2001 with effect from 23.4.1985. The said order, as we perceive, is not in accord with the principle laid down by the Constitution Bench decision in *B. Karunakar* (supra), for it has been stated there that in case of non-furnishing of an enquiry report the court can deal with it and pass as appropriate order or set aside the punishment and direct reinstatement for continuance of the departmental proceedings from that stage. In the case at hand, on the earlier round the punishment was set aside and direction for reinstatement was passed. Thus, on the face of the said order it is absolutely inexplicable and unacceptable that the Bank in 2001 can pass an order with effect from 23.4.1985 which would amount to annulment of the judgment of the earlier Full Bench. As has been held by the High Court in the impugned judgment that when on the date of non-furnishing of the enquiry report the delinquent officer was admittedly not under suspension, but was in service and, therefore, he would continue in service till he is dismissed from service in accordance with law or superannuated in conformity with the Regulations. How far the said direction is justified or not or how that should be construed, we shall deal with while addressing the other points but as far as the order of removal being made retrospectively operational, there can be no trace of doubt that it cannot be made retrospective.

31. Presently, we shall proceed to deal with the issue of superannuation as envisaged under the Regulations.

Regulation 19(1) deals with superannuation of an employee. The relevant part of Regulation 19(1) is as follows: -

> "19. Age of retirement. - (1) An officer shall retire from the service of the Bank on attaining the age of fifty eight years or upon the completion of thirty years' service whichever occurs first.
>
> Provided that the Competent Authority may, at its discretion, extend the period of service of an officer who has attained the age of fifty eight years or has completed thirty years' service as the case may be, should such extension be deemed desirable in the interest of the Bank.
>
> Provided further that an officer who had joined the service of the Bank either as an officer or otherwise on or after the 19th July, 1969 and attained the age of 58 years shall not be granted any further extension in service.
>
> Provided further that an officer may, at the discretion of the Executive Committee, be retired from the Bank's service after he has attained 50 years of age or has completed 25 years service as the case may be, by giving him three months notice in writing or pay in lieu thereof."

32. On a careful reading of the first proviso to Regulation 19(1) it is quite clear that the period of service can be extended by the discretion of the competent authority and such extension has to be desirable in the interest of the Bank. The second proviso provides that an officer who has joined the service of the bank either as an officer or otherwise on or after 19.7.1969 and attained the age of 58 years shall not be granted any further extension in service. By this proviso the power of the competent authority in respect of officers who had joined as officers or otherwise after the cut-off date, i.e. 19.7.1969 and have attained the age of 58 years of service, is curtailed. The delinquent officer joined the service as a clerk in the Bank on 26.2.1962 and was promoted as Grade-II Officer [illegible]-

I Officer in 1977. Even if this provision is extended to him, he could not have been granted extension of service after completion of 58 years of age. The said officer attained the age of 58 years on 24.2.2002. Be that as it may, the grant of extension is dependent on satisfaction the conditions as laid down in the first proviso. As is seen from the earlier round of litigation, the Full Bench had quashed the punishment and directed for reinstatement. In the second round in CM No. 1965 of 2000 the High Court has directed that the employee shall continue till passing of the appropriate orders in the disciplinary proceedings or superannuated as per rules. It has not commented on the validity of superannuation in the year 1992 as pleaded by the Bank and left it to be agitated in appropriate proceeding. Mr. Vikas Singh, learned senior counsel appearing for the employer-Bank, has submitted that the delinquent employee completed thirty years of service in 1992 and regard being had to the stipulation in the Regulation 19(1), he stood superannuated. Learned senior counsel would further submit that for extension of the period an affirmative act by the competent authority of the Bank is imperative. Mr. Patwalia, learned senior counsel appearing for the employee submitted that the delinquent officer could not have been superannuated on completion of thirty years of service as it was obligatory on the part of the Bank to intimate the officer that he had reached the stage of superannuation and, in any case, as the Bank continued the proceedings in pursuance of the liberty granted by the High Court, the relationship between the employer and employee had not come to an end.

33. At this juncture, it is noteworthy to refer to Regulation 19(2) of the Regulations. It reads as follows: -

> "19 (2) In case disciplinary proceedings under the relevant regulations of service have been initiated against an officer before he ceases to be in the Bank's service by the operation of, or by virtue of any of the said regulations or the provisions of these regulations the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by which the proceedings were initiated in the manner provided for in the said regulations as if the officer continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings.
>
> Explanation: An officer will retire on the last day of the month in which he completes the stipulated service or age of retirement."

34. The aforesaid Regulation, as it seems to us, deals with a different situation altogether. It clearly lays down that if the disciplinary proceedings have been initiated against an officer during the period when he is in service, the said proceedings can continue even after his retirement at the discretion of the Managing Director and for the said limited purpose the officer shall be deemed to be in service. In this regard it is worthwhile to refer to the decision in *UCO Bank and another v. Rajinder Lal Capoor*[19], wherein the appellant-Bank was grieved by the decision of the High Court whereby the order of punishment of removal imposed on an officer was modified to one of compulsory retirement with effect from the date of superannuation. In the said case, the employee attained the age of superannuation on 1.11.1996 and charge-sheet was issued on 13.11.1998. The disciplinary proceeding was initiated against the employee in terms of Regulation 20(3)(iii) of the UCO Bank Officer Employees' Service Regulations, 1979 which reads as follows: -

> "20. (3)(iii) The officer against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The officer concerned will not receive any

19. (2007) 6 SCC 694.

pay and/or allowance after the date of superannuation. He will also not be entitled for the payment of retirement benefits till the proceedings are completed and final order is passed thereon except his own contributions to CPF."

Interpreting the said Regulation, the Court opined that a bare reading of the said Regulation would clearly show that by reason thereof a legal fiction has been created, but the said legal fiction could be invoked only when the disciplinary proceedings had clearly been initiated prior to the respondent's ceasing to be in service. Further proceeding, the two-Judge Bench observed thus: -

"An order of dismissal or removal from service can be passed only when an employee is in service. If a person is not in employment, the question of terminating his services ordinarily would not arise unless there exists a specific rule in that behalf. As Regulation 20 is not applicable in the case of the respondent, we have no other option but to hold that the entire proceeding initiated against the respondent became vitiated in law."

35. In this context, reference to the authority in *Ramesh Chandra Sharma v. Punjab National Bank and another*[20] would be fruitful. In the said case the High Court had ruled that the appellant therein could not have been dismissed from service after his retirement. This Court referred to Regulation 20(3)(iii) of the Punjab National Bank Officer Employees' (Discipline & Appeal) Regulations, 1977 which reads as follows: -

"20. (3)(iii) The officer against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The officer concerned will not receive any

20. (2007) 9 SCC 15.

pay and/or allowance after the date of superannuation. He will also not be entitled for the payment of retirement benefits till the proceedings are completed and final order is passed thereon except his own contribution to CPF."

36. Interpreting the said Regulation the two-Judge Bench held thus: -

"The said Regulation clearly envisages continuation of a disciplinary proceeding despite the officer ceasing to be in service on the date of superannuation. For the said purpose a legal fiction has been created providing that the delinquent officer would be deemed to be in service until the proceedings are concluded and final order is passed thereon. The said Regulation being statutory in nature should be given full effect."

37. Slightly more recently in *State Bank of India v. Ram Lal Bhaskar and another*[21], a three-Judge Bench, placing reliance on Rule 19(3) of the State Bank of India Officers Service Rules, 1992, opined that in view of the language employed in Rule 19 which stipulated that in case the disciplinary proceedings under the relevant rules of service have been initiated against an officer before he ceases to be in the bank's service by the operation of, or by virtue of, any of the rules or the provisions of the Rules, the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by whom the proceedings were initiated in the manner provided for in the Rules as if the officer continues to be in service. He shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings and the punishment could be imposed.

38. In the case at hand, the disciplinary proceeding was initiated against the delinquent officer while he was in service. The first order of dismissal was passed on 23.4.1985. The said

21. (2011) 10 SCC 249.

order of punishment was set aside by the High Court and the officer concerned was directed to be reinstated for the limited purpose, i.e., supply of enquiry report and to proceed in the disciplinary proceeding from that stage. The said order was not interfered with by this Court. The Bank continued the proceeding. Needless to emphasise, the said continuance was in pursuance of the order of the Court. Under these circumstances, it has to be accepted that the concept of deemed continuance in service of the officer would have full play and, therefore, an order of removal could have been passed after finalization of the departmental proceeding on 22.11.2001. We have already held that the said order would not have been made retrospectively operative, but that will not invalidate the order of dismissal but it would only have prospective effect as has been held in *R. Jeevaratnam* (supra).

39. Having said that, it becomes necessary to determine the date of retirement and thereafter delve into how the period from the date of first removal and date of retirement would be treated. We may hasten to add that for the purpose of deemed continuance the delinquent officer would not be entitled to get any benefit for the simple reason, i.e., the continuance is only for finalisation of the disciplinary proceedings, as directed by the Full Bench of the High Court. Hence, the effect and impact of Regulation 19(1) of the Regulations comes into full play. On a seemly construction of the first proviso we are of the considered view that it requires an affirmative act by the competent authority, for it is an exercise of power of discretion and further the said discretion has to be exercised where the grant of extension is deemed desirable in the interest of the Bank. The submission of Mr. Patwalia to the effect that there should have been an intimation by the employer-Bank is founded on the finding recorded by the High Court in the impugned order that no order had been brought on record to show that the delinquent officer had retired. As the facts would reveal, in the year 1992 the concerned officer stood removed from service and at that juncture to expect the Bank in law to

intimate him about his date of superannuation or to pass an order would be an incorrect assumption. The conclusion which appears logical and acceptable is that unless an extension is granted by a positive or an affirmative act by the competent authority, an officer of the Bank retires on attaining age of 58 years or upon the completion of 30 years of service, whichever occurs first. In this regard the pronouncement in *C.L. Verma v. State of Madhya Pradesh and another*[22] is apt to refer. In the said case the effect of Rule 29 of Madhya Pradesh State Municipal Service (Executive) Rules, 1973 fell for interpretation. In the said Rule it was provided that a member of the service shall attain the age of superannuation on the date he completes his 58 years of age. The proviso to the said Rule stipulated that the State Government may allow a member of the service to continue in employment in the interest of Municipal Council or in public interest and, however, no member of service shall continue in service after he attains the age of 60 years. The appellant therein had attained the age of 58 years two days prior to the order of dismissal. The Court opined that the tenor of the proviso clearly indicates that it is intended to cover specific cases and individual employees. Be it noted, on behalf of the Government a notification was issued by the concerned Department. The Court opined that the said circular was not issued under the proviso to Rule 29 but was administrative in character and that on the face of mandate in Rule 29 the administrative order could not operate. The Court further ruled that as the appellant therein had attained the age of superannuation prior to the date of passing the order of dismissal, the Government had no right to deal with him in its disciplinary jurisdiction available in regard to employees. We have referred to this decision to highlight that the Regulation herein also is couched in similar language and, therefore, the first proviso would have full play and it should be apposite to conclude that the delinquent officer stood superannuated on completion of 30 years of service on 25.2.1992. It is because the conditions stipulated under the first proviso to the said

22. 1989 Supp. (2) SCC 437.

Regulation deal with a conditional situation to cover certain categories of cases and require an affirmative act and in the absence of that it is difficult to hold that the delinquent officer did not retire on completion of thirty years of service.

40. The next issue pertains to how the period from the date of order of first removal, i.e., 23.4.1985 till 25.2.1992 would be treated and to what benefits the officer concerned would be entitled to. The order of removal from service, as we have already opined, would come into effect from the date of passing of the order, i.e., 22.11.2001 as it has to be prospectively operative and, therefore, as a natural corollary he remained in service from 23.4.1985 till he attained the age of superannuation, i.e., 25.2.1992 or till the end of February, 1992, being the last day of the month. In the transfer case relief has been sought for grant of full salary for the whole period. Mr. Patwalia, learned senior counsel appearing for the legal representatives of the original petitioner, would contend that they should be entitled to get the full salary till the order of removal. We are unable to accept the said submission because we have already ruled that the officer stood superannuated on completion of thirty years and his continuance by virtue of the order passed by the High Court has to be treated as a deemed continuance for the purposes of finalization of the disciplinary proceeding. The submission put forth by Mr. Vikas Singh that the order of removal would relate back to the date of the earlier order, i.e., 23.4.1985 has already been repelled by us. Thus, we are to restrict the period for grant of benefit till the date of retirement. Mr. Singh in course of hearing has alternatively submitted that under no circumstances back wages in entirety should be paid as the concerned officer had not worked. To bolster his submission he has commended us to the decisions in *A.P. State Road Transport Corporation and others v. Abdul Kareem*[23], *A.P. SRTC and another v. B.S. David Paul*[24] and *J.K. Synthetics Ltd. v. K.P. Agrawal and*

23. (2005) 6 SCC 36.

24. (2006) 2 SCC 282.

another[25] wherein grant of back wages has been restricted on certain parameters. He has also urged that in pursuance of the order dated 15.12.2003 the Bank has deposited Rs.5.00 lacs in the High Court which was permitted to be withdrawn by the delinquent officer furnishing adequate security to the satisfaction of the Registrar General of the High Court and under the circumstances the said amount may be treated as back wages and be paid to the legal heirs, if not withdrawn by the original petitioner.

41. It is worthy to note here that during the continuance of the disciplinary proceeding the delinquent officer was not put under suspension. After the order of punishment passed by the disciplinary authority and affirmed by the appellate authority was quashed by the High Court on 22.5.1998, the concerned officer has to be treated to be in service from his date of first removal till his date of retirement. Had the Bank brought to the notice of the Full Bench about the legal position under the Regulations, in all probability, the matter would have been dealt with differently. Be that as it may, grant of salary in entirety for the period as determined by us to be the period of continuance in service would not be apposite and similarly, the submission advanced on behalf of the Bank that payment of rupees five lacs would meet the ends of justice does not deserve acceptance. Ordinarily, we would have directed the Bank to pay fifty per cent of the back wages for the period commencing 23.4.1985 till the end of February, 1992, with some interest but we do not want that the legal heirs of the delinquent officer should further go through any kind of tribulation in computation and face further legal hassle as regards the quantum. We are of the considered opinion that the controversy should be given a quietus and, therefore, instead of fixing fifty per cent of the back wages we direct that the Bank shall deposit a further sum of rupees five lacs with the Registrar General of the High Court within two months hence and the respondents shall be entitled to withdraw the same. We may hasten to clarify that if the amount earlier

25. (2007) 2 SCC 433.

deposited has not been withdrawn by the original respondent, Ram Niwas Bansal, the same shall also be withdrawn by the legal heirs.

42. In view of the aforesaid directions, the judgment and order passed by the High Court is modified and the civil appeal and the transfer case are disposed of leaving the parties to bear their respective costs.

D.G. Appeal disposed of.

PUBLIC SERVICE COMMISSION, UTTARANCHAL

v.

JAGDISH CHANDRA SINGH BORA & ANR. ETC.

(Civil Appeal No. 3034 of 2007)

MARCH 3, 2014

[SURINDER SINGH NIJJAR AND RANJANA PRAKASH DESAI, JJ.]

UTTRANCHAL SUBORDINATE ENGINEERING SERVICE (EMERGENCY DIRECT RECRUITMENT) RULES, 2001: r.5(4) - Selection for the post of Junior Engineer under the 2001 Rules - Advertisement and the 2001 Rules did not provide any weightage to be given to trained apprentices - Rules 2001 ceased to exist on 11.11.2002 - On 31.7.2003, 2003 Rules framed - Rules 2003 superseded all existing Rules but Rule 5(4) of 2001 Rules was transposed by Rule 5(4) of the 2003 Rules - Rule 5(4) of the 2003 Rules provided that the marks obtained in the written examination and the marks obtained in the interview shall be increased by 10 extra marks in case of trained apprentices - Claim by respondents-writ petitioners to make selection after giving benefit of 10 additional marks to the candidates for completed apprenticeship - Held: All the candidates including the respondents participated in the selection process under 2001 Rules being fully aware that no preference was given to the trained apprentices - Therefore, it cannot be said that any vested right had accrued to the trained apprentices, under the 2001 Rules - The Rules of 2003 came into force on 31.7. 2003 and no retrospective effect was given to it - The 2003 Rules could not have the effect of amending the 2001 Rules which had already ceased to exist in terms of Rule 6 thereof w.e.f. 11.11.2001 - It was wholly impermissible to alter the selection criteria which was advertised in 2001 - As no preference was given to the trained apprentices in 2001

Rules, many eligible candidates in that category may not have applied - Therefore, giving such preference would be clear infraction of Article 14 of the Constitution of India - Service law - Selection.

CIRCULAR/GOVERNMENT ORDERS/NOTIFICATION: Executive orders - Binding effect of - Held: The executive orders cannot supplant the rules framed under the proviso to Article 309 of the Constitution of India - Such executive orders/instructions can only supplement the rules framed under the proviso to Article 309 of the Constitution of India.

The State of Uttranchal came into existence on 9th November, 2000. The Public Service Commission (PSCU) was established in May, 2001. On 12th November, 2001, the Uttranchal Subordinate Engineering Service (Emergency Direct Recruitment) Rules, 2001 were framed for filling up large number of vacancies of post of Junior Engineer which became available on creation of the State of Uttranchal. A proposal was sent by State Government on 2nd November, 2001 to PSCU for conducting a written examination. The written examination was to be conducted by IIT as the PSCU did not have the necessary infrastructure. Pursuant to issuance of advertisement on 27th November, 2001, the written examination was held by the IIT on 12th January, 2002 and result of the written examination was declared on 10th July, 2003.

A notification was issued on 31st July, 2003 superseding all the existing rules and regulations of selection process in regard to direct recruitment of Junior Engineer in various departments. The candidates who had cleared written examination were called for interview from 18th to 22nd December, 2003.

In the notification dated 31st July, 2003, Rule 5(4) provided that for the purpose of selection, the marks obtained in the written examination would be added in the

marks obtained in the interview, but for preparing the final merit list, the candidates who had completed apprenticeship would be given extra 10 marks in addition to the marks obtained by them in the written examination and interview. However, by letter dated 29th April, 2004, it was clarified that 10 marks were to be added to the total marks obtained by the candidates who had completed apprenticeship, only where the direct recruit candidate and the apprentice candidate stood on equal footing. Thereafter, the selected list of the successful candidates was prepared and forwarded to the State Government on 15th May, 2004.

Aggrieved by the non-grant of additional 10 marks, large number of unsuccessful candidates in the apprenticeship category filed a number of petitions, seeking a writ in the nature of mandamus directing the appellant to make a selection after giving benefit of 10 additional marks to all the candidates who had completed apprenticeship. The High Court allowed the writ petition solely on the ground that the clarification dated 29th April, 2004 could not have the effect of amending the statutory rules framed under Article 309 on 31st July, 2003. It was held that the direction issued on 29th April, 2004 related to the same selection to which the amended rules of 2003 were applicable and, therefore, the G.O. dated 29th April, 2004 being in the nature of executive instructions could not supplant the statutory rules but could only supplement the statutory rules. Hence the instant appeals.

Allowing the appeals, the Court

HELD: 1. The Uttranchal Subordinate Engineering Service (Emergency Direct Recruitment) Rules, 2001 were specifically framed to cater for an emergency as the State of Uttaranchal came into existence on 9th November, 2000. There was such an urgent ne of

Junior Engineers that since the infrastructure of the PSCU was not in existence, a request was made that the posts be taken out of the purview of the PSCU on this one occasion, and the written examination be conducted by IIT, Roorkee. PSCU agreed to such procedure but limited only to the holding of the written examination. The interviews were still to be held by the PSCU. The Rules of 2001 were specifically framed for making the selection of the candidates, who would have applied for the available posts. Rule 4 provided comprehensive criteria for making a selection to the post of Junior Engineer. The selection was to be made on the basis of the total marks obtained by the candidates in the written examination and the interview. The list of successful candidates of the written examination was to be made available by IIT, Roorkee to PSCU. Thereafter, the PSCU was to call the candidates for interview on the basis of minimum qualifying marks in the written examination. Section 4(11) provided that the PSCU shall prepare a merit list by adding marks obtained by the candidates in the written examination and the interview. The Rules prescribed that if two or more candidates secured equal marks, the candidates securing more marks in the written examination shall be preferred. In case, the marks obtained by two candidates in written examination are also equal, the older candidate shall be preferred to the younger. Therefore, it is evident that consciously the State had not provided for any preference to be given to the trained apprentices under the Rules. Keeping in view the provisions contained in the Rules, the State Government issued an advertisement on 27th November, 2001. The advertisement also did not provide for any weightage to be given to the trained apprentices. All the candidates including the respondents participated in the selection process, being fully aware that no preference will be given to the trained apprentices. Therefore, it cannot be said that any accrued or vested right had

accrued to the trained apprentices, under the 2001 Rules. [Paras 18, 20] [1045-B, C-E; 1046-C-H; 1047-A]

U.P. State Road Transport Corporation & Anr. Vs. U.P. Parivahan Nigam Shishukhs Berozgar Sangh & Ors. **(1995) 2 SCC 1: 1995 (1) SCR 204 - referred to.**

2. The result of the written examination was declared on 10th July, 2003. The interview was conducted by the PSCU from 18th December, 2003 to 22nd December, 2003. Thereafter, only the result was to be declared and the appointments were to be made on the basis of merit obtained by the candidates in the selection process. The 2001 Rules specifically provided that the Rules are applicable only for the direct recruitment in the year 2002 for subordinate engineering service. The Rules also made it clear that the same shall become ineffective after the process of recruitment is completed. Thereafter, the selected candidates shall be governed by the Service Rules and the Government Orders applicable in the Government. This makes it abundantly clear that on 12th November, 2002, the 2001 Rules ceased to exist. However, on 31st July, 2003, the 2003 Rules were framed. A bare perusal of the title of the Rules would show that the Rules came into force on 31st July, 2003. The Rules superseded all existing Rules but Rule 5(4) of 2001 Rules was transposed by Rule 5(4) of the 2003 Rules. Rule 5(4) of the 2001 Rules provided that marks of interview shall be added to the marks of written examination for selection. But Rule 5(4) of the 2003 Rules provided that the marks obtained in the written examination and the marks obtained in the interview shall be increased by 10 extra marks in case of trained apprentices. The respondents could have taken no advantage of these Rules. The Selection process was under the 2001 Rules. The Rules of 2001 as well as advertisement did not provide for any additional marks/w

to the trained apprentices. The Rules of 2003 came into force on 31st July, 2003. No retrospective effect can be given to the same without any express provision to that effect being made in the Rules. This apart, the 2001 Rules that were said to be amended were, in fact, non-existent. The 2001 Rules expired on 11th November, 2001 in terms of Rule 6 thereof. The High Court was in error in holding that 2003 Rules were applicable to the process of selection which had commenced in 2001 under the 2001 Rules. [Paras 21, 22 and 23] [1047-B-H; 1048-A-B]

3. The High Court has wrongly concluded that as the 2003 Rules had been framed in obedience to the directions issued by a single judge of the High Court in a writ petition titled Subhash Chandra Vs. State of Uttaranchal, they would relate to the selection which was governed by the 2001 Rules and the advertisement issued by the State on 27th November, 2001. Although 2003 Rules are titled as 'First Amendment Rules', the same is a misnomer. The 2003 Rules could not have the effect of amending the 2001 Rules which had already ceased to exist in terms of Rule 6 thereof with effect from 11th November, 2001. The respondents, therefore, cannot claim that any accrued or vested right of the trained apprentices has been taken away by the 2004 clarification, in relation to the selection governed by the 2001 rules, and advertisement dated 11th November, 2001. Furthermore, the High Court in Subhash Chandra's case had only reiterated the directions which have been given by the Supreme Court in the case of UPSRTC. Inspite of those directions being in existence, no preference had been provided to the trained apprentices in the 2001 Rules. The respondents, unsuccessful candidates who were trained apprentices, woke up only after the select list was published by the PSCU. Even if the 2003 Rules have been framed on the directions of the High Court, the rules came into force on 31st July, 2003.

Therefore, it cannot be said that the said rules were applicable to the selection which was governed under the 2001 Rules and the advertisement dated 11th November, 2001. Under the 2001 Rules, the marks to be given for the interview could not be more than 12.5% of the written examination and there was no provision for adding 10 marks to the total marks of written test and interview in the category of trained apprentices. This was sought to be introduced by the 2003 Rules which came into force on 31st July, 2003. In such circumstances, it would be wholly impermissible to alter the selection criteria which was advertised on 27th November, 2001. Since no preference had been given to the trained apprentices, many eligible candidates in that category may not have applied. This would lead to a clear infraction of Article 14 of the Constitution of India. Selection procedure can not be altered after the process of selection had been completed. [Paras 24, 25] [1048-B-H; 1049-C-E]

K. Manjusree Vs. State of Andhra Pradesh & Anr. **(2008) 3 SCC 512: 2008 (2) SCR 1025 - relied on.**

4. It is incorrect to state that the benefit of 10 additional marks to the trained apprentices is limited only to those trained apprentices who have secured equal marks with one or more candidates in the category of direct recruits. The reliance was placed on the directions issued by this Court in the case of UPSRTC which was as follows: "Other things being equal, a trained apprentice should be given preference over direct recruits." The only natural meaning of the said phrase 'other things being equal' is that all the candidates must have been subjected to the same selection process, i.e., same written test and interview. Further that their inter-se merit is determined on the same criteria, applicable to both categories. In this case, it is the aggregate of the marks secured by the candidate in

the interview. The additional 10 marks are given to the apprentices as they are generally expected to secure lesser marks than the direct recruits in the written examination. Thus, by adding 10 marks to the total of the written examination of the trained apprentices, they are sought to be put at par with the direct recruits. Therefore, necessarily this preference is to be given to all the trained apprentices across the board. It cannot be restricted only to those trained apprentices who fortuitously happen to secure the same marks as one or more of the direct recruits. In case the additional 10 marks are restricted only to such trained apprentice candidates, it would result in hostile discrimination. This can be best demonstrated by giving an illustration. Assume there are ten candidates belonging to trained apprentices category. Let us say that candidate No.1 secures 50% total marks on the basis of the marks obtained in the written test plus interview, whilst candidates No.2 to 10 secure total marks ranging from 51 to 59. But candidate No.1 has secured total marks identical to a direct recruit, i.e., 50%; whereas candidates No.2 to 10 have not secured marks at par with any direct recruit candidate. On the basis of the clarification dated 29th April, 2004, candidate No.1 will get the benefit of 10% weightage and candidates No.2 to 10 will not. Therefore, after weightage is given to candidate No.1, his/her total marks would be 60%. This would put him/her over and above, all other candidates, i.e., candidates No.2 to 10 who have secured higher marks than candidate No.1 who actually has lesser marks, if no weightage is given to his/her. Therefore, candidate Nos. 2 to 10 securing higher marks would be shown at a lower rank to candidate No.1 in the inter-se merit. In such a situation, a trained apprentice candidate securing lesser marks than his colleague would not only steal a march over the direct recruits but also over candidates who got more marks within his own category. Such an interpretation would lead to absurd

consequences. This is not the intention of giving the preference to the trained apprentices. This interpretation would, in fact, create a sub-classification within the class of trained apprentice candidates. Such a sub-classification would have no rationale nexus, with the object sought to be achieved. The object of the preference is to give weightage to the apprentices so that the State does not lose the benefit of the training given to them, at the State expense. This would be a clear breach of Article 14 of the Constitution of India. [Para 26] [1049-F-H; 1050-A-H; 1051-A-C]

5. The only direction issued by this Court in UPSTRC's case was to give preference to the trained apprentices over direct recruits. No direction was given in the judgment as to how the preference was to be given. However, in order to ensure that the training given to the apprentices at the State expense is utilized, certain directions were issued. Inspite of the said directions, no preference was given to the trained apprentices in the selection process which was governed by the 2001 Rules, and the advertisement dated 27th November, 2001. Whilst the process of selection was still in progress, the High Court rendered its judgment in the case of Subhash Chandra. The 2003 Rules were framed and enforced with effect from 31st July, 2003. Consequently, when the interviews were being conducted, the PSCU was faced with the 'amendment rules' of 2003. Therefore, the PSCU by a letter dated 5th April, 2004 sought clarification as to whether 2001 rules would be applicable or Rules of 2003 would be applicable, to the selection process. In these circumstances, the State Government wrote to the PSCU on 29th April, 2004, on the basis of legal advice that preference to the trained apprentices is to be given only if the two candidates secured equal marks. The legal opinion clarified that the amended rules of 2003 would not be applicable to the selection d

already started. Therefore, the selection process under the 2001 Rules was excluded. However, 2004 clarification would not have the effect of amending 2003 Rules. Undoubtedly, 2004 clarification is only an executive order. It is settled proposition of law that the executive orders cannot supplant the rules framed under the proviso to Article 309 of the Constitution of India. Such executive orders/instructions can only supplement the rules framed under the proviso to Article 309 of the Constitution of India. Although clarification dated 29th April, 2004 would not have the effect of superseding, amending or altering the 2003 Rules; it would not be possible to give any relief to the respondents. The criteria under the 2003 Rules governed all future recruitments. The claim of the respondents (trained apprentices) would not be covered under the 2001 Rules by virtue of the so called amendment made by 2003 Rules. The High Court committed an error, firstly, in holding that the 2003 rules are applicable, and secondly, not taking into consideration that all the posts had been filled up by the time the decision had been rendered. [Paras 27, 28] [1051-D, G-H; 1052-A-G; 1053-A-B]

U.P. Rajya Vidyut Parishad Apprentice Welfare Association & Anr. Vs. State of U.P. & Ors. **(2000) 5 SCC 438;** *N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors.* **(1990) 3 SCC 157;** *P. Mahendran & Ors. Vs. State of Karnataka & Ors.* **(1990) 1 SCC 411: 1989 (2) Suppl. SCR 385;** *Sonia Vs. Oriental Insurance Co. Ltd. & Ors.* **(2007) 10 SCC 627: 2007 (8) SCR 883;** *Chandra Prakash Tiwari & Ors. Vs. Shakuntala Shukla & Ors.* **(2002) 6 SCC 127: 2002 (3) SCR 948;** *Manish Kumar Shahi Vs. State of Bihar & Ors.* **(2010) 12 SCC 576;** *Ramji Purshottam (dead) by Lrs. & Ors. Vs. Laxmanbhai D. Kurlawala (dead) by Lrs. & Anr.* **(2004) 6 SCC 455 - referred to.**

Case Law Reference:

1995 (1) SCR 204	**Referred to**	**Para 8**

(2000) 5 SCC 438	**Referred to**	**Para 9**
(1990) 3 SCC 157	**Referred to**	**Para 14**
1989 (2) Suppl. SCR 385	**Referred to**	**Para 14**
2007 (8) SCR 883	**Referred to**	**Para 14**
2002 (3) SCR 948	**Referred to**	**Para 14**
(2010) 12 SCC 576	**Referred to**	**Para 14**
(2004) 6 SCC 455	**Referred to**	**Para 16**
2008 (2) SCR 1025	**Relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3034 of 2007.

From the Judgment and Order dated 02.03.2006 of the High Court of Uttaranchal at Nainital in Writ Petition Nos. 149, 129, 135, 136, 137, 147, 148, 162, 169, 255, 302, 186 and 300 of 2004 (S/B).

WITH

Civil Appeal No. 3036 of 2007.

Vijay Hansaria, Jatinder Kumar Bhatia, Ajay Kumar, Krishna Prakash Dubey for the Appellant.

S.R. SIngh, Ankur Yadav, Ujjawal Pandey, Raj Singh Rana, K.S. Rana, P.N. Gupta, Ashwani Bhardwaj, Prateek Dwivedi, Rachana Srivastava for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These appeals have been filed by the Public Service Commission, Uttaranchal, Haridwar (hereinafter referred to as 'PSCU') challenging the judgment dated 2nd March, 2006 of the High Court of Uttaranchal at Nainital rendered in Writ Petition Nos. 149, 129, 135, 136, 137, 147, 148, 162, 169, 255 of

2004. By the aforesaid judgment, the High Court has given a direction to the appellant to give weightage of 10 bonus marks to the trained apprentice candidates as per the "Uttaranchal Subordinate Service [Emergency Direct Recruitment (First Amendment)] Rules, 2003" in the selection held by UPSC; and after adding 10 marks, merit list of the selected candidates be prepared and recommended for the appointment to the Government. It has also been directed that all the successful candidates shall be given appointment in the remaining vacancies of the Junior Engineers in the various departments of the Government and the instrumentalities of the State according to the merit list of apprentices selected in the merit list. It has been further directed that the aforesaid order shall survive for one year from the date of its publication.

2. Civil Appeal No.3036 of 2007 impugns the judgment of the High Court of Uttaranchal at Nainital dated 31st March, 2006 wherein the High Court has allowed the Writ Petition Nos. 446 of 2006, 275 of 2004, 166 of 2004, 138 of 2006, 333 of 2004 and 775 of 2006 in terms of the earlier judgment dated 2nd March, 2006 which is subject matter of Civil Appeal No.3034 of 2007.

3. In the year 2001, large number of vacancies of Junior Engineers existed in various departments of the State of Uttaranchal. Therefore, a proposal was sent by the State Government on 2nd November, 2001 to the PSCU for conducting a written examination. The written examination had to be conducted by IIT, Roorkee as the PSCU did not have the necessary infrastructure. The PSCU had been established in May, 2001 soon after the State of Uttaranchal came into existence on 9th November, 2000. On 12th November, 2001, the Government of Uttaranchal framed Uttaranchal Subordinate Engineering Service (Emergency Direct Recruitment) Rules, 2001 under proviso to Article 309 of the Constitution of India. These rules were notified vide Gazette Notification No.1973/ One-2001 dated 12th November, 2001. It appears that these

rules were framed only for filling up large number of post of Junior Engineers which became available upon the creation of State of Uttaranchal. Therefore, the rules specifically provided as follows :-

> "The Rules shall become ineffective after the process of Recruitment is completed as it has never been promulgated. Candidates selected on the basis of Rules shall be governed by Service Rules and G.Os. as applicable before in the Govt."

4. Rule 5 which dealt with the manner in which the candidate was to be selected and the merit list was to be prepared reads as under :-

> "4. Conduct method of Examination
>
> (1) Appointing authorities shall inform the no. of SC, ST and OBC vacancies in all the categories and decide the vacancies to Dept. of Personnel of State Govt. who will publish the same in the newspapers.
>
> (2) The application for selection shall be invited in prescribed format of the Govt. for consideration.
>
> (3) Even if the relevant Service Rules regarding the issue or Govt. Orders are contrary, then also with the permission of IIT Roorkee shall conduct the examination for the Direct Recruitment of Senior Engineers for the candidates.
>
> (4) The marks of interview to be added to marks of the written examination for selection.
>
> (5) Written examination shall be conducted by the IIT Roorkee according to Rules Prescribed by the State Govt.
>
> (6) Marks for the interview shall be determined by the State Govt. which shall not be more than 12.5"/o of the written examination.

(7) Question papers of the written examination shall be printed both in Hindi and English languages.

(8) Written examination shall be conducted at place on time as decided by IIT Roorkee.

(9) IIT Roorkee shall prepare list on the basis of written examination and shall make it available to the Public Service Commission, Uttaranchal.

(10) Commission shall call the candidates for interview on the basis of minimum qualifying marks in the written examination.

(11) Commission shall prepare the merit list as shown in the written examination and interview. If two or more candidates score equal marks their the candidate scoring more marks in written exam shall be preferred. If marks in written exam are also equal the candidate of more age shall be preferred and to be kept in merit list accordingly. The names of candidates in merit list shall not be more than 25% of the total no. of vacancies.

(12) Commission shall forward the merit list to the Department of Personnel."

5. On 27th November, 2001, the State issued an advertisement for filling up the vacancies of Junior Engineers, which was accompanied by a prescribed format of the application form. The terms and conditions of the advertisement were strictly in conformity with the 2001 rules. The written examination was held by the IIT Roorkee on 12th January, 2002. The result of the written examination was declared on 10th July, 2003.

6. It appears that a notification was issued on 31st July, 2003, superseding all the existing rules and regulations of selection process in regard to direct recruitment of Junior Engineer in various departments. The notification reads as

under :

"Govt. of Uttaranchal
Department of Personnel
Notification Misc.
Dated 31.07.2003

No. 1097/one-2 2003 Hon'ble Governor under Article 309 Constitution of India for different Engineering Departments the effective Services Rules are encroached once and Rules framed for direct recruitment of Junior Engineers as follows:

Uttaranchal Subordinate Engineering Services (Emergency Direct Recruitment) (First Amendment) Rules 2003.

3. Brief name, Start and application/effect

(i) The Rules shall be called Uttaranchal Subordinate Engineering Services (Emergency Direct Recruitment) (First Amendment) Rules 2003.

(ii) The Rules shall be applicable-with immediate effect.

(iii) Substitution of Rule 5 (4)

(iv) Rule 5(4) given in column 1 to be substituted by Rule given in column 2 in Uttaranchal Subordinate Engineering Services (Emergency Direct Recruitment) Rules 2001.

Present Rule	Substituted Rule
5(4) The marks of interview to be added to marks of the written examination for selection.	5(4) for selection marks scored by the candidate in written exam and interview to be added but for the preparation of merit list such candidates who had completed apprenticeship in the con

be given bonus of 10 marks in the total marks scored in written exam and interview.

7. The candidates who had cleared the written examination were called for interview from 18th December, 2003 to 22nd December, 2003. In the notification dated 31st July, 2003, Rule 5(4) provided that for the purpose of selection, the marks obtained in the written examination would be added in the marks obtained in the interview, but for preparing the final merit list, the candidates who had completed apprenticeship would be given extra 10 marks in addition to the marks obtained by them in the written examination and interview. However, by letter dated 29th April, 2004, it was clarified that 10 marks were to be added to the total marks obtained by the candidates who had completed apprenticeship, only where the direct recruit candidate and the apprentice candidate stood on equal footing. Thereafter, the selected list of the successful candidates was prepared and forwarded to the State Government on 15th May, 2004.

8. Aggrieved by the non-grant of additional 10 marks, large number of unsuccessful candidates in the apprenticeship category filed a number of petitions, seeking a writ in the nature of mandamus directing the appellant to make a selection after giving benefit of 10 additional marks to all the candidates who had completed apprenticeship. In the writ petition filed before the High Court, the petitioners had claimed that the preference had to be given to the trained apprentices in view of the directions by this Court in the case of *U.P. State Road Transport Corporation & Anr. Vs. U.P. Parivahan Nigam Shishukhs Berozgar Sangh & Ors.*[1] In the aforesaid judgment, the following directions were given :-

"(1) Other things being equal, a trained apprentice should be given preference over direct recruits.

1. (1995) 2 SCC 1.

(2) For this, a trainee would not be required to get his name sponsored by any employment exchange. The decision of this Court in Union of India v. N. Hargopal would permit this.

(3) If age bar would come in the way of the trainee, the same would be relaxed in accordance with what is stated in this regard, if any, in the service rule concerned. If the service rule be silent on this aspect, relaxation to the extent of the period for which the apprentice had undergone training would be given.

(4) The training institute concerned would maintain a list of the persons trained yearwise. The persons trained earlier would be treated as senior to the persons trained later. In between the trained apprentices, preference shall be given to those who are senior."

9. These directions were reiterated by this Court in *U.P. Rajya Vidyut Parishad Apprentice Welfare Association & Anr. Vs. State of U.P. & Ors.*[2]

10. On the basis of the aforesaid judgments, the trained apprentices claimed to be a class apart. It was claimed that the classification between the apprentices and others would not be only for the purpose of giving preferential treatment in the selection but also for giving relaxation in upper age limit, relaxation in the matter of getting their names sponsored by the employment exchange.

11. The High Court has allowed the writ petition solely on the ground that the clarification dated 29th April, 2004 could not have the effect of amending the statutory rules framed under Article 309 on 31st July, 2003. It is held that the direction issued on 29th April, 2004 related to the same selection to which the amended rules of 2003 were applicable. Therefore, the G.O. dated 29th April, 2004 being in the nature of executive instructions could not supplant the statutory rules but could only

2. (2000) 5 SCC 438.

supplement the statutory rules. With this reasoning, the High Court issued a writ in the nature of mandamus directing the PSCU to give weightage of additional 10 marks to the apprentices by adding the same to the total marks secured by them in the written examination and the interview.

12. We have heard the learned counsel for the parties.

13. Mr. Vijay Hansaria, learned counsel appearing for the appellant, has submitted that the High Court has misread the directions issued by this Court in the case of *U.P. State Road Transport Corporation & Anr.* (supra). He further submitted that the selection was governed by the 2001 rules which had been framed only for making selection on the large number of posts that have become available on the creation of Uttaranchal. He submits that the 2001 Rules specifically provided that it shall be applicable only for the direct recruitment in the year 2002. The process for this recruitment had commenced when the advertisement was issued in the year 2001. All the respondents had applied pursuant to the aforesaid advertisement. Under these rules, no preference was given to the trained apprenticeship. Even the advertisement did not indicate any preference to the trained apprentices. Learned senior counsel pointed out that 2001 rules became ineffective with effect from 11th November, 2002 as provided in Rule 6 thereof. Mr. Hansaria further submits that the 2003 rules have been wrongly read by the High Court to be an amendment of the 2001 rules. After making a reference to the 2003 Rules, learned senior counsel pointed out that the 2003 Rules came into force on 31st July, 2003. Therefore, the High Court has erred in treating the same to be as amendment of the 2001 rules, which no longer existed.

14. Learned senior counsel further submitted that 2003 rules cannot be given retrospective effect as no such express provision has been made to that effect. He relies on the judgment in *N.T. Devin Katti & Ors. Vs. Karnataka Public*

Service Commission & Ors.[3] *P. Mahendran & Ors. Vs. State of Karnataka & Ors.*[4] and *Sonia Vs. Oriental Insurance Co. Ltd. & Ors.*[5] He also submits that all the respondents having participated in the selection process cannot be permitted to challenge the same. He submitted that the final select list was published on 15th May, 2004. Only when the respondents did not get selected on merit, they filed the writ petitions in June, 2004. He relies on the judgments in *Chandra Prakash Tiwari & Ors. Vs. Shakuntala Shukla & Ors.*[6] and *Manish Kumar Shahi Vs. State of Bihar & Ors.*[7]

15. Mr. Hansaria further pointed out that 841 posts had been advertised on 27th November, 2001. All the posts have been duly filled up soon after selection. Therefore, the High Court committed an error of jurisdiction in issuing the directions to prepare the merit list after adding 10 marks to the marks obtained by the trained apprentices. He submitted that in any event, all the vacancies having been filled up immediately after the publication of the select list, the mandamus issued by the High Court can not possibly be implemented.

16. Mr. C.U. Singh, appearing for the respondents submitted that vested rights of the respondents under 2003 Rules could not have been taken away by issuance of executive instruments issued on 29th April, 2004. He further submitted that in this case no retrospective effect is being given to the 2003 Rules as these Rules were framed in respect of antecedent facts. He relies on the judgment of this Court in *Ramji Purshottam (dead) by Lrs. & Ors. Vs. Laxmanbhai D. Kurlawala (dead) by Lrs. & Anr.*[8]

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3. (1990) 3 SCC 157.
4. (1990) 1 SCC 411.
5. (2007) 10 SCC 627.
6. (2002) 6 SCC 127.
7. (2010) 12 SCC 576.
8. (2004) 6 SCC 455.

17. We have considered the submissions made by the learned counsel for the parties.

18. In our opinion, it is not at all necessary to examine all the submissions made by the learned counsel for the parties. The 2001 Rules were specifically framed to cater for an emergency as the State of Uttaranchal came into existence on 9th November, 2000. The State sent a letter/request on 2nd November, 2001 to PSCU to hold a written examination to fill up large number of posts which have become available on creation of the new State. On 27th November, 2001, the State Government advertised 841 posts of Jr. Engineers in different departments throughout the State. There was such an urgent need for recruitment that since the infrastructure of the PSCU was not in existence, a request was made that the posts be taken out of the purview of the PSCU on this one occasion, and the written examination be conducted by IIT, Roorkee. PSCU agreed to such procedure but limited only to the holding of the written examination. The interviews were still to be held by the PSCU. The Rules of 2001 were specifically framed for making the selection of the candidates, who would have applied for the available posts.

19. The Rules were notified on 12th November, 2001. Within two weeks, the necessary advertisement was issued on 27th November, 2001. The 2001 Rules specifically provided as under:-

1. Brief name, Start and application/effect

(i) The Rules shall be called Service (Emergency Direct Recruitment) Rules, 2001.

(ii) The Rules shall be applicable with immediate effect.

(iii) The Rules shall be applicable only for the direct recruitment in the year 2002 for Subordinate Engineering Services.

(iv) The Rules shall be applicable to all the Department for Direct Recruitment of Junior Engineers.

(v) The rules shall have over riding effect on all the applicable service Rules for the purpose of Direct Recruitment of Junior Engineer for once only.

20. A perusal of the aforesaid would clearly show that all the candidates including the respondents, who applied in response to the advertisement dated 27th November, 2001 were governed by the 2001 Rules. Rule 4 provides comprehensive criteria for making a selection to the post of Jr. Engineer. The written examination was to be conducted by the IIT, Roorkee. The selection was to be made on the basis of the total marks obtained by the candidates in the written examination and the interview. The list of successful candidates of the written examination was to be made available by IIT, Roorkee to PSCU. Thereafter, the PSCU was to call the candidates for interview on the basis of minimum qualifying marks in the written examination. Section 4(11) provides that the PSCU shall prepare a merit list by adding marks obtained by the candidates in the written examination and the interview. If two or more candidates secured equal marks, the candidates securing more marks in the written examination shall be preferred. In case, the marks obtained by two candidates in written examination are also equal, the older candidate shall be preferred to the younger. Therefore, it is evident that consciously the State had not provided for any preference to be given to the trained apprentices under the Rules. Keeping in view the provisions contained in the Rules, the State Government issued an advertisement on 27th November, 2001. The advertisement also did not provide for any weightage to be given to the trained apprentices. All the candidates including the respondents participated in the selection process, being fully aware that no preference will be given to the trained apprentices. This was inspite of the directions issued by this Court in *UPSRTC's* case (supra). There

that any accrued or vested right had accrued to the trained apprentices, under the 2001 Rules.

21. The result of the written examination was declared on 10th July, 2003. The interview was conducted by the PSCU from 18th December, 2003 to 22nd December, 2003. Thereafter, only the result was to be declared and the appointments were to be made on the basis of merit obtained by the candidates in the selection process.

22. As noticed earlier, the 2001 Rules specifically provided that the Rules are applicable only for the direct recruitment in the year 2002 for subordinate engineering service. The Rules also make it clear that the same shall become ineffective after the process of recruitment is completed. Thereafter, the selected candidates shall be governed by the Service Rules and the Government Orders applicable in the Government. This makes it abundantly clear that on 12th November, 2002, the 2001 Rules ceased to exist.

23. However, on 31st July, 2003, the 2003 Rules were framed. A bare perusal of the title of the Rules would show that the Rules came into force on 31st July, 2003. The Rules supersede all existing Rules but Rule 5(4) of 2001 Rules is transposed by Rule 5(4) of the 2003 Rules. Rule 5(4) of the 2001 Rules provided that marks of interview shall be added to the marks of written examination for selection. But Rule 5(4) of the 2003 Rules provides that the marks obtained in the written examination and the marks obtained in the interview shall be increased by 10 extra marks in case of trained apprentices. In our opinion, the respondents could have taken no advantage of these Rules. The Selection process was under the 2001 Rules. The Rules of 2001 as well as advertisement did not provide for any additional marks/weightage to be given to the trained apprentices. The Rules of 2003 came into force on 31st July, 2003. No retrospective effect can be given to the same without any express provision to that effect being made in the Rules. This apart, the 2001 Rules that were said to be amended

were, in fact, non-existent. The 2001 Rules expired on 11th November, 2001 in terms of Rule 6 thereof. The High Court, in our opinion, was in error in holding that 2003 Rules were applicable to the process of selection which had commenced in 2001 under the 2001 Rules.

24. In our opinion, the High Court has wrongly concluded that as the 2003 Rules had been framed in obedience to the directions issued by a Single Judge of the Uttaranchal High Court in Writ Petition No.44 (SB) of 2002 titled *Subhash Chandra Vs. State of Uttaranchal,* they would relate to the selection which was governed by the 2001 Rules and the advertisement issued by the State on 27th November, 2001. We have already earlier concluded that although 2003 Rules are titled as 'First Amendment Rules', the same is a misnomer. The 2003 Rules could not have the effect of amending the 2001 Rules which had already ceased to exist in terms of Rule 6 thereof with effect from 11th November, 2001. The respondents, therefore, cannot claim that any accrued or vested right of the trained apprentices has been taken away by the 2004 clarification, in relation to the selection governed by the 2001 rules, and advertisement dated 11th November, 2001.

25. Furthermore, the High Court in *Subhash Chandra's* case (supra) had only reiterated the directions which have been given by this Court in the case of *UPSRTC* (supra). Inspite of those directions being in existence, no preference had been provided to the trained apprentices in the 2001 Rules. We had earlier also noticed that the respondents, unsuccessful candidates who were trained apprentices, woke up only after the select list was published by the PSCU. We may also point out that even if the 2003 Rules have been framed on the directions of the High Court, the rules came into force on 31st July, 2003. Therefore, by no stretch of imagination can it be said that the aforesaid rules were applicable to the selection which was governed under the 2001 Rules and the advertisement dated 11th November, 2001. Candidat[illegible]e

basis of the aforesaid advertisement. As noticed earlier, the advertisement in this case was issued on 27th November, 2001. It had set out the criteria of selection laid down in the 2001 Rules which were notified on 12th November, 2001. Written examination in respect of aforesaid advertisement was held by IIT, Roorkee on 12th January, 2002. The result of the written examination was declared on 10th July, 2003. The 2003 Rules were notified on 31st July, 2003. The interviews were conducted between 18th December, 2003 to 22nd December, 2003. Under the 2001 Rules, the marks to be given for the interview could not be more than 12.5% of the written examination. Under the 2001 Rules, there was no provision for adding 10 marks to the total marks of written test and interview in the category of trained apprentices. This was sought to be introduced by the 2003 Rules which came into force on 31st July, 2003. In such circumstances, it would be wholly impermissible to alter the selection criteria which was advertised on 27th November, 2001. Since no preference had been given to the trained apprentices, many eligible candidates in that category may not have applied. This would lead to a clear infraction of Article 14 of the Constitution of India. To this extent, we accept the submission made by Mr. Hansaria. Selection procedure can not be altered after the process of selection had been completed. [See: *K. Manjusree Vs. State of Andhra Pradesh & Anr.* (2008) 3 SCC 512 (para 27)].

26. We are not able to accept the submission of Mr. Hansaria that the benefit of 10 additional marks to the trained apprentices is limited only to those trained apprentices who have secured equal marks with one or more candidates in the category of direct recruits. The learned senior counsel seeks to support the aforesaid submission from the directions issued by this Court in the case of UPSRTC (supra) which was as follows :

> "Other things being equal, a trained apprentice should be given preference over direct recruits."

The only natural meaning of the aforesaid phrase 'other things being equal' is that all the candidates must have been subjected to the same selection process, i.e., same written test and interview. Further that their inter-se merit is determined on the same criteria, applicable to both categories. In this case, it is the aggregate of the marks secured by the candidate in the written test and the interview. The additional 10 marks are given to the apprentices as they are generally expected to secure lesser marks than the direct recruits in the written examination. Thus, by adding 10 marks to the total of the written examination of the trained apprentices, they are sought to be put at par with the direct recruits. Therefore, necessarily this preference is to be given to all the trained apprentices across the board. It cannot be restricted only to those trained apprentices who fortuitously happen to secure the same marks as one or more of the direct recruits.

In case the additional 10 marks are restricted only to such trained apprentice candidates, it would result in hostile discrimination. This can be best demonstrated by giving an illustration. Assume there are ten candidates belonging to trained apprentices category. Let us say that candidate No.1 secures 50% total marks on the basis of the marks obtained in the written test plus interview, whilst candidates No.2 to 10 secure total marks ranging from 51 to 59. But candidate No.1 has secured total marks identical to a direct recruit, i.e., 50%; whereas candidates No.2 to 10 have not secured marks at par with any direct recruit candidate. On the basis of the clarification dated 29th April, 2004, candidate No.1 will get the benefit of 10% weightage and candidates No.2 to 10 will not. Therefore, after weightage is given to candidate No.1, his/her total marks would be 60%. This would put him/her over and above, all other candidates, i.e., candidates No.2 to 10 who have secured higher marks than candidate No.1 who actually has lesser marks, if no weightage is given to his/her. Therefore, candidate Nos. 2 to 10 securing higher marks would be shown at a lower rank to candidate No.1 in the inter-se m[illegible]n,

a trained apprentice candidate securing lesser marks than his colleague would not only steal a march over the direct recruits but also over candidates who got more marks within his own category. Such an interpretation would lead to absurd consequences. This is not the intention of giving the preference to the trained apprentices. The interpretation sought to be placed by Mr. Hansaria would, in fact, create a sub-classification within the class of trained apprentice candidates. Such a sub-classification would have no rationale nexus, with the object sought to be achieved. The object of the preference is to give weightage to the apprentices so that the State does not lose the benefit of the training given to them, at the State expense. This would be a clear breach of Article 14 of the Constitution of India.

27. The only direction issued by this Court in UPSTRC's case (supra) was to give preference to the trained apprentices over direct recruits. No direction is given in the judgment as to how the preference is to be given. It was left entirely to the discretion of the Government to make the necessary provision in the statutory rules. In that case, number of candidates who had successfully completed apprenticeship under the Apprenticeship Act, 1961 claimed appointment upon completion. In support of their claim, the candidates relied on number of Government Orders, which according to them held out a promise that on successful completion of apprenticeship, they would be given employment. The High Court issued a writ in the nature of Mandamus directing that such candidate should be given employment. In such circumstances, UPSRTC came before this Court and submitted that there was no obligation on the State Government to ensure employment to any trained apprentices. This Court analyzed the various Government Circulars and came to the conclusion that there is no promise held out for the candidates of definite employment. However, in order to ensure that the training given to the apprentices at the State expense is utilized, certain directions were issued, which have been reproduced earlier. As noticed earlier, inspite

of the aforesaid directions, no preference was given to the trained apprentices in the selection process which was governed by the 2001 Rules, and the advertisement dated 27th November, 2001. Whilst the process of selection was still in progress, the High Court rendered its judgment in the case of Subhash Chandra (supra). For the reasons which are not made clear in the pleadings or by the learned counsel for any of the parties, the 2003 Rules were framed and enforced with effect from 31st July, 2003. Consequently, when the interviews were being conducted, the PSCU was faced with the 'amendment rules' of 2003. Therefore, the PSCU by a letter dated 5th April, 2004 sought clarification as to whether 2001 rules would be applicable or Rules of 2003 would be applicable, to the selection process. In these circumstances, the State Government wrote to the PSCU on 29th April, 2004, on the basis of legal advice that preference to the trained apprentices is to be given only if the two candidates secured equal marks. The legal opinion clarified that the amended rules of 2003 would not be applicable to the selection process which had already started. Therefore, the selection process under the 2001 Rules was excluded.

28. However, we find substance in the submission made by Mr. C.U. Singh that 2004 clarification would not have the effect of amending 2003 Rules. Undoubtedly, 2004 clarification is only an executive order. It is settled proposition of law that the executive orders cannot supplant the rules framed under the proviso to Article 309 of the Constitution of India. Such executive orders/instructions can only supplement the rules framed under the proviso to Article 309 of the Constitution of India. Inspite of accepting the submission of Mr. C.U. Singh that clarification dated 29th April, 2004 would not have the effect of superceding, amending or altering the 2003 Rules; it would not be possible to give any relief to the respondents. The criteria under the 2003 Rules governs all future recruitments. We have earlier already concluded that no vested right had accrued to the respondents, the trained apprentices

We do not accept the submission of Mr. C.U. Singh that the claim of the respondents (trained apprentices) would be covered under the 2001 Rules by virtue of the so called amendment made by 2003 Rules. We are of the opinion that the High Court committed an error, firstly, in holding that the 2003 rules are applicable, and secondly, not taking into consideration that all the posts had been filled up by the time the decision had been rendered.

29. For the reasons stated above, we are of the opinion that the judgment rendered by the High Court is unsustainable in law and the same is hereby set aside. The appeals are allowed with no order as to costs.

D.G. Appeals allowed.

STATE OF KERALA & ORS.

v.

B. SURENDRA DAS ETC.

(Civil Appeal Nos. 3196-98 of 2014)

MARCH 5, 2014

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

ABKARI POLICY: Kerala Abkari Policy - Object of - Held: Is to curb the rampant alcoholism in the State of Kerala, which claims to have the highest consumption of alcohol as against the other states in India, and whereby the younger generation is getting addicted - The objective is in pursuance of Article 47 of the Constitution which declares it to be a Directive Policy for the State to endeavour to bring about prohibition of consumption of intoxicating drinks - Constitution of India, 1950 - Article 47 - Liquor.

CONSTITUTION OF INDIA, 1950 - Article 47 - Liquor - Right to trade - Held: There is no fundamental right to trade in liquor - At the same time where such a trade is permitted, there cannot be any room for discrimination.

KERALA ABKARI ACT:

r.13 - Kerala Abkari Policy 2011-12 - Amendment to s.13 omitting words 'three star' from r.13(3) - Constitutionality of - Held: In the case of B. Six Holiday Resorts, the deletion of two star hotels from the eligibility of FL-3 licences was upheld by Supreme Court - It was held therein that promotion of tourism should be balanced with general public interest and that if policy is not open to challenge the amendment of the rules to effect the policy can also not be challenged - Deletion of three star hotels falls in the same genre as the deletion of two star hotels, which was done earlier - This being the position, the State cannot be faulted for deletion of three star

hotels after a periodical revision of the policy.

r.13 - Kerala Abkari Policy 2011-12 - Amendment to r.13 introducing distance rule - Constitutionality of - Held: The consequences of the amendment would be that four star and five star hotels would not be permitted to have FL-3 licences only on the ground that they are within the prohibited distance from such hotels which have poor hygiene standards, and which are not following norms laid down by the State Government - As per the report of the CAG, there was violation of licence conditions by the Bar Hotels - The Excise Commissioner also sent a letter to the Government highlighting poor standards maintained by the 418 unclassified bars and requesting not to grant fresh FL3 licenses as during the last one year several people had died due to excessive drinking in the unclassified hotels - Even then seven more FL3 licenses were issued - Moreover in the Abkari Policy for 2010-11, the Government declared that the FL3 licensees not having the requisite star qualification and who were functional during 2009-10 should be regularized - Government having not taken a firm stand to ensure that only hotels of a minimum standard are issued FL3 licenses has seriously compromised public safety - This is counter-productive to the objective of r.13(3), which is to promote tourism, as well as to the State's avowed policy of improving the health and nutrition standards of its citizens - In the circumstances, although there is no dispute regarding the power of the State Government to bring about the necessary reform, by modifying the rules, it has got to be justified on the touchstone of the correlation between the provision and the objective to be achieved - If that correlation is not established, surely the rule will suffer from the vice of arbitrariness, and therefore will be hit by Article 14 - The State Government has appointed a one-man commission for reviewing the Abkari Policy, by issuing a necessary notification - The commission would take into consideration the hard realities which are reflected in the report of the CAG and make necessary

recommendations - In these circumstances, distance rule by way of addition of Rule (3E) in Rule 13(3) is held to be bad in law - The state government will not proceed to deny FL3 licenses to hotels with a classification of four star and above by resorting to their deletion under r.13(3) until the report of the one-man commission is received, and until it takes action against the non-standard restaurants which have been permitted under the sixth and seventh proviso of r.13(3).

Classification and reclassification of hotels - Bar licence - Held: The two star and three star hotels stand on a different footing as against the hotels with four star and higher classification under the tourism policy of the Government of India - The Ministry of Tourism of the Government of India has issued the amended guidelines for classification/re-classification of hotels on 28.6.2012 - The classification of the hotels into star categories and heritage categories is done thereunder, and it is a voluntary scheme - If a local law prohibits the issuance of a bar licence to four star, five star, five star deluxe, heritage classic and heritage grand categories, which is otherwise necessary, such local law will prevail - In any case three star hotels will have to be placed in a different category as against the hotels with four star and higher classification, since it is not necessary for three star hotels to have an FL3 licence.

Pursuant to the State's Abkari Policy framed in 2011-12, two amendments were introduced by the State of Kerala in Rule 13 of the Kerala Abkari Act. Firstly, the words 'three star' were omitted from Rule 13(3). Consequently, after this amendment of the rule which came into force immediately, three star hotels not already having a licence, were held not eligible to get a bar licence for retail sale of liquor in the hotels. Thus, no new hotels having the three star classification were entitled to the licence known as FL-3 licence for selling the IMFL. The hotels having the two star or

were already ineligible to get this licence by virtue of the pre-existing proviso to Rule 13(3), introduced by notification dated 20.12.2002. Secondly, Rule (3E) was added in Rule 13 w.e.f. 27.3.2012 introducing distance rule whereby no new bar hotels of any classification were permitted to be opened (a) if they were situated within a distance of 3 kms. from existing bar hotels in a panchayat area, and (b) within a distance of 1 km. from existing bar hotels in a municipal area. Writ petitions were filed challenging these amendments. A single judge of High Court dismissed the writ petition. The Division Bench of the High Court allowed the appeals and struck down the two amendments as unconstitutional. The instant appeals were filed challenging the order of the High Court.

Partly allowing the appeals, the Court

HELD: 1. The avowed object of this Abkari Policy is to curb the rampant alcoholism in the State of Kerala, which claims to have the highest consumption of alcohol as against the other states in India, and whereby the younger generation is getting addicted. Thus, the objective is in pursuance of Article 47 of the Constitution of India which declares it to be a Directive Policy for the State to endeavour to bring about prohibition of consumption of intoxicating drinks. [para 4] [1066-B-C]

2. Abkari Policy of the Government of Kerala for the year 2011-2012:-

The Government of Kerala announced the Abkari Policy on 17.8.2011 wherein serious concern was shown regarding the rising trend of alcoholism and the consequential social issues arising in the Kerala society and government clarification that it did not wish to view the liquor business as a source of revenue. [Para 5, 6 and 7] [1067-B, C, D-F]

3. There cannot be any dispute on the proposition that, there is no fundamental right to trade in liquor. At the same time the dicta of the Supreme Court in Khoday Distilleries cannot be ignored that where such a trade is permitted, there can not be any room for discrimination. [para 32] [1088-A-B]

Khoday Distilleries Ltd. & Ors. v. State of Karnataka **1995 (1) SCC 574 1994 (4) Suppl. SCR 477 ;** *State of Kerala v. B. Six Holiday Resorts Private Ltd.* **2010 (5) SCC 186: 2010 (3) SCR 1 - relied on.**

4. There are two amendments which are under challenge. As far as the deletion of three star hotels is concerned, in the case of B. Six Holiday Resorts wherein, the previous deletion of two star hotels from the eligibility of FL-3 licences was upheld by this Court. It was held that promotion of tourism should be balanced with general public interest. Paragraph 31 permitted a periodical reassessment of policy, and held that if policy is not open to challenge the amendment of the rules to effect the policy can also not be challenged This being the position the grievances made by the hoteliers with respect to the deletion of three star hotels, and to insist on a bar licence, cannot be sustained, on this ground. Deletion of three star hotels falls in the same genre as the deletion of two star hotels, which was done earlier. This Court has upheld the deletion of two star hotels in the said judgment. This being the position the state can not be faulted for deletion of three star hotels after a periodical revision of the policy. [para 33] [1088-B-G]

5. The two star and three star hotels stand on a different footing as against the hotels with four star and higher classification under the tourism policy of the Government of India. The Ministry of Tourism (H&R Division) of the Government of India has issued the amended guidelines for classificatio of

hotels on 28.6.2012. The classification of the hotels into star categories and heritage categories is done thereunder, and it is a voluntary scheme. Annexure-2 contains the provisions concerning classification/re-classification of operational hotels. This being the position, it is not necessary for a three star hotel to have a bar licence. In fact para 8(f) also states that if a local law prohibits the issuance of a bar licence to four star, five star, five star deluxe, heritage classic and heritage grand categories, which is otherwise necessary, such local law will prevail. In any case three star hotels will have to be placed in a different category as against the hotels with four star and higher classification, since it is not necessary for three star hotels to have an FL3 licence. [Para 34] [1088-G-H; 1089-A-B, D-E]

6. The position with respect to the distance rule introduced in 2012 is, however, different. As far as the amendment brought in 2012 introducing the distance rule is concerned, the hard realities cannot be ignored which were recorded in the report of the Comptroller and Auditor General who is a constitutional functionary, and who has made the report on receiving the necessary information from the State Government. Para 5.3.1.1 of the report spoke for itself and read that the field officers of the Department had reported violation of licence conditions like unhygienic conditions, lack of facilities, non adherence of the time schedule, selling on dry days, opening more than one counter, etc. in these bar hotels. However, no action was taken by the Department on these reports. The Excise Commissioner sent a letter (January 2011) to the Government highlighting the poor standards maintained by the 418 unclassified bars and requested not to grant fresh FL3 licenses for areas other than tourism notified areas. In the letter the Excise Commissioner, inter alia, stated that the restaurant segment of the unclassified hotels were functioning for

name sake only and during the last one year seven people had died due to excessive drinking in the unclassified hotels. He also pointed out that he had personally seen that almost all the customers went there to drink liquor and not for taking food. Even though the Excise Commissioner had requested not to issue fresh FL3 licenses, seven more FL3 licenses were issued between 12 January and 31 March 2011. Moreover in the Abkari Policy for 2010-11, the Government declared that the FL3 licensees not having the requisite star qualification and who were functional during 2009-10 should be regularised. Thus, the Government has made it a regular feature to regularise ineligible licensees. The Government has not taken a firm stand to ensure that only hotels of a minimum standard are issued FL3 licenses. Further, the Government has seriously compromised public safety by (a) regularising 418 unclassified bars, though they were not able to attain the minimum standards despite repeated extension of time and (b) by turning a blind eye towards the various complaints against these unclassified bars. On this being pointed out in audit the Department stated (June 2011) that the Government is the competent authority to issue orders allowing relaxation, if any, for the functioning of FL3 licensees/bar hotels. [para 35] [1089-F-G; 1091-C-H; 1092-A-C]

7. The consequences of the amendment of 2012 will be that four star and five star hotels would not be permitted to have FL-3 licences only on the ground that they are within the prohibited distance from such hotels which have poor hygiene standards, and which are not following norms laid down by the State Government. The FL3 licences are issued on an annual basis, and it is quite within the powers of the Government not to renew these licenses if such serious violations are reported. But the Government appears to be slow h

action. It will surely be counter-productive to the objective of Rule 13 (3), which is to promote tourism, as well as to the State's avowed policy of improving the health and nutrition standards of its citizens. The criticism of the respondents, particularly of the hotels which have been permitted under the 6th and 7th proviso to Rule 13(3), is therefore quite justified. In the circumstances, although there is no dispute regarding the power of the State Government to bring about the necessary reform, by modifying the rules, it has got to be justified on the touchstone of the correlation between the provision and the objective to be achieved. If that correlation is not established, surely the rule will suffer from the vice of arbitrariness, and therefore will be hit by Article 14. The State Government has introduced awareness programmes in this behalf and, it ought to continue with that. It should also take steps to see to it that hotels with poor hygiene standards are not allowed to function. The State Government has appointed a one-man commission for reviewing the Abkari Policy, by issuing a necessary notification on 23.1.2013. It is hoped that the commission will take into consideration the hard realities which are reflected in the report of the CAG and make necessary recommendations. As far as this Court is concerned, the validity of the amendment of 2012, in the present circumstances cannot be upheld. [paras 36, 37] [1092-D-H; 1092-A-C]

8. If the Government is really serious about reducing the consumption of liquor, it should also take steps to reduce its own shops and depots and in any case should not open new ones. In view of the very high consumption of liquor, which the State Government intends to reduce, the Government should consider not issuing further FL-1 licences. If it is not possible for the Government to reduce the existing FL-1 shops, with respect to which it enjoys a monopoly, it is of no use for it to direct the

private sector alone to function in a particular manner. The Government must as well behave in conformity with the mandate of Article 47. There is one more development in this matter. In as much as this court had not granted any stay of the impugned judgment and order of the High Court, an order was passed by this Court on 19/9/2012 that the applications of the claimants for the licenses be considered in eight weeks. Since no decision was forthcoming, some of the respondents filed Contempt Petitions. A notice was issued on the Contempt Petition filed by respondent. A reply was filed on behalf of the appellants on 25.01.2013 that they had considered the applications, some of them were rejected, and in the rest further information was sought. These steps were initiated within the time stipulated by this court, and due to the large number of applications, the decision was taking its own time. On 8.02.2013, this court directed that the Contempt Petitions be heard alongwith the special leave petitions. Since the Civil appeals arising out of these SLPs are being disposed of with this order, no separate orders are required on the contempt petitions. The appellants will have to act now in terms of the order being passed herein. [paras 39, 40] [1094-G-H; 1095-A-E]

P.N. Kausal and Ors. vs. Union of India & Ors. **1978 (3) SCC 558 - relied on.**

Kuldip Singh vs. Government of NCT of Delhi **2006 (5) SCC 702:2006 (3) Suppl. SCR 335;** *Khandige Sham Bhat and Ors. vs. The Agricultural Income Tax Officer* **AIR 1963 SC 591: 1963 SCR 809;** *State of Kerala Vs. Maharashtra Distilleries Ltd & Ors.* **2005 (11) SCC 1: 2005 (1) Suppl. SCR 91;** *Javed and Ors. vs. State of Haryana* **2003 (8) SCC 369: 2003 (1) Suppl. SCR 947;** *Balco Employees Union vs. Union of India* **2002 (2) SCC 333: 2001 (5) Suppl. SCR 511 ;** *State of Andhra Pradesh and Ors. vs. Mc Dowell and Co.* **1996 (3) SCC 709: 1996 (3) SCR 721 ;** *M/s Ugar Sugar Works Ltd. vs. Delhi Administration & Ors.* **2001 (**

SCR 630; *State of M.P. vs. Nandlal Jaiswal & Ors.* **1986 (4) SCC 566: 1987 (1) SCR 1 ;** *State of Jammu and Kashmir vs. Triloki Nath Khosa & Ors.* **1974 (1) SCC 19: 1974 (1) SCR 771 ;** *Rashbihari Panda vs. State of Orissa* **1969 (1) SCC 414: 1969 (3) SCR 374 ;** *State of Maharashtra vs. Indian Hotels and Restaurant Assn.* **2013 (8) SCC 519: 2013 (7) SCR 654;** *Reliance Energy Limited vs. Maharashtra State Road Development Corporation* **2007 (8) SCC 1: 2007 (9) SCR 853 - referred to.**

9. The judgment rendered by the Division Bench is set-aside to the extent it interferes with the amendment brought in the year 2011. The deletion of three star hotels from the category of hotels eligible for FL3 licenses under Rule 13(3) is held valid.As far as the amendment brought in 2012 introducing the distance rule by way of addition of Rule (3E) in Rule 13(3) is concerned, the same is held to be bad in law. The judgment of the High Court is confirmed to that extent. The state government will not proceed to deny FL3 licenses to hotels with a classification of four star and above by resorting to their deletion under Rule 13 (3) until the report of the one-man commission is received, and until it takes action against the non-standard restaurants which have been permitted under the sixth and seventh proviso of Rule 13(3). [para 41] [1095-F-H; 1096-A-B]

Case Law Reference:

1994 (4) Suppl. SCR 477	**relied on**	**Para 10**
2006 (3) Suppl. SCR 335	**relied on**	**Para 17**
2010 (3) SCR 1	**relied on**	**Para 18**
1963 SCR 809	**Referred to**	**Para 19**
2005 (1) Suppl. SCR 91	**Referred to**	**Para 20**
2003 (1) Suppl. SCR 947	**Referred to**	**Para 21**

2001 (5) Suppl. SCR 511	**Referred to**	**Para 21**
1996 (3) SCR 721	**Referred to**	**Para 22**
2001 (2) SCR 630	**Referred to**	**Para 23**
1987 (1) SCR 1	**Referred to**	**Para 26**
1974 (1) SCR 771	**Referred to**	**Para 27**
1969 (3) SCR 374	**Referred to**	**Para 28**
2013 (7) SCR 654	**Referred to**	**Para 29**
2007 (9) SCR 853	**Referred to**	**Para 29**
1978 (3) SCC 558	**Relied on**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3196-98 of 2014.

From the Judgment and Order dated 27.07.2012 of the High Court of Kerala at Ernakulam in W.A. Nos. 470, 670 and 745 of 2012.

WITH

Civil Appeal Nos. 3199-3218, 3219, 3220, 3221, 3222, 3223, 3224, 3225, 3226 and 3227 of 2014, Contempt Petition (C) Nos. 449 and 450 of 2012, 20, 18 and 19 of 2013, 431, 432-444 of 2012 and 5 of 2013.

V. Giri, Mukul Rohatgi, Chander Uday Singh, Krishnan Venugopal, Mohammed Sadique, Abhilash M.R., Krishna Pradip, Ramesh Babu M.R., Aditya Soni, G. Prakash, Himinder Lal, D.K. Devesh, S.K. Roshan, Prasenjit Pritam, Amarjit Singh Bedi, Radha Shyam Jena, K.B. Pradeep, Sanand Ramakrishnan, Rajeev Mishra, Sumita Hazarika, AS. Tuisem Shimray, Romy Chacko, Varun Mudgal, M.C. Ashri, Sudhi Vasudevan, V.K. Sidharthan, Roy Abraham, Reena Roy, Seema Jain, Harish Beeran, Amer Mushtaq, Deepak Prakash, Biju P. Raman, Vivek Kumar Verma, [illegible] Nandini V.), Joe Joseph Kochikunni, M.[illegible]i,

Ajay K. Jain, Neelam Saini, James P. Thomas, Rohit Kumar Singh, Sajith P.Warrier, P.D. Baby John, Venkita Subramoniam T.R., Rahat Bansal, P. Sreekumar, Alex Joseph, Shiv Sagar Tiwari, Bobby Augustine, Rajesh Tiwari for the Appearing Parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave granted.

2. This group of Civil Appeals raises the questions with respect to the legality and validity of two amendments introduced by the first appellant-State of Kerala, in pursuance of its Abkari Policy framed in 2011-2012, in the Foreign Liquor Rules framed under the Kerala Abkari Act, since those amendments have been struck down as unconstitutional by the impugned judgment and order rendered by the High Court of Kerala.

3. Rule 13 of the Foreign Liquor Rules governs the grant of licences for the sale of the Indian Manufactured Foreign Liquor ('IMFL' for short). The two amendments which are disputed are as follows:-

(i) Firstly, the words 'three star' were omitted from Rule 13(3) of these rules by Government of Kerala by issuing notification dated 9.12.2011. Consequently, after this amendment of the rule which has come into force immediately, three star hotels not already having a licence, will not be eligible to get a bar licence for retail sale of liquor in the hotels. Thus, no new hotels having the three star classification will be issued the licence known as FL-3 licence for selling the IMFL. The hotels having the two star or lesser classification are already ineligible to get this licence by virtue of the pre-existing proviso to Rule 13(3), introduced by notification dated 20.12.2002.

(ii) Secondly, Rule (3E) has been added in this Rule 13 w.e.f. 27.3.2012 by issuing a notification of even date, whereby

no new bar hotels of any classification will be permitted to be opened (a) if they are situated within a distance of 3 kms. from existing bar hotels in a panchayat area, and (b) within a distance of 1 km. from existing bar hotels in a municipal area.

4. The avowed object of this Abkari Policy is to curb the rampant alcoholism in the State of Kerala, which claims to have the highest consumption of alcohol as against the other states in India, and whereby the younger generation is getting addicted. Thus, the objective is in pursuance of Article 47 of the Constitution of India which declares it to be a Directive Policy for the State to endeavour to bring about prohibition of consumption of intoxicating drinks. These two amendments were challenged by the respondents in the Kerela High Court on the touchstone of Article 14 of the Constitution of India, as being arbitrary, discriminatory, irrational, excessive, and even malafide. It is contended by them that the amendments will not succeed in achieving the objectives for which they have been introduced. On the contrary, the two amendments will affect the other objective of the policy of the State of Kerala viz. to encourage and increase tourism in the State.

5. The respondent No.1, B. Surendra Das, was one such person who filed a Writ Petition, bearing Writ Petition (C) No.5650/2012, to challenge the denial of the FL-3 licence to his three star hotel on the basis of the first amendment effected by notification dated 9.12.2011. The writ petition was dismissed by a Single Judge by his judgment and order dated 7.3.2012. Being aggrieved by the said judgment and order, he preferred Writ Appeal No.470/2012. Some other persons whose writ petitions were rejected, filed similar Writ Appeals. The distance rule introduced with the addition of Rule (3E) in Rule 13 w.e.f. 27.3.2012 was also challenged by some other persons by filing Writ Petitions directly to the Division Bench. All these Writ Appeals and Writ Petitions were allowed by a Division Bench of the High Court by its common judgment and order dated 27.7.2012, which struck dow[illegible]s

as unconstitutional. Being aggrieved by the said judgment and order, these appeals have been filed by the appellant-State of Kerala and its concerned officers of the Excise Department.

Abkari Policy of the Government of Kerala for the year 2011-2012:-

6. Before we deal with the impugned judgment and the amendments, we must first refer to the Abkari Policy of the Government of Kerala which led to the two disputed amendments to Rule 13. The Government of Kerala announced the Abkari Policy on 17.8.2011. In the second sub-para of the very first paragraph of this policy, the Government noted as follows:-

"This Government views with serious concern the rising trend of alcoholism and the consequential social issues arising in the Kerala society. Strong feelings against this have been emanating from the civil society. Fully realising, Government intends to formulate a stringent Abkari Policy."

7. The notable features of this policy were as follows:-

"a. The Government noted the rising trend of alcoholism in the state and its consequences.

b. Clarified that it did not wish to view the liquor business as a source of revenue.

c. Noted that as a prelude to forming its Abkari Policy, detailed discussions were held with stakeholders, such as trade-unions in the Toddy/ IMFL sector, bar-owners, distilleries and brewers, anti-liquor organizations, NGOs/individuals running de-addiction centers, religious heads. Etc.

d. For IMFL the following yard-sticks wereimposed

(i) A condition insisting on a distance of 3 km and 1 km fromexisting bar hotels in panchayats and municipalities respectively.

(ii) From 1.4.2012 bar licences would begranted only to hotels having four-star and above classification.

(iii) From the 2013-2014 financial year onwards Bar- licences would be granted only to five star hotels etc.

e. Further, impositions were as follows:

(i) The age limit for buying and selling alcohol was increased.

(ii) The maximum limit of alcohol possession was reduced.

(iii) The working hours of bars were altered and restricted to 8 am to 11 pm in panchayats and 9 am to 12 pm in corporation areas."

The relevant Foreign Liquor Rule 13(3):-

8. As a consequence of this policy the two amendments were brought in, firstly the denial of fresh licences to three star hotels by the amending notification dated 9.12.2011, and secondly the distance rule by the notification dated 27.3.2012. Relevant portion of Rule 13(3) reads as follows:-

"13. Licences for possession, use or sale:- Licences for the possession and sale of foreign liquor or for possession or use of foreign liquor shall be of the following descriptions and in the forms appended hereto.

xxx xxx xxx

(3) Foreign Liquor 3 Hotels (R

Licence in this form may be issued by the Excise Commissioner under orders of Government, in the interest of promotion of tourism in the State, to hotels which have obtained (three star)1, four star, five star, five star deluxe, heritage, heritage grand or heritage classic classification from Ministry of Tourism, Government of India, where the privilege of sale of foreign liquor in such hotels have been purchased on payment of an annual rental of Rs. 22,00,000 (Rupees twenty two lakhs only). But no such licence shall be issued to hotels which are located within 200 (two hundred) metres from an educational institution, temple, church, mosque or burial ground. Hotels other than those in the private sector having four star, five star, five star deluxe classification will be exempted from the distance restrictions in the interest of promotion of tourism in the State. In the case of hotels in the private sector of the above categories and hotels having heritage, heritage grand and heritage classic classification issued by the Ministry of Tourism, Government of India, no such licence shall be issued if located within 50 (fifty) metres from any educational institution, temple, church, mosque, burial ground or scheduled caste/scheduled tribe colony. The applicant shall produce from the Abkari Workers Welfare Fund Inspector a certificate to the effect that he has remitted before the date of application for the licence/renewal of licence, the arrears of contributions, if any, payable upto the 31st of December of the preceding year.

The existing licencees who do not maintain two star standards will be allowed time upto 31st March, 2007 to upgrade their standards to two star. Their licence will be renewed till that date. Failure to upgrade the standard of those hotels would lead to cancellation of licence and forfeiture of rental paid by them. Licencees shall have no claim for compensation. The applicant shall produce from the Abkari Worker's Welfare Fund Inspector a

certificate to the effect that he has remitted before the date of application for the licence/renewal of licence, the arrears of contribution, if any, payable upto 31st day of December preceding year.

The question whether a hotel or restaurant confirms to the standard of two star hotel shall be determined in accordance with the specific issues for classification of star hotels issued by the Department of Tourism and in case of doubt or dispute, the decision of the Excise Commission shall be final.

The cost of liquor shall be billed along with the cost of meals. The cost of liquor shall be shown separately in the bill and the duplicate copies thereof shall be retained for inspection by the Officers of the Excise Commission.

xxx xxx xxx

Provided also that such bar licences, having dispute on distance rules and shifting outside Municipal Corporation area, including those of Approved Restaurants, existing as on 1st April, 2004 shall be regularized.

(Fourth Proviso)

xxx xxx xxx

Provided further that all existing licences not having the above classification and are functional as on 31st March, 2007 shall be regularized.

(Sixth Proviso)

Provided also that all FL-3 licences not having the requisite star classification and are functional during 2009-2010 shall be regularized.

(Seventh Proviso)

xxx xxx xxx

(3B) No liquor shall be sold under FL-3 licences for removal outside the hotel to anyone including the residents of the hotel:

Provided that the liquor may be sold and served to the residents of the hotel in the rooms where they reside or in the restaurant where they partake food, if such hotels have restaurants exclusively for the use of families and others where no liquor shall be served:

Provided further that the holder of an FL-3 licence may serve liquor along with meals by the side of swimming pools and in the lawns and roof gardens of the hotel if he obtains a special permit for the purpose from the Commissioner of Excise, on payment of additional annual rental of [Rs. 50,000(Rupees Fifty Thousand only)].

Provided also that for serving liquor at restaurants to persons other than residents, the licencee shall pay an additional annual fee of [Rs. 25,000 (Rupees Twenty Five Thousand)].

xxx xxx xxx

(3E) 2 Notwithstanding anything contained in these rules, no new FL-3 licence shall be granted to hotels which are located within a radius of three kilometers in Grama Panchayat and one kilometer in Municipal Corporation/ City Corporation, from another hotel having an FL-3 licence granted under this rule].

1. Deleted by impugned Amendment of 2011.

2. Introduced by impugned Amendment of 2012."

Judgment of the Single Judge:-

9. The learned single Judge who heard the matter concerning the denial of licences to new three star hotels held that there was no vested right to get a licence, leave aside any Fundamental Right. It was held that there was no element of discrimination, nor that of legitimate expectation. He also held that the unamended rule cannot be applied once the amendment comes into force, and therefore rejected the petition.

Judgment of the Division Bench:-

10. The Division Bench, on the other hand, noted in paragraph 5 of its judgment the submission of the respondents that although there was no Fundamental Right to carry on business in liquor, as held in Khoday Distilleries Ltd. & Ors. vs. State of Karnataka reported in 1995 (1) SCC 574, once the State permits such a trade, it has to make rules and permit the business without any arbitrariness or discrimination, and in conformity with Article 14 of the Constitution of India. It also noted the submissions of the respondents that they have made huge investments, and many of them had earned the classification of heritage hotels from the Ministry of Tourism, Government of Kerala. They also challenged the 4th, and particularly 6th and 7th proviso of this rule. The 6th proviso regularized the licences as functioning on 31.3.2007. The 7th proviso regularized those licences functioning during 2009-2010. It was submitted that if such hotels, although not conforming to the statutory requirements, were to be tolerated, how can the distance rule be applied to deny licences to hotels having three star, four star or higher classification, which meet the prescribed criteria, by measuring distances from such hotels which do not meet minimum standards of health and hygiene?

11. The Division Bench noted that when it comes to the wholesale business in liquor in the State, there was a complete monopoly of the State Government in as s

was in the hands of 3 entities, (1) Kerala State Beverages (Manufacturing and Marketing) Corporation Limited, (2) Kerala State Civil Supplies Corporation Limited and (3) Kerala State Co-operative Consumer Marketing Federation Limited. The Court noted that all these 3 Government companies were together running around 400 shops, in the State having FL1 licenses. The shops with these licenses sell liquor, in the form of unopened bottles, which is not to be consumed on the premises. These are the shops which have the highest sale of liquor, and the consequence of it in any case is the high consumption of liquor. The Court also noted that the Government earned huge revenue from this sale, and the State Government's annual collection was over 7000 crores. If these sales by the shops run by the State are to be permitted, why should the privately owned restaurants and bars not be permitted to vend liquor?

12. The Division Bench was of the view that whereas on the one hand, the policy of the State perpetuated the monopoly of the existing hotels having three star or higher classification, on the other hand by preventing new star hotels from coming up, it would encourage consumption of spurious liquor. The Court was of the view that there was no distinction between the existing three star hotels and the new three star hotels, to be opened. Besides most of these hotels were set up in areas where there was a thriving tourism business like the Kovalam Beach near Thiruvanantapuram. The decision to set up hotels ought to be left to the hoteliers. The State Government will defeat the tourism policy by introducing, by amendment, the distance rule. For all these reasons the Court held that the two amendments were discriminatory, and will not achieve the policy which they intended to achieve. The Court, therefore, held the two amendments to be bad in law and unconstitutional.

13. Learned senior counsel, Mr. V. Giri assisted by Mr. Ramesh Babu, learned counsel, has appeared for the appellants. He has been supported by Mr. P.K. Bali, learned

senior counsel appearing for the Kerala Pradesh Madhya Virudh Samithy (i.e. committee opposing consumption of liquor in the area of Kerala). Senior counsel Mr. Mukul Rohtagi, Chander Udai Singh, Krishnan Venugopal and others have appeared for the respondents and the interveners.

Submissions on behalf of the appellants:-

14. The principal submission of Mr. Giri, as well as Mr. Bali, has been that the consumption of liquor is the highest in the State of Kerala, as compared to all other states in India. Chronic diseases are on the rise due to the excessive consumption of alcohol. The amendments in Rule 13(3) of the Foreign Liquor Rules are effected to bring in force the Abkari Policy of the Government, with a view to bring down the sale and distribution of liquor within the State. Mr. Giri highlighted the objectives of the Abkari Policy framed from the year 2011-2012 (These objectives have already been referred to in paragraph 7 above). It was submitted that trading in liquor is not a Fundamental Right as held in *Khoday Distilleries* (supra), and the effect of the policy decision taken by the State is to be considered having regard to the provisions contained in Article 47 of the Constitution of India, as also the power of the State to regulate and control the trade in liquor in terms of the provisions of the Abkari Act.

15. It was pointed out by Mr. Giri that the revised policy was introduced by the Government foreseeing the ill effects of increase in the consumption of liquor, and with the intention of reducing it in a phased manner. The amendments have been brought about for that purpose as a part of the social commitment to the public at large. The Abkari Policy has been framed from 1992 onwards as follows:-

> *"(i) In 1992, with the intention of reducing the number of bar hotels, Government decided to restrict grant of FL-3 Licences to only hotels having two star and above.*

(ii) By 1996 Abkari policy the Government decided to ban sale of Arrack with effect from 01.04.1996.

(iii) In 2002 as per the Abkari policy of 202, an amendment was brought in the Rule restricting grant of FL-3 Licence to only hotels having 3 star and above classification.

(iv) In continuation of the policy of the Government to reduce sale and distribution of Liquor, Abkari policy of 2011 was announced interalia restricting issue of FL-3 Licence to only having 4 star and above classification."

Thereafter, the distance rule has been brought in 2012 by adding Rule (3E) in Rule 13. It was submitted that all these changes in the rules have been made with the object of gradually reducing the sale and distribution of liquor in the State.

16. Mr. Giri emphasized the observations in sub-para (c) and (d) of para 60 of *Khoday Distilleries* (supra) to the following effect:-

"(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is res extra commercium being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously

include liquor, except for medicinal purposes. Article 47 is one of the Directive Principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the Directive Principle contained in Article 47, except when it is used and consumed for medicinal purposes."

17. He then emphasized that this Hon'ble Court has also held in *Kuldip Singh vs. Government of NCT of Delhi* reported in 2006 (5) SCC 702 that the right to carry on business in liquor is not a Fundamental Right, and the policy decision of the Government in Abkari Matters, introduced through amendment should not be easily interfered with, unless the amendment is motivated by malafides, arbitrariness and discrimination.

18. Apart from these two leading judgments, he drew our attention to another judgment of this Court in *State of Kerala vs. B. Six Holiday Resorts Private Limited* reported in 2010 (5) SCC 186 when this very Rule 13(3) was amended w.e.f. 1.4.2002, and grant of FL-3 licences to two star hotels was stopped. The challenge to this restriction was repelled by this Court in the following words in paragraphs 30 and 31 of this judgment. These paragraphs read as follows:-

"30. Rule 13(3) provides for grant of licences to sell foreign liquor in hotels (restaurants). It contemplates the Excise Commissioner issuing licences under the orders of the State Government in the interest of promotion of tourism in the State, to hotels and restaurants conforming to standards specified therein. It also provides for the renewal of such licences. The substitution of the last proviso to Rule 13(3) by the notification dated 20.2.2002 provided that no new licences under the said Rule shall be issued. The proviso does no[illegible]s

already granted. Nor does it interfere with renewal of the existing licences. It only prohibits grant of further licences. The issue of such licences was to promote tourism in the State. The promotion of tourism should be balanced with the general public interest. If on account of the fact that sufficient licences had already been granted or in public interest, the State takes a policy decision not to grant further licences, it cannot be said to defeat the Rules. It merely gives effect to the policy of the State not to grant fresh licences until further orders. This is evident from the explanatory note to the amendment dated 20.2.2002. The introduction of the proviso enabled the State to assess the situation and reframe the excise policy.

31. It was submitted on behalf of the State Government that Rule 13(3) was again amended with effect from 1.4.2002 to implement a new policy. By the said amendment, the minimum eligibility for licence was increased from Two-star categorization to Three-Star categorization and the ban on issue of fresh licences was removed by deleting the proviso which was inserted by the amendment dated 20.2.2002. It was contended that the amendments merely implemented the policies of the government from time to time. There is considerable force in the contention of the State. If the State on a periodical re-assessment of policy changed the policy, it may amend the Rules by adding, modifying or omitting any rule, to give effect to the policy. If the policy is not open to challenge, the amendments to implement the policy are also not open to challenge. When the amendment was made on 20.2.2002, the object of the newly added proviso was to stop the grant of fresh licences until a policy was finalized."

19. It was, therefore, submitted by Mr. Giri that when a policy was introduced with a good intention, after considering the serious problems in the society, and after consulting all

affected interests including the hoteliers, there was no reason for the High Court to interfere therein by calling it arbitrary or discriminatory. In this context he relied upon a Constitution Bench Judgment in *Khandige Sham Bhat and Ors. vs. The Agricultural Income Tax Officer* reported in AIR 1963 SC 591 wherein the issue was with respect to the classification of State of Kerala into two parts, i.e., the Madras area and the Travancore-Cochin area, for the purpose of imposition of agricultural Income Tax. The petitioners had contended that it had no rational nexus with the object of the Act, namely, imposition of agricultural income-tax, for, as the two parts belong to the same State, no post amalgamation law can treat assesses of the same State differently in the matter of taxation. This Court, while dismissing the Petitions, stated the following in para 11 of the judgment:

> "The said discussion leads to the only conclusion that the Legislature in its sincere attempt to meet a difficult situation made a law adopting one of the diverse methods open to it and even the method adopted cannot be said to be either unreasonable or arbitrary, as the overall picture indicates that it works fairly well on all similarly situated, though some hardship may be caused to some in the implementation of the law which is almost inevitable in every taxation law. We cannot, therefore, say that in the present case the one method adopted instead of another is either arbitrary or capricious."

He, further, submitted that if three star hotels are not to be issued FL-3 licences any more, that was as a part of the continuing policy of the State, and the previous restriction of not issuing FL-3 licences to two star hotels has already been upheld by this Court. That being so, the amendment of Rule 13(3) omitting three star hotels by notification dated 9.12.2011 could not be faulted.

20. As far as the distance rule is concerned, Mr. Giri submitted that there were already v[illegible]f

restaurants and liquor bars having FL-3 licences spread over the State, in the Grama Panchayat and in the municipal areas. The objective behind introducing the distance rule is to prevent any more restaurants and bars selling liquor coming up in the near vicinity of the existing ones. The existing restaurants and hotels have caused sufficient damage to the younger generation, and it is to prevent further damaging effects on the health of the society that the subsequent amendments had been brought in, by introducing Rule (3E) in the year 2012. The High Court should not have interfered, and held this added rule as unconstitutional on the ground of alleged discrimination against parties which had not set up their hotels as yet. The State was trying to do its best in furtherance to the Directive Principle contained in Article 47 of the Constitution, and as Article 37 of the Constitution states, the principles laid down in the Directive Principles are fundamental in the governance of the country, and the State has the duty to apply them in making the laws. He submitted that as held in *Khoday Distilleries Ltd.* (supra) the correct way to describe the Fundamental Rights under Article 19(1) is to call them *'Qualified Fundamental Rights'*. The right to practice any profession, or to carry on any occupation, trade or business guaranteed under Article 19(1)(g) of the Constitution is subject to the reasonable restrictions under sub-article (6) thereof, and there was no reason to hold that the restrictions imposed under the present rules are in any way unreasonable. Mr. Giri, referred to Section 69 of Kerala Abkari Act, and submitted that the rules framed under the statute must be considered as a part of the statute. They are on a higher pedestal as against rules framed by notifications de hors any statute, and cannot be challenged on the grounds as sought by the respondents. He referred to a judgment of this Court in *State of Kerala Vs. Maharashtra Distilleries Ltd & Ors.* reported in 2005 (11) SCC 1 wherein the Constitution Bench held in para 79 of that judgment that permissive privilege to deal in liquor is not a right. He asked that if the step taken by the Government is in the right direction and is a bonafide one, should the State be restricted from taking such a step?

21. It was submitted by Mr. Giri that the decision of the Government to deny FL-3 licences to new three star hotels does not operate against the objective of tourism, and even under the Government of India policy on tourism, it was not necessary for the three star hotels to have the bar licence. He, however, stated that to begin with the Government be allowed to act in public interest, and if at a later point in time it finds that the decision requires reconsideration, it will review the decision. The villagers are objecting to the new liquor shops coming up and so are the organizations of women and social activists. The state cannot be oblivious to the requirements of the citizens. The distance rule will apply across the board, and no new licences will be given if any liquor vending shop is sought to be set up within the prohibited distance. Mr. Giri submitted that Article 14 is wrongly invoked in the present matter. It should not be permitted to be invoked in matters of public policy and where public interest was involved. He relied upon the judgment of this Court in *Javed and Ors. vs. State of Haryana* reported in 2003 (8) SCC 369 where this Court was concerned with the prohibition imposed by Haryana Panchayat Raj Act for people having more than two children from taking up office as a member of Panchayat. This Court held in that matter that Fundamental Rights are not to be read in isolation, and they have to be read alongwith the Chapter on Directive Principles. Under Article 47 the State has the duty to raise the level of nutrition and standard of living and to improve public health. These aspects cannot be ignored. He thereafter referred to paragraph 93 of the judgment of this Court in *Balco Employees Union vs. Union of India* reported in 2002 (2) SCC 333 to submit that it is not for the Court to decide the policy matters. The affected persons are women and children also, and the State has taken steps to protect their interest.

22. The submissions of Mr. Giri were supported by learned senior counsel Mr. Bali. He represented the earlier referred Kerala Pradesh Madhya Virudha Samithy. It has filed a separate SLP challenging the impugned [illegible].

38251/2012. He drew our attention to various judgments. The salient from amongst them are mentioned hereafter. Firstly he referred to the judgment of this Court in *State of Andhra Pradesh and Ors. vs. Mc Dowell and Co.* reported in 1996 (3) SCC 709, wherein a bench of three Judges of this Court laid down:-

> *"43……..A law made by the Parliament or the Legislature can be struck down by Courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part-III of the constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the Legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other*

> *constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom……."*
>
> *(emphasis supplied)*

23. Thereafter, he referred to the judgment in *M/s Ugar Sugar Works Ltd. vs. Delhi Administration & Ors.* reported in 2001 (3) SCC 635. That was a case where a notification was issued laying down the terms and conditions for registration of different brands of IMFL for supply within the territory of Delhi on the basis of Minimum Sales Figures (MSF), as a criterion of eligibility for grant of licence. It was challenged as violating Article 14 and 19(1)(g) of the Constitution. This Court held that laying down the requirement for achieving minimum sale figure of a particular brand of liquor in other States, as a mode for determination of the acceptability of that brand of liquor, could not be held to be irrelevant, irrational or unreasonable.

24. Mr. K. Padmanabhan Nair, learned senior counsel appeared for respondent No. 3 in SLP No. 14956/2003. Respondent No. 3 is one Shashidharan, a resident of a village in Distt. Thrissur. He is objecting to a bar hotel being set up in his village, and his submission was that he should be heard in case a licence is to be given to set up a hotel in that village. He supported the policy of the State Government and the submission of Mr. Giri and Mr. Bali.

Reply on behalf of the respondents:-

25. The learned senior counsel appearing for the respondents submitted that as can be seen from paragraph 5 of the impugned judgment, the High Co[illegible]e

relevant observations of this Court in *Khoday Distilleries* (supra), wherein this Court has held that although there is no right to carry on liquor business as a Fundamental right, wherever it is permitted by the state, there should not be any room for discrimination. It was submitted that this observation is supported by paragraph 60(g) of the very judgment which reads as follows:-

> *"(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business."*

26. The judgment of this Court in *State of M.P. vs. Nandlal Jaiswal & Ors.* reported in 1986 (4) SCC 566 and particularly last part of paragraph 33 was pressed into service which reads as follows:-

> *"33……. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and respondent Nos. 5-11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that Article."*

27. The respondents submitted that the distance rule was clearly going to affect the objectives of the tourism policy. This

will not permit setting up of any four star or five star hotels within the prohibited distance even from hotels which do not meet the minimum standards of health, hygiene and safety, and which have, on occasions, supplied spurious liquor. They relied upon paragraph 31 of the judgment of this Court in *State of Jammu and Kashmir vs. Triloki Nath Khosa & Ors.* reported in 1974 (1) SCC 19, wherein this Court has held that such classification may lead to artificial inequalities. It must be truly founded on substantial differntia. There is no reason to make any distinction between the new three star hotels to be set up and the existing three star hotels. It will create a monopoly in favour of the existing three star hotels.

28. It was submitted by them that on the one hand the Government itself is selling liquor from large number of depots and shops, through the FL-1 licences, where the liquor bottles are purchased and taken home. The very fact that the Government is earning more than 7000 crores annually shows the consumption permitted by the Government. Although the government is contending that it is not looking at it from the point of revenue, it is not reducing the number of depots and shops which are set up by itself. Reliance was placed in this behalf on the judgment in the case of *Rashbihari Panda vs. State of Orissa* reported in 1969 (1) SCC 414. This case involved the creation of a monopoly, with respect to Kendu leaves, by the Government, in favour of those licensees who had worked satisfactorily in the previous year and had paid the amounts due from them regularly, to continue their licences with the added provision that the agents with whom they had been working in 1967 will also work during 1968. This was challenged on the ground that the Government, by offering to enter into agreements for advance purchases of Kendu leaves by private offers, in preference to open competition, was favoring existing licensees, and this was hit by Article 14 of the Constitution. This Court accepted the contention and directed that the tenders for purchase of Kendu Leaves be invited by the Government, in the next season, from all persons inter[illegible]e

Respondents relied on certain observations made by this Court, with respect to the creation of a monopoly that favours private individuals, in the cloak of public interest. These are as follows:

> *"19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu Leaves from carrying on their business."*

29. Reliance was also placed on the judgment of this Court in the case *State of Maharashtra vs. Indian Hotels and Restaurant Assn.* reported in 2013 (8) SCC 519, in the case of the bar-dancers of Mumbai, wherein the amendment to the Bombay Police Act introducing S 33 A and 33 B was held to be bad in law. Section 33 A prohibited performances of dances in eating houses in permit rooms and beer bars. This was on the ground that whereas the dance in three star hotels and above was permitted under 33 B, those in these establishments were frowned upon under S 33 A. While striking this down the Court held that such a classification is wholly unconstitutional and contrary to Article 14. The judgment of this Court earlier referred in the matter of *Triloki Nath Khosa* (supra) was referred to, wherein, it has been laid down that the classification to be made is to be founded on a substantial differentia. With respect to the judgment in the case of *B. Six Holiday Resorts* (supra) it was submitted by the respondents herein that there was no challenge in that matter on the basis of Article 14. Thereafter, reliance was placed on paragraph 36 and 39 from

the judgment of this court in *Reliance Energy Limited vs. Maharashtra State Road Development Corporation* reported in 2007 (8) SCC 1 wherein it was held that Article 14 requires a level playing field, though it is subject to public interest.

The report of the Comptroller and Auditor General (CAG) of India on the working of the Kerala Excise Department for the year 2006-2007 to 2010-2011:-

30. The respondents have relied upon the report made by the CAG of India under Section 16 of the CAG's (Duties, Powers and Conditions of Service) Act, 1971. This report contained the results of the audit on the working of the State Excise Department for the year 2006-07 to 2010-11, and it was submitted to the Governor of Kerala under Article 151(2) of the Constitution of India. In paragraph 5.3.1.1, the report deals with the issue as to whether the FL3 licences were issued and renewed to non-standard hotels/restaurants. The report was relied upon to point out that many hotels which were not meeting the standards were permitted and regularized, initially upto 30.6.1992. Thereafter, the regularization was extended till 31.3.2007, and on the next day (that is on 1.4.2007) all existing licences were regularized. Subsequently, on 1.4.2010 all FL3 licences functional during 2009-2010 were regularized. The report points that the licences were issued to hotels, with poor hygiene standards, which did not abide by the working hours prescribed for hotels, and which sold liquor even on dry days. The report also pointed out that in January 2011 the Excise Commissioner of the State had sent a letter to the Government of Kerela, highlighting the poor standards maintained by 418 unclassified bars, and requested it not to grant fresh FL-3 licences for areas other than tourism notified areas. The Commissioner had also pointed out that during the last one year seven people had died due to excessive drinking in the unclassified hotels. The report records that even though the Excise Commissioner had requested that fresh FL-3 licences be not issued to such establishments, t[illegible]o

be issued, and Government had made it a regular feature to regularize ineligible licensees. We may, however, note that the Kerala Bar Association has filed its Written Submission placing on record its objections with respect to the report of the Comptroller and Auditor General.

31. The submission of the respondents, therefore, is that as of now the FL-3 licences are not being permitted to 2 star restaurants. With the amendment of 2011, the hotels with classification of three star are also not being given FL-3 licences. This is going to discriminate against the three star hotels which are to be set up hereafter, or where some investment has also been made in anticipation of such a license. Besides, the distance rule introduced in 2012 will affect the new hotels with classification of four star and five star. It was submitted that this is counter productive to the policy of encouraging tourism, since four star and five star hotels attract large number of foreign tourists. It will result in the monopoly of the existing four star and five star hotels on the one hand, and will stagnate the growth of the new ones. The consumption of liquor in all the hotels with star classification is not even 30 percent of the total consumption in the State. The Government is not preventing the hotels, with poor hygiene standards, from selling liquor and on the other hand the effect of the policy will be to make prospect of setting up of new hotels with a classification of four star and five star unattractive. This will undoubtedly affect the objective of tourism which the State otherwise proclaims to support. The amendment of 2012 is therefore, clearly arbitrary and unjustified according to the respondents.

Consideration of the Submissions:-

32. We have considered the submissions on behalf of the State and of those supporting the State, as well as of those on behalf of the respondents. We do not dispute the intention of the State of Kerala, nor do we dispute the problem that it is facing, and the desire to curb the situation that exists in the

State. There cannot be any dispute on the proposition that, there is no fundamental right to trade in liquor. At the same time we cannot ignore the dicta of the Supreme Court in *Khoday Distilleries* (supra) and particularly in para 60(g) where the Apex Court has laid down that where such a trade is permitted, there can not be any room for discrimination.

33. There are two amendments which are under challenge. We will have to deal with these two amendments in the light of the factual scenario and the law governing the same. As far as the deletion of three star hotels is concerned, we do have a judgment of this Court in the case of *B. Six Holiday Resorts* (supra), wherein, the previous deletion of two star hotels from the eligibility of FL-3 licences was upheld by this Court. It has been submitted by the respondents that the plea under Article 14 was not specifically canvassed when the matter was considered and decided. In this behalf we have already referred to paragraphs 30 and 31 of this judgment. In paragraph 30 this Court has held that promotion of tourism should be balanced with general public interest. Paragraph 31 permits a periodical reassessment of policy, and holds that if policy is not open to challenge the amendment of the rules to effect the policy can also not be challenged This being the position the grievances made by the hoteliers with respect to the deletion of three star hotels, and to insist on a bar licence, cannot be sustained, on this ground. Deletion of three star hotels falls in the same genre as the deletion of two star hotels, which was done earlier. This Court has upheld the deletion of two star hotels in the said judgment. This being the position the state can not be faulted for deletion of three star hotels after a periodical revision of the policy.

34. We must as well note that the two star and three star hotels stand on a different footing as against the hotels with four star and higher classification under the tourism policy of the Government of India. It is relevant to note that the Ministry of Tourism (H&R Division) of the Governm[illegible]d

the amended guidelines for classification/re-classification of hotels on 28.6.2012. The classification of the hotels into star categories and heritage categories is done thereunder, and it is a voluntary scheme. Annexure-2 contains the provisions concerning classification/re-classification of operational hotels. Para 8(f) thereof provides as follows:

> ***"8(f) Bar License (necessary for four star, five star, five star deluxe, heritage classic & heritage grand categories).*** *Wherever bar license is prohibited for a hotel as per local law, the bar will not be mandatory and wherever bar is allowed as per local laws, then the hotel will have to obtain bar license first and then apply for classification to the Ministry of Tourism."*

This being the position, it is not necessary for a three star hotel to have a bar licence. In fact as can be seen the para 8(f) above also states that if a local law prohibits the issuance of a bar licence to four star, five star, five star deluxe, heritage classic and heritage grand categories, which is otherwise necessary, such local law will prevail. In any case three star hotels will have to be placed in a different category as against the hotels with four star and higher classification, since it is not necessary for three star hotels to have an FL3 licence.

35. The position with respect to the distance rule introduced in 2012 is, however, different. As far as the amendment brought in 2012 introducing the distance rule is concerned, we cannot ignore the hard realities which are recorded in the report of the Comptroller and Auditor General who is a constitutional functionary, and who has made the report on receiving the necessary information from the State Government. This above referred para 5.3.1.1 of this report speaks for itself and reads as follows:-

> ***"5.3.1.1 Were FL3 licenses issued and renewed to non-standard hotels/restaurants?***

> *The minimum standard eligible for obtaining an FL3 licence was 2-star standards from April 1982 and 3-star and above from April 2002. We noticed that licenses were issued and renewed to 418 bar hotels, ie. 61 per cent of the total bar hotels in the state even though they were not eligible for the FL3 licenses as per the Rules.*
>
> *We noticed that the Government first allowed time up to 30 June 1992 for those licensees who had not attained the prescribed two star standards to attain the prescribed standard and subsequently extended the period. During the review period, we noticed that the Excise Commissioner submitted his proposals for the Abkari policy for the year 2007-08 vide letter dated 11 January 2007 which did not include the proposal for regularisation of 418 non standard bar hotels, the list of which was sent to the Government in January 2006. However, based on a discussion with the Hon'ble Minister for Labour and Excise on 22 January 2007, the Excise Commissioner sent a revised proposal on 23 January 2007 including the proposal that "Bar Licenses (FL3 licences) which have not attained 2-star classification and functioning at present may be regularised".*
>
> *After we pointed out the matter the Government stated (November 2011) that there are certain bar hotels functioning with standard below two star specifications. As these hotels were functioning for long periods, they were regularised based on Abkari Policy 2007-08.*
>
> *The point is not acceptable for the reason that as per Rules the licences are issued each year and the standard for granting licence are still three star standard.*
>
> *We noticed that the Government, 15 years after extending time limit for the first time, again extended (12 March 2007) the time limit up to 31 March 2007 and stated that failure to comply with th[illegible]d*

to cancellation of licences. However, on the very next day, i.e. 13 March 2007 the Government added a proviso to Rule 13 that all existing licensees not having the above classification and which were functional as on 31 March 2007 shall be regularised. The Abkari policy for 2008-09 (February 2008) stated that the Government would insist on minimum facility and hygienic conditions in all the 418 bar hotels which did not have 2-star status, but which were regularised during 2007-08.

We noticed that the field officers of the Department had reported violation of licence conditions like unhygienic conditions, lack of facilities, non adherence of the time schedule, selling on dry days, opening more than one counter, etc. in these bar hotels. However, no action was taken by the Department on these reports.

The Excise Commissioner sent a letter (January 2011) to the Government highlighting the poor standards maintained by the 418 unclassified bars and requested not to grant fresh FL3 licenses for areas other than tourism notified areas. In the letter the Excise Commissioner, inter alia, stated that the restaurant segment of the unclassified hotels were functioning for name sake only and during the last one year seven people had died due to excessive drinking in the unclassified hotels. He also pointed out that he had personally seen that almost all the customers went there to drink liquor and not for taking food.

We noticed that even though the Excise Commissioner had requested not to issue fresh FL3 licenses, seven more FL3 licenses were issued between 12 January and 31 March 2011. Moreover in the Abkari Policy for 2010-11, the Government declared that the FL3 licensees not having the requisite star qualification and who were functional during 2009-10 should be regularised. Thus, the Government has made it a regular

feature to regularise ineligible licensees. We are of the opinion that the Government has not taken a firm stand to ensure that only hotels of a minimum standard are issued FL3 licenses. Further, we opine that the Government has seriously compromised public safety by (a) regularising 418 unclassified bars, though they were not able to attain the minimum standards despite repeated extension of time and (b) by turning a blind eye towards the various complaints against these unclassified bars. On this being pointed out in audit the Department stated (June 2011) that the Government is the competent authority to issue orders allowing relaxation, if any, for the functioning of FL3 licensees/bar hotels.

36. As rightly submitted by the counsel for the respondents the consequences of the amendment of 2012 will be that four star and five star hotels would not be permitted to have FL-3 licences only on the ground that they are within the prohibited distance from such hotels which have poor hygiene standards, and which are not following norms laid down by the State Government. We may mention that the FL3 licences are issued on an annual basis, and it is quite within the powers of the Government not to renew these licenses if such serious violations are reported. But the Government appears to be slow in taking any such action. It will surely be counter-productive to the objective of Rule 13 (3), which is to promote tourism, as well as to the State's avowed policy of improving the health and nutrition standards of its citizens. The criticism of the respondents, particularly of the hotels which have been permitted under the 6th and 7th proviso to Rule 13(3), is therefore quite justified.

37. In the circumstances, although we do not dispute the power of the State Government to bring about the necessary reform, by modifying the rules, it has got to be justified on the touchstone of the correlation between the provision and the objective to be achieved. If that correla[illegible],

surely the rule will suffer from the vice of arbitrariness, and therefore will be hit by Article 14. The State Government has introduced awareness programmes in this behalf and, it ought to continue with that. It should also take steps to see to it that hotels with poor hygiene standards are not allowed to function. We are informed that the State Government has appointed a one-man commission for reviewing the Abkari Policy, by issuing a necessary notification on 23.1.2013. We hope that the commission will take into consideration the hard realities which are reflected in the report of the CAG and make necessary recommendations. As far as this Court is concerned, we cannot uphold the validity of the amendment of 2012, in the present circumstances.

38. We may as well refer, at this stage, to the judgment of this Court in *P.N. Kausal and Ors. vs. Union of India & Ors.* reported in 1978 (3) SCC 558. In that matter what the Punjab Government had done was to prohibit the sale of liquor on Tuesdays and Fridays, but that was applicable only to hotels, restaurants and other institutions, and was not applicable to the institutions run by the Government. The Court held this to be prima-facie discriminatory. In the words of Krishna Iyer,J who wrote the judgment for a bench of three Judges "It suggests a dubious dealing by State Power". The Learned Judge observed that "such hollow homage to Article 47 and the Father of the Nation gives diminishing credibility mileage in a democratic polity". Thankfully, the Additional Solicitor General made a statement to the Court which is recorded in paragraph 42 of that judgment that the Government readily agreed that the ban would be observed by the State Government also. Paragraph 42 of the said judgment reads as follows:-

> "42. We must here record an undertaking by the Punjab Government and eliminate a possible confusion. The amended rule partially prohibits liquor sales in the sense that on Tuesdays and Fridays no hotel, restaurant or other institution covered by it shall trade in liquor. But

> this prohibition is made non-applicable to like institutions run by the Government or its agencies. We, prima facie, felt that this was discriminatory on its face. Further, Article 47 charged the State with promotion of prohibition as a fundamental policy and it is indefensible for Government to enforce prohibitionist restraints on others and itself practise the opposite and betray the constitutional mandate. It suggests dubious dealing by State Power. Such hollow homage to Article 47 and the Father of the nation gives diminishing credibility mileage in a democratic polity The learned Additional Solicitor General, without going into the correctness of propriety of our initial view-probably he wanted to controvert or clarify-readily agreed that the Tuesday-Friday ban would be equally observed by the State organs also. The undertaking recorded, as part of the proceedings of the Court, runs thus:-
>
> The Additional Solicitor General appearing for the State of Punjab states that the Punjab State undertakes to proceed on the footing that the 'Note' is not in force and that they do not propose to rely on the 'Note' and will, in regard to tourist bungalows and resorts run by the Tourism Department of the State Government, observe the same regulatory provision as is contained in the substantive part of Rule 37 Sub-rule 9. We accept this statement and treat it as an undertaking by the State. Formal steps for deleting the 'Note' will be taken in due course."

39. We are of the view that if the Government is really serious about reducing the consumption of liquor, it should also take steps to reduce its own shops and depots and in any case should not open new ones. In view of the very high consumption of liquor, which the State Government intends to reduce, what we expect is that the Government should consider not issuing further FL-1 licences. If it is not possible for the Government to reduce the existing FL-1 shops, with res

a monopoly, it is of no use for it to direct the private sector alone to function in a particular manner. The Government must as well behave in conformity with the mandate of Article 47.

40. Before we conclude the proceedings, we may refer to one more development in this matter. In as much as this court had not granted any stay of the impugned judgment and order of the High Court, an order was passed by this Court on 19/9/2012 that the applications of the claimants for the licenses be considered in eight weeks. Since no decision was forthcoming, some of the respondents filed Contempt Petitions bearing Nos. 449 of 2012 and other contempt petitions. A notice was issued on the Contempt Petition no. 449 of 2012 filed by respondent B. Surendra Das. A reply was filed on behalf of the appellants on 25.01.2013 that they had considered the applications, some of them were rejected, and in the rest further information was sought. These steps were initiated within the time stipulated by this court, and due to the large number of applications, the decision was taking its own time. On 8.02.2013, this court directed that the Contempt Petitions be heard alongwith the special leave petitions. Since the Civil appeals arising out of these SLPs are being disposed of with this order, no separate orders are required on the contempt petitions. The Appellants will have to act now in terms of the order being passed herein.

41. For the reasons stated above we allow these appeals in part and hold as follows:

(i) The judgment rendered by the Division Bench is set-aside to the extent it interferes with the amendment brought in the year 2011. The deletion of three star hotels from the category of hotels eligible for FL3 licenses under Rule 13(3) is held valid.

(ii) As far as the amendment brought in 2012 introducing the distance rule by way of addition of Rule (3E) in Rule 13(3) is concerned, the same is held to be bad in law. The judgment of the High Court is confirmed to that extent.

(iii) The state government will not proceed to deny FL3 licenses to hotels with a classification of four star and above by resorting to their deletion under Rule 13 (3) until the report of the one-man commission is received, and until it takes action against the non-standard restaurants which have been permitted under the sixth and seventh proviso of Rule 13(3).

(iv) No order is necessary on the contempt petitions and they stand disposed of.

(v) All parties will bear their own costs.

D.G. Appeals partly allowed.

BISWANATH GHOSH (DEAD) BY LRS. AND OTHERS
v.
GOBINDA GHOSH ALIAS GOBINDHA CHANDRA GHOSH AND OTHERS
(Civil Appeal No. 3672 of 2007)

MARCH 14, 2014

[JAGDISH SINGH KHEHAR AND M.Y. EQBAL, JJ.]

SPECIFIC RELIEF ACT, 1963: s.16(c) - Specific performance - Readiness and willingness to perform contract - Held: For compliance of s.16(c) of the Act, it is not necessary for the plaintiff to aver in the same words used in the section i.e. ready and willing to perform the contract - The readiness and willingness of person seeking performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfill his obligation and accept the performance when the time for performance arrive - In the instant case, the sequence of facts and events showed that the plaintiffs-appellants were always ready and willing to discharge their obligation and perform their part of the agreement - Therefore, there was sufficient compliance of the requirements of s.16(c) of the Act on their part.

CODE OF CIVIL PROCEDURE, 1908: s.100 - Second appeal - Substantial question of law - Held: Jurisdiction of High Court to entertain a second appeal is confined only to such appeal which involves substantial question of law.

The plaintiff-appellants took a loan of Rs. 3000 from the defendants-respondents and executed a registered kobala dated 24.11.1964. On a same day, a registered Ekrarnama was also executed between them stipulating the terms of re-conveyance on payment of the loan amount by the appellants to the respondents. In 1990, the appellants filed a suit for recovery against the

respondents under the Bengal Money Lenders Act, 1940. The Munsif dismissed the suit. On appeal, the matter was remanded back to the Munsif with a direction to the trial court to allow the appellants an opportunity for amending the plaint and to add the prayer of specific performance of the contract and pass fresh judgment in accordance with law.

The appellant amended the plaint adding the prayer of specific performance of contract to transfer the suit property in terms of the agreement for reconveyance. The Munsif allowed the amendment application and finally decreed the suit holding that the suit was not barred by limitation by holding that the order of amendment related back to the date of institution of the suit. The appeal before first appellate court was dismissed. The High Court allowed the second appeal. Hence the instant appeal.

Allowing the appeal, the Court

HELD: 1. The judgment of remand passed by the first appellate court in first round of appeal revealed that both the parties made their submission on the interpretation of two documents, namely Kobala and the agreement of re-conveyance. It also revealed that there were exchange of letters whereupon the defendants-respondents in the reply letter expressed their willingness to reconvey the land but after harvest of aushpaddy on the suit land. Thereafter, the plaintiff issued another letter agreeing to have conveyance of the suit land after harvest on payment of Rs.3000/-. The defendant also replied to such letter agreeing to reconvey the suit land after the harvest. From these finding, it is evidently clear that a direction was issued to the Munsif to allow the plaintiff to amend the plaint. The appellate court also gave opportunity to the defendants-respondents for filing additional written statement. The plaint was amende[illegible]a

decree of specific performance was added in the said suit. The Munsif decreed the suit for specific performance holding that the suit was not barred by limitation. [Paras 7, 9 and 10] [1105-C-E; 1107-B-E]

2. The judgment passed by the High Court revealed that the High Court, after referring to Section 16 and Section 20 of the Specific Relief Act held that since the readiness and willingness have not been averred and proved, both the Munsif and first appellate court committed error in decreeing the suit for specific performance. The High Court further observed that by converting a suit under Section 36 of the Bengal Money lenders Act into a suit for specific performance, basically the nature and character of the suit was changed and such amendment was wrongly allowed in favour of the plaintiffs-appellants. [Para 14] [1108-B-D]

3. Section 100 states that an appeal shall lie to the High Court from an appellate decree only if the High Court is satisfied that the case involves a substantial question of law. It further mandates that the memorandum of appeal precisely states the substantial question of law involved in the appeal. If such an appeal is filed, the High Court while admitting or entertaining the appeal must record its satisfaction and formulate the substantial question of law involved in the appeal. The appeal shall then be heard on the questions so formulated and the respondent shall be allowed to argue only on those substantial questions of law. However, proviso to this section empowers the court to hear on any substantial question of law not formulated, after recording reasons. If the memorandum of appeal arising out from an appellate decree is not drawn up in the manner provided in the Code, the Court may reject the memorandum of appeal or return the same for the purposes of being amended within the time fixed by the Court. The order of High Court showed that the High Court while admitting

the appeal did not formulate any substantial question of law and it was only after the arguments were concluded, some questions of law were formulated and the appeal was decided by passing the impugned judgment. [Paras 18, 20 and 22] [1109-G-H; 1110-A-B, F, H; 1111-A-B]

Sasikumar & Ors vs. Kunnath Chellappan Nair & Ors. **(2005) 12 SCC 588: 2005 (4) Suppl. SCR 363;** *Gurdev Kaur & Ors. vs. Kaki & Ors.* **(2007) 1 SCC 546: 2006 (1) Suppl. SCR 27 - relied on.**

4. On the question of readiness and willingness, the High Court held both the courts below totally neglected and failed to consider the point of readiness and willingness which must be continuous and both the courts below also failed to consider that this readiness and willingness have not been averred and/ or not been proved. The High Court has committed error of law in setting aside the judgment and decree of the trial court and the first appellate court on the basis of said finding. It is well settled proposition of law that in a suit for specific performance the plaintiff must be able to show that he is ready and willing to carry out those obligations which are in fact part of the consideration for the undertaking of the defendant. For the compliance of Section 16(c) of the Act, it is not necessary for the plaintiff to aver in the same words used in the section i.e. ready and willing to perform the contract. The readiness and willingness of person seeking performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfill his obligation and accept the performance when the time for performance arrive. [Paras 24, 25, 26, 32] [1111-D-F; 1112-C-E; 1117-A-B]

Kedar Lal Seal & Anr. vs. Hari Lal Seal **AIR (39) 1952 SC 47: 1952 SCR 179 ;** *Syed Dastagir vs. T.R. Gopalakrishna Setty* **(1999) 6 SCC 337**

351; *Mst. Sugani vs. Rameshwar Das and Anr.* **AIR 2006 SC 2172: 2006 (1) Suppl. SCR 235 - relied on.**

Ardeshir Mama vs. Flora Sassoon **55 IA (PC) 360;** *Maksud Ali & Ors. vs. Eskandar Ali* **16 DLR (1964) 138 Cort and** *Gee vs. The Ambergate, Nottingham and Boston and Eastern Junction Railway Company* **(1851) 17 Queen's Bench Reports 127 - referred to.**

5. Admittedly on 1.12.1964, two documents were executed viz. the sale deed in favour of the defendants on payment of Rs.3,000/-. An agreement of re-conveyance was also executed on the same day whereby the defendants agreed to return back the property within the stipulated time. The plaintiffs sent a notice through a lawyer informing the defendants that as per the terms of the agreement of re-conveyance the plaintiffs tendered the amount of Rs.3,000/- and requested them to execute the sale deed. The defendants deferred the date and time on one pretext or another. In the same notice, the plaintiffs reminded the defendants to execute the sale deed after receiving the said amount. The defendants-respondents on 29.4.1968 sent reply to the plaintiffs' notice stating that that they were ready to execute and register the sale deed in favour of the plaintiffs, but because of the paddy grown on the land it could be done after some time. The plaintiffs again sent a notice on 6.6.1968 referring the reply dated 29.4.1968 and requesting the defendants to execute the sale deed after harvesting the paddy. In spite of assurance, when the defendants failed to execute the sale deed, the plaintiffs filed the suit on 7.5.1970 stating therein that the plaintiffs have every right to reconvey and to take possession of the suit land. Although the suit was dismissed, but in appeal the first appellate court while dismissing the appeal mentioned in the order that the plaintiffs have deposited the money as per directions of the Munsif

before the date fixed in the judgment passed for specific performance. Sequence of facts and events showed that the plaintiffs-appellants were always ready and willing to discharge their obligation and perform their part of the agreement. The undisputed facts and events shall amount to sufficient compliance of the requirements of Section 16(c) of the Specific Relief Act. The impugned judgment passed by the High Court is set aside and the judgment and decree of the first appellate court confirming the judgment and decree passed by the Munsif are restored. [Paras 33, 34, 36] [1117-C-G; 1118-G-H; 1120-A-E, F-G]

Case Law Reference:

2005 (4) Suppl. SCR 363	**Relied on**	**Para 16**
2006 (1) Suppl. SCR 27	**Relied on**	**Para 16**
1952 SCR 179	**Relied on**	**Para 26**
1999 (1) Suppl. SCR 351	**Relied on**	**Para 27**
2006 (1) Suppl. SCR 235	**Relied on**	**Para 28**
55 IA (PC) 360	**Referred to**	**Para 29**
16 DLR (1964) 138	**Referred to**	**Para 30**
(1851) 17 Queen's Bench Reports 127	**Referred to**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3672 of 2007.

From the Judgment and Order dated 28.03.2005 of the High Court at Calcutta in S.A. No. 244 of 1987.

S.B. Sanyal, R.K. Gupta, S.K. Gupta, M.K. Singh, B.P. Gupta, Shekhar Kumar for the Appellants.

Bijan Kumar Ghosh for the Respor

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. This appeal is directed against the judgment and order dated 28.3.2005 passed by Calcutta High Court in S.A. No.244 of 1987 whereby the judgment and decree passed by the Trial Court as also the Appellate Court has been reversed and the suit was dismissed holding that the suit itself was barred by limitation and lack of relevant pleading and evidence disentitle the plaintiff-appellant to get a decree for specific performance and for re-conveyance of the suit property.

2. The facts of the case lie in a narrow compass.

3. The plaintiffs-appellants in need of money took a loan of Rs.3,000/- from the defendants-respondents and executed a registered Kobala dated 24.11.1964. On the same day, a registered Ekrarnama was also executed between the parties stipulating the terms of re-conveyance on payment of the loan amount by the appellants to the respondents.

4. In the year 1970, the appellants filed a suit being Title Suit No.215 of 1970 against the defendants before the Sub-Divisional Munsif, Bangaon under Section 36 of the Bengal Money Lenders Act, 1940. The said suit was resisted by the defendants-respondents, stating therein that the aforesaid sale deed executed by the plaintiffs was out an out-sale of the suit property and possession was also delivered to the respondents. The learned Munsif in terms of the judgment dated 20.12.1973 dismissed the suit. The plaintiffs then filed appeal against the said judgment being Title Appeal No.350 of 1974. The learned Additional District Judge, upon hearing the parties, allowed the appeal and remanded the matter back to the Trial Court with a direction to the Trial Court to allow the plaintiffs-appellants an opportunity for amending the plaint and to add prayer for specific performance of the contract and to pass fresh judgment in accordance with law.

5. Consequent upon the remand, the appellants amended

the plaint by filing application on 1.3.1975 adding prayer for specific performance of contract to transfer the suit property in terms of the agreement for re-conveyance. The said application for amendment was allowed and the learned Munsif framed additional issues, and after considering the evidence on record finally decreed the suit holding that the suit was not barred by limitation. The court of Munsif held that the order for amendment related back to the date of institution of the suit and, therefore, the suit cannot be held to be barred by limitation. Aggrieved by the said judgment and decree, the defendants-respondents filed appeal being Title Appeal No.836 of 1983, which was dismissed on merit by the First Appellate Court. The respondents then filed Second Appeal, which was finally allowed in favour of the defendant-respondents and the judgment and decree passed by both the courts of Munsif and the Additional District Judge have been set aside. Hence, this appeal by special leave by the plaintiff-appellants.

6. From the impugned judgment passed by the High Court it appears that the High Court formulated the following substantial questions of law and considered the same while allowing the appeal:

"1) Whether the Learned Courts below erred in law in granting a decree for specific performance of contract notwithstanding the fact that the necessary averment as required by the provisions of the Specific Relief Act were absent in the plaint.

2) Whether from the materials on records both the learned Courts below ought to have held that the plaintiffs had failed to plead and prove that they were ready and willing to perform their part of contract.

3) Whether the prayer for specific performance of contract in the instant case is barred by limitation.

4) Whether the amendment as prayed for was rightly allowed and whether on the basis of the said amendment both the Courts below rightly decreed the suit."

7. Before we proceed with the matter, it would be proper to first go through the judgment of remand passed by the Additional District Judge in first round of appeal being Title Appeal No.350 of 1974, which was preferred against the judgment passed by Munsif dismissing the suit of the plaintiffs-appellants. From perusal of the judgment, it reveals that both parties made their submission on the interpretation of two documents, namely Kobala and the agreement of re-conveyance. It also reveals that there were exchange of letters (Exhibit 'B' and 'B1') whereupon the defendants-respondents in the reply letter expressed their willingness to reconvey the land but after harvest of aushpaddy on the suit land. Thereafter, the plaintiff issued another letter dated 6.6.1968 agreeing to have conveyance of the suit land after harvest on payment of Rs.3000/- (Exhibit 'B2'). The defendant also replied to such letter (Exhibit 'B3') agreeing to reconvey the suit land after the harvest.

8. On the basis of these exchanges of letters and in the facts and circumstances of the case, the Appellate Court held that the plaintiff-appellants should be given opportunity to have specific performance of contract in terms of the agreement. The relevant portion of the finding and the order passed in the appeal is extracted hereinbelow:

"The learned advocate for the plaintiffs-appellants submits in view of the facts and circumstances the plaintiffs should be given an opportunity to have a specific performance of contract in terms of an agreement (ext.1). Under the law time is not essence of contract in case of sale of land. The parties mutually extended the time as the letters passed between them indicate. The evidence on record does not speak for the fact that the plaintiffs are keen to treat the

transaction as a loan under the provision of Bengal Money Lenders Act. They are, on the other hand, keen to fall back upon the agreement of repurchase Ext.1. But the suit has been framed as one under section 36 of Bengal Money Lenders Act and as such no relief can be given to the plaintiffs by way of specific performance. So far the end of justice the plaintiff should be given an opportunity to include a prayer for specific performance of contract by effecting amendment of the plaint appropriately and on payment of the requisite court fees and on compliance with the formalities of a suit for specific performance.

The learned advocate for the respondents has objected to giving of such opportunity to the plaintiffs as the proposed amendment will alter the nature of the suit. I do not think so.

The main prayer of the plaintiffs is for restoration of the land in terms of the agreement either by reopening the transaction or by specific performance of contract.

Considering all these, I for the ends of justice remand the suit for giving the plaintiffs an opportunity to amend the plaint in the light of observation made above in my judgment. The result the appeal succeeds. Memo of appeal is correctly stamped. Hence,

O R D E R E D

that the appeal be allowed on contest without costs. The judgment and decree of the learned Munsif are hereby set aside. The suit be remanded to the trial court for allowing the plaintiff an opportunity to amend the plaint for making a prayer for specific performance of contract. The plaintiff shall pay a cost of Rs.30/- (Rupees Thirty) to the defendants for making such amendment. The defendants shall get opportunity to file additional written statement. The amendment shall be effected withi e

receipt of record of this suit. In default, the plaintiffs' suit shall stands dismissed.

After the amendment the learned Munsif shall decide the suit on taking further evidence if the parties like to adduce and on the basis of evidence on record in terms of the added prayer of the plaintiffs."

9. From the finding recorded by the Additional District Judge in the aforementioned judgment of remand, it is evidently clear that a direction was issued to the learned Munsif to allow the plaintiff to amend the plaint on payment of cost of Rs.30/-. The Appellate Court also gave opportunity to the defendants-respondents for filing additional written statement.

10. In terms of the aforesaid judgment, the plaint was amended and a relief for a decree of specific performance was added in the said suit. The learned Munsif, after framing additional issue and considering the facts and evidence on record, decreed the suit for specific performance holding that the suit was not barred by limitation. While passing the decree, the plaintiff-appellant was directed to deposit consideration amount of Rs.3,000/-.

11. Learned Munsif held that after the amendment was allowed and relief for decree of specific performance was added, it should be deemed that the suit for specific performance was filed on the date of institution of the suit i.e. 7.5.1970.

12. Aggrieved by the said judgment and decree passed by the Munsif, the defendants-respondents preferred an appeal being Title Appeal No.836 of 1983. The said appeal was heard and finally dismissed by the First Appellate Court holding that the suit was well within the period of limitation and it was not barred by limitation inasmuch as the amendment of the plaint related back to the date of the presentation of the plaint.

13. The defendants-respondents then assailed the judgment by filing second appeal being S.A. No.244 of 1987. The High Court, as stated above, reversed the finding given by the Trial Court and the Appellate Court and set aside the same by allowing the appeal.

14. From perusal of the judgment passed by the High Court, it reveals that the High Court, after referring Section 16 and Section 20 of the Specific Relief Act and relying on the decision of the Supreme Court, came to the conclusion that since the readiness and willingness have not been averred and proved, both the Trial Court and First Appellate Court committed error in decreeing the suit for specific performance. The High Court further observed that by converting a suit under Section 36 of the Bengal Money lenders Act into a suit for specific performance, basically the nature and character of the suit was changed and such amendments have been wrongly allowed in favour of the plaintiffs-appellants.

15. Mr. S.B. Sanyal, learned senior counsel appearing for the appellant, vehemently contended that the impugned judgment of the High Court is vitiated in law for not following the mandatory requirements of Section 100 of the Code of Civil Procedure (in short "Code"). As a matter of fact, the High Court has adopted wrong procedure in dealing with the second appeal.

16. Mr. Sanyal further contended that the High Court while entertaining the appeal for admission has to formulate substantial question of law involved in the said appeal for consideration and only after giving notice to the respondents an opportunity of hearing on those substantial questions of law, shall finally decide the appeal. In this connection, learned senior counsel relied upon the decision of this Court in the cases of *Sasikumar & Ors vs. Kunnath Chellappan Nair & Ors.,* (2005) 12 SCC 588 and *Gurdev Kaur & Ors. vs. Kaki & Ors.,* (2007) 1 SCC 546. We find force in the submission of Mr. Sanyal

17. Section 100 of the Code lays down the provision with regard to second appeal which reads as under:-

> **"100. Second appeal:-** (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

18. From bare reading of the aforesaid provision it is manifestly clear that an appeal shall lie to the High Court from an appellate decree only if the High Court is satisfied that the case involves a substantial question of law. It further mandates that the memorandum of appeal precisely states the substantial question of law involved in the appeal. If such an appeal is filed, the High Court while admitting or entertaining the appeal must

record its satisfaction and formulate the substantial question of law involved in the appeal. The appeal shall then be heard on the questions so formulated and the respondent shall be allowed to argue only on those substantial questions of law. However, proviso to this section empowers the court to hear on any substantial question of law not formulated after recording reasons.

19. Order XLI, Rule (3) of the Code is also worth to be quoted hereinbelow:-

> **"3.Rejection or amendment of memorandum:-**(1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.
>
> (2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.
>
> (3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment."

20. It is, therefore, clear that if a memorandum of appeal arising out from an appellate decree is not drawn up in the manner provided in the Code, the Court may reject the memorandum of appeal or return the same for the purposes of being amended within the time fixed by the Court.

21. In the instant case what the High Court has done is evident from its order dated 13.1.1987. The order reads as under:-

> "This appeal will be heard on all the grounds and issue a Rule and stay as prayed for"

22. The aforesaid order shows tha e

admitting the appeal has not formulated any substantial question of law and it was only after the arguments were concluded some questions of law were formulated and the appeal was decided by passing the impugned judgment.

23. The law is well settled by catena of decisions of this Court that jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involves substantial question of law. Section 100 of the Code casts a mandate on the High Court to first formulate substantial question of law at the time of admission of the appeal. In other words, a duty is cast on the High Court to formulate substantial question of law before hearing the appeal. Since the same has not been done, the impugned judgment is vitiated in law.

24. On the question of readiness and willingness, the High Court after relying upon some decisions of this Court allowed the appeal and set aside the judgment and decree of the Trial Court and the First Appellate Court. The only finding recorded by the High Court is extracted hereinbelow:-

> "In my view, both the Courts below totally neglected and failed to consider the point of readiness and willingness which must be continuous and both the Courts below also failed to consider that this readiness and willingness have not been averred and/ or not been proved. The Learned Appellate Court below without scanning the judgment and decree passed by the Learned Trial Judge wrongly dittoed the judgment and decree passed by the Learned Trial Judge and failed to perform its statutory obligations and/ or duties.
>
> In view of the discussions made above and in view of the decisions of the Hon'ble Apex Court referred to above, both the judgments and decrees passed by the Learned Trial Judge as well as the Learned Appellate Court are set aside.

> The suit is therefore, dismissed.
>
> Let a decree be drawn up accordingly.
>
> In the substantially of the facts and circumstances the parties are to bear their respective costs.
>
> Let the lower Court records be sent down to the Courts below forthwith.
>
> Urgent Xerox certified copy, if applied for, will be given to the parties as expeditiously as possible."

25. In our considered opinion, the High Court has committed error of law in setting aside the judgment and decree of the Trial Court and the First Appellate Court on the basis of aforesaid finding.

26. It is well settled proposition of law that in a suit for specific performance the plaintiff must be able to show that he is ready and willing to carry out those obligations which are in fact part of the consideration for the undertaking of the defendant. For the compliance of Section 16(c) of the Act it is not necessary for the plaintiff to aver in the same words used in the section i.e. ready and willing to perform the contract. Absence of the specific words in the plaint would not result in dismissal of the suit if sufficient fact and evidence are brought on record to satisfy the court the readiness and willingness to perform his part of the contract. In the case of *Kedar Lal Seal & Anr. vs. Hari Lal Seal,* AIR (39) 1952 SC 47, this Court has held that the Court would be slow to throw out the claim on mere technicality of the pleading. The Court observed:

> "51. I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff such general or other relief as it d[illegible]e

extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

27. In the case of *Syed Dastagir vs. T.R. Gopalakrishna Setty,* (1999) 6 SCC 337, this Court dealing with a similar issue observed:

"9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded maybe in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or

language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

28. In the case of *Mst. Sugani vs. Rameshwar Das and Anr.,* AIR 2006 SC 2172, this Court observed that

"17. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact. It is true that the lower appellate court should not ordinarily reject witness accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible. One drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

18. If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Co[illegible]al

Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in *Reserve Bank of India vs. Ramkrishna Govind Morey,* AIR 1976 SC 830, held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference."

29. In the case of *Ardeshir Mama vs. Flora Sassoon,* 55 IA (PC) 360, their Lordships of the Judicial Committee observed that

"Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from his obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract

on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

30. Following the aforesaid principle, the Pakistan Supreme Court in the case of *Maksud Ali & Ors. vs. Eskandar Ali,* 16 DLR (1964) 138, observed as under:

"25. So far as the question of making any express averment in the pleading of such readiness and willingness is concerned, we are of the view that although there can be doubt that this is the invariable practice of pleading, and if we may say so, a desirable practice, designed to give a clear and express notice to the opponent of the case sought to be made out, it cannot be said that this is a rule of law which would render the structure of the suit itself defective or that without it a proper cause of action would not appear on the plaint. We are, therefore, unable to accept the contention of the learned counsel that the present suit was bound to fail in the absence of such an averment."

31. In the case of *Cort and Gee vs. The Ambergate, Nottingham and Boston and Eastern Junction Railway Company,* (1851) 17 Queen's Bench Reports 127, the Court observed that

"In common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labour, which might possibly enhance the amount of damages to be awarded against them. "

32. In sum and substance, in our considered opinion, the readiness and willingness of person seeking performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfill his obligation and accept the performance when the time for performance arrive.

33. In the background of the principles discussed hereinbefore, we shall now consider the conduct of the plaintiffs-appellants and the act done by them in performance of their part of obligations. These may be summarized as under:

i) Admittedly on 1.12.1964, two documents were executed viz. the sale deed in favour of the defendants on payment of Rs.3,000/-.

ii) An agreement of re-conveyance was also executed on the same day whereby the defendants agreed to return back the property within the stipulated time;

iii) Before the expiry of the time stipulated in the deed of re-conveyance, the plaintiffs send a notice through a lawyer informing the defendants that as per the terms of the agreement of re-conveyance the plaintiffs tendered the amount of Rs.3,000/- and requested them to execute the sale deed. The defendants deferred the date and time on one pretext or another. In the same notice, the plaintiffs reminded the defendants to execute the sale deed after receiving the aforesaid amount.

iv) The defendants-respondents on 29.4.1968 sent reply to the plaintiffs' notice stating that that they are ready to execute and register the sale deed in favour of the plaintiffs, but because of the paddy grown on the land it could be done after some time. The reply dated 29.4.1968 is reproduced hereinbelow:

"NOTICE

To

1. Sree Biswanath Ghosh

2. Sri Guru Pada Ghosh

3. Tarak Dasi Ghosh of Village Narikela, P.O. Gaighata

Under instructions and advice of my clients Sri Narendra Nath Ghosh, and Sri Harendra Nath Ghosh and in reply of the said notice dated 22.4.68. I am to intimate you that the averments and contents of the said notice under reply regarding offer of Rs. 3000/- by you and to requesting them that after harvesting of the crops after the expiry of moth of Pous in respect of the land in question and to execute and register the said sale deed are altogether false.

That the land in question under the said notice my clients has shown Aush Paddy on the 4th day of Baisak within the knowledge of you and without any objection and the said paddy seeds have grown to some extent my clients are ready to execute and register the sale deed in favour of you at our own cost after acknowledged receipt of the said amount of Rs. 3000/- from my clients within ensuring month of Bhadra after harvesting the said paddy dated 29.4.68.

Sd/- Rabindra Nath Dutta
Advocate
29.4.68"

v) The plaintiffs again sent a notice on 6.6.1968 referring the reply dated 29.4.1968 and requesting the defendants to execute the sale deed after harvesting the paddy. The said letter is also extracted hereinbelow:

"From:
NirendraNath Basu, Advocate, Bongaon,
P.O. Dt. 24 Parganas

To,

1 .Sri Narendra Nath Ghosh) Sons of Late Hazari Lai Ghosh

2. Sri Harendra Nath Ghosh)

Residents of Village Narikela, P.O. Gaighata, Dt. 24 Parganas, Dated at Bongaon on the 6th day of June, 1968.

Sir,

In pursuance of the letter dated 29/4/1968 sent on behalf of your Advocate Rabindra Nath Dutta under instruction of my clients Sri Biswanath Ghosh, Sri Gurupada Ghosh, Sri Tarak Basi Ghosh. You are informed that after harvest the 'Aush Paddy' within the month of Bhadra and within the said month acknowledged receipt a sum of Rs. 3000/- in cash from my client and execute and register a sale deed in favour of my client and deliver vacant possession in favour of my clients otherwise you will be liable for all costs and damages dated 6.6.68.

Sd/- Narendra Nath Basu
Advocate, Bongaon
Dated 6.6.68

Schedule

P.S. Gaighata, Mouza- Narikela
Settlement Plot No. 189 of .46 decimals.
Settlement Plot No. 566 of .42 decimals out of .84 dec.
Settlement Plot No. 416 of .14 decimals
Settlement 413 of. 15 decimals.

Total 1.17 acre of land. Sd/-

vi) In spite of assurance, when the defendants failed to execute the sale deed, the plaintiffs filed the suit on 7.5.1970 before the Munsif, Bongaon stating therein that the plaintiffs have every right to reconvey and to take possession of the suit land. Although the suit was dismissed, but in appeal the First Appellate Court while dismissing the appeal by Judgment dated 16.12.1985 mentioned in the order that the plaintiffs have deposited the money as per directions of learned Munsif before the date fixed in the judgment passed for specific performance.

34. From the aforementioned sequence of facts and events, it can be safely inferred that the plaintiffs-appellants were always ready and willing to discharge their obligation and perform their part of the agreement. In our considered opinion, the undisputed facts and events referred to hereinabove shall amount to sufficient compliance of the requirements of Section 16(c) of the Specific Relief Act.

35. Taking into consideration the entire facts and circumstances of the case and the law discussed hereinabove, in our considered opinion the impugned judgment passed by the High Court cannot be sustained in law.

36. For the aforesaid reasons, the appeal is allowed, the impugned judgment passed by the High Court is set aside and the judgment and decree of the First Appellate Court confirming the judgment and decree passed by the Munsif are restored. However, in the facts of the case, there shall be no order as to costs.

D.G. Appeal allowed.

STATE OF PUNJAB AND OTHERS
v.
DHANJIT SINGH SANDHU
(Civil Appeal Nos. 5698-5699 of 2009)

MARCH 14, 2014

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

Punjab Urban Estate (Development and Regulation) Rules, 1964: r.14 - Non-completion of building within time prescribed from the date of issue of the allotment letter - Demand of non-construction fee/extension fee - Held: In the instant case, allottee having failed to abide by the terms and conditions and did not raise construction, he was liable to pay non-construction fee/extension fee which was demanded from him in order to enable him to avoid resumption of the plot to the appellant-authority.

Approbate and reprobate: Allotment letter - Specific condition that non-construction of building would lead to resumption of the plot under the provisions of the Acts and the Rules - Non compliance of - Demand raised for payment of non-construction fee/extension fee - In order to avoid resumption of the plot by the Authority, allottee paid the extension fee - After availing the benefit of extension on payment of extension fee, allottee sent a letter to the Estate Officer demanding refund of the extension fee on the basis of amended Rule 13 of 1995 Rules - Held: The defaulting allottee cannot be allowed to approbate and reprobate by first agreeing to abide by terms and conditions of allotment and later denying their liability as per the agreed terms - It is settled proposition of law that once an order has been passed which is complied with, accepted by the other party who derived the benefit out of it, he cannot subsequently challenge it on any ground - Punjab Regional and Town Planning and Development (General) Rules 1995.

Doctrines/Principles: Doctrine of election - Held: Is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it - The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity - By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

The respondent was allotted a plot. In terms of allotment letter, the respondent was required to complete the construction of building within three years from the date of issuance of the allotment letter after getting the plans of the proposed building approved by the competent Authority. As per Clause 15 of the allotment letter, the allotment was subject to the provisions of Punjab Estates (Development and Regulation Act), 1964 and the Rules and Policies framed thereunder. In the year 1995, the State of Punjab came up with the legislation known as Punjab Regional and Town Planning and Development Act, 1995. By the said Act, the Punjab Urban Estate (Development and Regulation) Act 1964 and Punjab Housing Development Board Act, 1972 were repealed. In exercise of power conferred under the Act, the State Government framed Rules called the Punjab Regional and Town Planning and Development (General) Rules 1995. Rule 13 of the Rules specified the time within which the building is required to be constructed. It also provided for extension of time limit subject to payment of prescribed fee mentioned therein.

The Punjab Urban Planning and Development Authority ('PUDA') issued a circular dated 15.1.1998 revising the rate of extension fee chargeable for the residential and commercial plots and by the said circular a very high rate of extension fee was proposed to be charged. The respondent from time to time deposited the extension fee as demanded by the

The respondent filed a writ petition on the ground that an amount of Rs.1.20 lacs has been in excess charged from the respondent and praying inter alia for the directions to refund the excess fee charged from the respondent. The court directed the appellant to reconsider the representation and to dispose of the same in the light of the order passed in Tehal Singh's case. In compliance with the said directions, the respondent's representation was considered and came to be rejected on 23.12.2004 on the ground that in the facts and circumstances of the case the instant case was not similar to Tehal Singh's case. The writ petition was finally heard by the High Court and relying on the ratio decided in Tehal Singh's case disposed of the writ petition, quashed the notice and directed the appellant to calculate the extension fee as per Rule 13 of 1995 Rules. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1.1 It is clear from the terms of the allotment that the allotment of the plot was subject to the provisions contained in the Punjab Estates (Development and Regulation) Act, 1964. Section 10 of the Act envisaged provision for resumption and forfeiture of the land in case of breach of conditions of allotment. In exercise of power conferred by 1964 Act, Rules were framed in the year 1965 i.e. Punjab Urban Estate (Development and Regulation) Rules, 1964. Rule 14 of the said Rules categorically provided that the transferee shall complete the building within three years from the date of issue of the allotment letter. In accordance with the Rules and Regulations of erection of the building, the time limit may be extended by the Estate Officer, if he is satisfied that failure to complete the construction of the building within the said period was due to the reasons beyond the

control of the allottee. Since the respondent-allottee failed to abide by the terms and conditions and did not raise construction, he was liable to pay non-construction fee/ extension fee which was demanded from him in order to enable him to avoid resumption of the plot to the appellant-authority. The said demand was made by letters dated 6.1.1997 and 27.10.1999. [Paras 10, 11 and 12] [1132-F-G; 1133-C-F]

Tehal Singh vs. State of Punjab & Ors. **C.W.P. No.13648 of 1998 - Distinguished.**

1.2 In response to letter dated 6.1.1997, the respondent agreed to pay the extension fee imposed by the Estate Officer of the appellant authority in order to avoid resumption/auction of the plot. Meanwhile, the State of Punjab enacted Punjab Regional and Town Planning and Development Act, 1995. By Section 183 of 1995 Act, earlier Act of 1964 and Punjab Housing Development Board Act, 1972 were repealed with the saving clause. Subsequent to the Act, by Notification dated 30.6.1995, Punjab Urban Development Authority was established w.e.f. 1.7.1995 and the Board stood abolished with effect from that date. Many other Acts were also repealed. By the said Act, Authority was empowered to deal with the land and prescribe the fee in case where extension of period for completion of building is set for by the allottee. [paras 13 to 15] [1134-H; 1135-A-D]

2.1. In the instant case, the respondents-allottees accepted the terms and conditions of the allotment letter and possession were taken but they did not raise any construction upto 2000. There was a specific condition that non-construction of building would lead to the resumption of the said plot under the provisions of the Acts and the Rules. When the allottees did not raise construction on the plot, the demand was raised for payment of non-construction fee/ex[illegible]r

to avoid resumption of the plot by the Authority, allottee paid the extension fee. After availing the benefit of extension on payment of extension fee, the allottee sent a letter to the Estate Officer demanding refund of the extension fee on the basis of amended Rule 13 of 1995 Rules. The defaulting allottes of valuable plots cannot be allowed to approbate and reprobate by first agreeing to abide by terms and conditions of allotment and later seeking to deny their liability as per the agreed terms. The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. [paras 21, 22] [1137-C-F, G-H; 1138-B]

C.I.T. vs. Mr. P. Firm Maur **AIR 1965 SC 1216: 1965 SCR 815;** *Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amravati & Ors.* **AIR 1969 SC 329: 1969 SCR 808;** *R.N. Gosain vs. Yashpal Dhir* **AIR 1993 SC 352: 1992 (2) Suppl. SCR 257;** *Sri Babu Ram Alias Durga Prasad vs. Sri Indra Pal Singh (Dead) by Lrs.* **AIR 1998 SC 3021: 1998 (3) SCR 1145;** *R. Deshpande vs. Maruti Balram Haibatti* **AIR 1998 SC 2979 : 1998 (3) SCR 1079 ;** *The Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond and Gem Development Corporation Ltd. and Anr.* **AIR 2013 SC 1241: 2013 (4) SCR 331 - relied on.**

2.2. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty

to speak, from asserting a right which he would have otherwise had. In the instant case, the High Court has totally overlooked the facts of the instant case and allowed the writ petition. The impugned order, therefore, cannot be sustained in law and is set aside. [paras 25, 26] [1139-B-E]

Case Law Reference:

1965 SCR 815	**relied on**	**Para 22**
1969 SCR 808	**relied on**	**Para 22**
1992 (2) Suppl. SCR 257	**relied on**	**Para 22**
1998 (3) SCR 1145	**relied on**	**Para 23**
1998 (3) SCR 1079	**relied on**	**Para 23**
2013 (4) SCR 331	**relied on**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5698-5699 of 2009.

From the Judgment and Order dated 08.01.2009 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 8864 of 2007 and Order dated 27.03.2009 in Review Petition No. 112 of 2009.

Rachana Joshi Issar for the Appellants.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. These appeals are directed against the judgment and order dated 8.1.2009 passed by the Punjab & Haryana High Court in C.W.P. No.8864 of 2007 and also order dated 27.3.2009 passed in Review Petition No. 112 of 2009, whereby the writ petition filed by the respondent was allowed and the order dated 23.12.2004 passed by appellant no.3 rejecting the application for refund of the extension fee received by the appellant in excess of the rates mentioned in Rule 13 of the Punjab Regional and Town Planning t,

1995 (in short '1995 Act') in the light of the judgment passed in C.W.P. No.13648 of 1998 (*Tehal Singh vs. State of Punjab & Ors.*) along with up-to-date interest has been set aside.

2. The facts of the case lie in a narrow compass.

3. The respondent was allotted a plot of land measuring 400 square yards bearing No.2177 at Durgi Road, Urban Estate Phase-II, Ludhiana vide allotment letter dated 1.4.1986. In terms of allotment, the respondent was required to complete the construction of building within three years from the date of issuance of the allotment letter after getting the plans of the proposed building approved by the competent Authority. The case of the respondent-writ petitioner is that there was no condition in the allotment letter for charging extension fee in the case of failure to complete construction of the building within the aforementioned period of three years nevertheless as per clause 15 of the allotment letter, the allotment was subject to the provisions of Punjab Estates (Development and Regulation Act), 1964 and the Rules and Policies framed thereunder.

4. It appears that in the year 1995, the State of Punjab came with the legislation known as Punjab Regional and Town Planning and Development Act, 1995 (in short 'PUDA Act'). By the said Act, the Punjab Urban Estate (Development and Regulation) Act 1964 (in short '1964 Act') and Punjab Housing Development Board Act, 1972 were repealed. In exercise of power conferred under the Act, the State Government framed rules called the Punjab Regional and Town Planning and Development (General) Rules 1995 (in short '1995 Rules') which was published vide Notification dated 22nd August, 1995. Rule 13 of the Rules specified the time within which the building is to be constructed. It also provides for extension of time limit subject to payment of prescribed fee mentioned therein.

5. The Punjab Urban Planning and Development Authority (in short 'PUDA') issued a circular dated 15.1.1998 revising the

rate of extension fee chargeable for the residential and commercial plots and by the said circular a very high rate of extension fee was proposed to be charged. The respondent from time to time deposited the extension fee so demanded by the appellant. It is alleged that an amount of Rs.1.20 lacs has been in excess charged from the respondent. The appellant's case is that the appellant in an attempt to nullify the effect of the judgment rendered in Tehal Singh's case and to validate the demand of enhanced rate of extension fee purportedly framed the Rules called Punjab Regional and Town Planning and Development (General) Second Amendment Rules, 2001 (in short '2001 Rules') giving retrospective effect.

6. The respondent moved a writ petition being C.W.P. No. 7934 of 2004 praying inter alia for the directions to refund the excess fee charged from the respondent. It was disposed of with the directions to the appellant to reconsider the representation and to dispose of the same in the light of the order passed in C.W.P. No.13648 of 1998 (Tehal Singh's case). In compliance with the aforesaid directions, the respondent's representation was considered and came to be rejected by the appellant vide order dated 23.12.2004 on the ground that in the facts and circumstances of the case the instant case was not similar to Tehal Singh's case.

7. The writ petition was finally heard by the Punjab and Haryana High Court and relying on the ratio decided in *Tehal Sing's* case (supra) disposed of the writ petition, quashed the notice and directed the appellant to calculate the extension fee as per Rule 13 of 1995 Rules. For better appreciation, the concluding paragraphs 15 to 17 of the impugned order are quoted hereinbelow:-

> "15. When the facts of the present case are examined in the light of the principle laid down by the Division Bench judgment in *Tehal Singh's* case (supra), we are left with no doubt that the show cause notices issued to the petitioner on 19.9.2006 (P-4) a[illegible]"}

requiring him to pay extension fee of Rs. 1,32,958/- was violative of the provisions of the 1995 Act and Rule 13 of the 1995 Rules, as has already been noticed in the preceding paras. The controversy, in fact, stand settled by the Division Bench judgment in *Tehal Singh's* case (supra) and the issue does not deserve to be reopened. The respondents have failed to consider the reply filed by the petitioner wherein judgment rendered by the Division Bench in *Tehal Singh's* case (supra) has been cited and the charging of extension fee at exorbitant rate has been duly answered.

16. In view of above, the writ petition succeeds. The impugned notice dated 12.12.2006 (P-7) is hereby quashed. The respondents are directed to calculate the extension fee as per Rule 13 of the 1995 Rules. The needful shall be done within a period of two months from the date of receipt of a certified copy of this order. The petitioner shall pay the extension fee within a period of two months from the date of receipt of the calculation given in the fresh notice to be issued by the respondents. The petitioner shall further be entitled to consequential benefit to get the site plans approved. The petitioner is also held entitled to his costs.

17. The other connected writ petitions are also disposed of in the above terms. It is, however, clarified that in cases such as C.W.P. Nos. 8864 and 13765 of 2007, where the petitioners have already paid the extension fee as per the rates demanded by the respondents, which are exorbitant and against the Division Bench judgment of this Court in Tehal Singh's case, the respondents are directed to re-calculate the amount of extension fee as per the provisions of Rule 13 of the Rules and refund the over-payment alongwith interest 10% per annum."

8. We have heard Mrs. Rachna Joshi Issar, learned counsel appearing for the appellant.

9. As noticed above, the plot in question was allotted to the respondent vide an allotment letter dated 1.4.1986. In terms of the allotment letter, the allottee had to fulfill the terms and conditions enumerated in the said letter. The terms and conditions of the said allotment are extracted hereinbelow:-

"1. Plot No. 2177 Phase-II measuring 400 sq. yds. in Durgri Rd. Urban Estate has been allotted to you. The tentative price of the said plot is Rs. 51,000/-

2. The plot is preferential one and additional price at the rate of 10% of the original normal price is Rs.

3. Total price of the plot (normal) plus preferential is Rs. 51,000/-

4. The above price of the plot is subject to variation with reference to the actual measurement of the site as well as in cost of enhancement of compensation by the court or otherwise and you shall have to pay the additional price of the plot if any, determined by the department, within 30 days of the date of demand of in case of sale by allotment.

5. You shall have to convey your acceptance/refusal unless you refuse to accept the allotment by a registered A/D letter within 30 days of the issue of this allotment order and have to pay 15% of the sale price amounting of Rs. 4750/- or such other amount with together with the amount already paid equal to at least 25% of the sale price of the site. In case of failure to deposit the sale amount the allotment shall be liable to be cancelled and earnest money already paid forfeited.

6. In case you refuse to accept the allotment through acknowledgment due registered letter addressed to the undersigned within 30 days of the date of issue of allotment order. You will be entitled to the

money

7. On payment of 100% of the purchase price of the plot you shall have to execute in deed of conveyance in the prescribed from in such manner as may be directed by the Estate Officer.

8. Balance 7.5% of the purchase price shall be payable either lump-sum within 60 days of the issue of allotment order without any interest or in four 2 six monthly equated instalment alongwith interest at the rate of 7% per annum The first installment shall fall due after the expiry of six months from the date of issue of allotment order and shall be payable on the 10th of the month following in which it falls due.

9. Each remittance shall be remitted to the Estate Officer by means of demand draft payable to him drawn on any Scheduled Bank situated at the nearest place to the Estate Officer. Each such remittance shall be accompanied by a letter showing particulars of the site i.e. plot No. allotment No. and date of issue of allotment order etc. In the absence of these particulars, the amount shall not deem to have been received.

10. You shall have to pay separately for any building material trees, structures and compound wall etc. existing in the plot at the time of allotment for which compensation has been assessed and paid by the Government in x case you want to make use of the same, failing which the government shall have the right remove or dispose of the same even after the delivery of possession.

11. The allotment shall be liable to cancellation in case of the declaration made in the application for the allotment of the plot is established to be incorrect.

12. You shall have to complete the building within three

years from the date of issue of allotment order, after getting the plans of the proposed building approved by the competent authority.

13. The Government shall not be responsible for leveling the uneven sites.

14. No allottee under this policy shall dispose of his plot for period of ten years from the date of transfer of the ownership to him. However the transfer of residential plot in the Urban Estate shall be allowed to be made in case of death of the allottee in favour of his hairs.

However, the transfer can be allowed before the expiry of ten years, in exceptional cases, with the prior approval of the Government. In case an allottee contravenes provisions of this para, the plot will be resumed and price paid may be forfeited by the Government.

15. The allotment is subject to the provision of the Punjab Urban Estates (Development & Regulation) Act, 1964 and rules and policy framed thereunder as amended from time to time and you shall have to accept and abide by the provision of the Act/ Rules/ policy. "

10. Further, it is clear that the allotment of the plot was subject to the provisions contained in the 1964 Act. Section 10 of the Act envisages provision for resumption and forfeiture of the land in case of breach of conditions of allotment. Section 10 reads as under:-

"10. Resumption and forfeiture for breach of conditions of transfer.- (i) If any transferee has failed to pay the consideration money or any installment thereof on account of the sale of any site or building, or both, under section 3, or has committed a breach of any other condition of such sale, the Estate Officer may, by notice

in writing, call upon the transferee to show cause why an order of resumption of the site or building, or both, as the case may be, and forfeiture of the whole or any part of the money, if any, paid in respect thereof (which in no case shall exceed ten per cent of the total amount of the consideration money, interest and other dues payable in respect of the sale of the site or building, or both) should not be made".

11. In exercise of power conferred by 1964 Act, Rules were framed in the year 1965 i.e. Punjab Urban Estate (Development and Regulation) Rules, 1964. Rule 14 of the said Rules categorically provided that the transferee shall complete the building within three years from the date of issue of the allotment letter. In accordance with the Rules and Regulations of erection of the building, the time limit may be extended by the Estate Officer if he is satisfied that failure to complete the construction of the building within the said period was due to the reasons beyond the control of the allottee.

12. Since the respondent-allottee failed to abide by the terms and conditions and did not raise construction, he was liable to pay non-construction fee/extension fee which was demanded from him in order to enable him to avoid resumption of the plot to the appellant-authority. The aforesaid demand was made by letters dated 6.1.1997 and 27.10.1999. The said letter dated 6.1.1997 is extracted hereinbelow:-

"PUNJAB URBAN, PLANNING DEVELOPMENT AUTHOR, SECTOR -32, SAMARALA ROAD, PUDA COMPLEX, LUDHIANA REGISTERED

To,

D.S. Sandhu Superintending Engineer (PWD) Office of the Chief Engineer, PWD B&R, Patna

No. PUDA/E.O./Ludhiana (Endst. No. 2177)96/34478 Dated 06.01.97,

Sub: Regarding payment of balance installment resumption of plot of Urban Estate D Road, Sector/ Phase-II at Ludhiana, residential/ commercial plot no. 2177. area 400.

With regard to the above subject.

2. Res. 26712/- the detail of which is given below is recoverable from you as balance of residential/commercial plot No. 2177, Urban Estate, D road, Sector/Phase-II, at Ludhiana. Therefore, deposit a bank draft of this amount alongwith 18%interest per annum which should be in favour of Estate Officer, PUDA, Ludhiana and may be payable at any scheduled bank upto 31.01.97 in all circumstances and appear before the undersigned on the date at 11.00 a.m. in case of failure to do so, action would be initiated for resumption of allotment of plot under the conditions of allotment and under Punjab Regional and Town Planning and Development Act, 1995 and the rules made thereunder and no other opportunity would be given to you.

1.....amount of balance installments.

2. amount of enhanced compensation

3. extension fee 26712/-

4. interest

5. penalty

Total 26712
Sd/- Estate Officer
In English PUDA,
Ludhiana."

13. In response to the aforesaid letter dated 6.1.1997, the respondent agreed to pay the extensio[illegible]e

Estate Officer of the appellant authority in order to avoid resumption/auction of the plot.

14. Meanwhile, the State of Punjab enacted Punjab Regional and Town Planning and Development Act, 1995. Rules were also framed under the said Act. By Section 183 of 1995 Act, earlier Act of 1964 and Punjab Housing Development Board Act, 1972 were repealed with the saving clause.

15. Subsequent to the aforesaid Act, by Notification dated 30.6.1995, Punjab Urban Development Authority was established w.e.f. 1.7.1995 and the Board stood abolished with effect from that date. Many other Acts were also repealed. By the said Act Authority was empowered to deal with the land and prescribe the fee in case where extension of period for completion of building is set for by the allottee.

16. Since the High Court passed the impugned order following the decision rendered by the Punjab & Haryana High Court in *Tehal Singh's* case, it would be proper to refer the facts of that case.

17. In *Tehal Singh vs. State of Punjab and Ors.* (C.W.P. No.13648 of 1998), the petitioner filed the writ petition seeking a writ for quashing certain letters demanding extension fee and striking down condition No.19 of allotment letter, insofar as it relates to the charging of separate extension fee for non completion of construction of building. Further mandamus was sought for directing the respondents to charge extension fee from the petitioner under the provisions of Rule 13 of 1995 Rules. The High Court after referring various provisions of 1995 Acts and Rules made thereunder observed as under:-

> "A conjoint reading of the various provisions of the 1995 Act and the 1995 Rules shows that the transfer of land under sub-section (1) of Section 43 is not only subject to the directions which may be given by the State Government

> under the 1995 Act but also the conditions which may be prescribed with regard to completion of building of part thereof and with regard to extension of period for such completion and payment of fee for such extension. A perusal of rule 13 of the 1995 Rules along with Section 180 (2) (i) and Section 2 (zc) of the 1995 Act shows that the time within which the building is to be completed and other related matters are governed by the 1995 Rules. Therefore, with the coming into force of these Rules, the rates of extension fee prescribed by the Board stood superseded and in terms of sub-rule (2) of Rule 13 of the 1995 Rules, the petitioners became eligible to seek extension of the specified time limit subject to payment of the fee prescribed under sub-rule (3) of Rule 13."

18. The Court further came to the following conclusions:-

> "We have thoughtfully considered the respective submissions. In our opinion, Shri Malhotra's contention on the issue of applicability of the 1995 Act to the plots allotted to the petitioners is clearly wide of the margin. A bare reading of the plain language of sub-section (4)of Section 183 of the 1995 Act makes it clear that the allotment of Section 183 of the 1995 Act makes it clear that the allotment made by the erstwhile Board will be deemed to have been made under the 1995 Act. Therefore, the construction of the building will have to be regulated by the conditions of allotment read with Rule 13 of the 1995 Rules. As a logical corollary, the extension of the time limit specified in the letter of allotment will also be governed by the provisions of the 1995 Rules and the petitioners are entitled to seek extension of the time limit by paying the fee prescribed under Rule 13".

19. Consequently the Court declared the notices demanding enhanced extension fee as illegal and ultra vires to the provisions of 1995 Act under the Rules made thereunder.

20. It is worth to mention here that the aforesaid judgment rendered in Tehal Singh's case was challenged before the Supreme Court in S.L.P. No.18500-18501 of 1999 and was dismissed on 10.11.2000, but the said order of dismissal was modified by the Supreme Court by order dated 12.2.2001 in the following terms.

> "In the facts and circumstances of the case the order does not warrant in any interference of this Court. The appeals are accordingly dismissed."

21. As noticed above, the facts are quite different from the facts in Tehal Singh's case. In the instant case, the respondents-allottees accepted the terms and conditions of the allotment letter and possession were taken but they did not raise any construction upto 2000. There was a specific condition that non-construction of building would lead to the resumption of the said plot under the provisions of the Acts and the Rules. As noticed above, when the allottees did not raise construction on the plot, the demand was raised for payment of non-construction fee/extension fee in order to avoid resumption of the plot by the Authority, allottee paid the extension fee. After availing the benefit of extension on payment of extension fee, the allottee sent a letter to the Estate Officer demanding refund of the extension fee on the basis of amended Rule 13 of 1995 Rules. The said demand was rejected by the Estate Officer by passing the reasoned order in compliance of the directions of the High Court. In the facts of the instant case, we have no doubt in our mind in holding that the ratio decided in Tehal Singh's case will not apply in the instant case. In our considered opinion defaulting allottes of valuable plots cannot be allowed to approbate and reprobate by first agreeing to abide by terms and conditions of allotment and later seeking to deny their liability as per the agreed terms.

22. The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the

provisions of a statute. (vide *C.I.T. vs. Mr. P. Firm Maur,* AIR 1965 SC 1216).

It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329). In R.N. Gosain vs. Yashpal Dhir, AIR 1993 SC 352, this Court has observed as under:-

> "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

23. This Court in *Sri Babu Ram Alias Durga Prasad vs. Sri Indra Pal Singh (Dead) by Lrs.,* AIR 1998 SC 3021, and *P.R. Deshpande vs. Maruti Balram Haibatti,* AIR 1998 SC 2979, the Supreme Court has observed that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

24. The Supreme Court in *The Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond and Gem Development Corporation Ltd. and Anr.,* AIR 2013 SC 1241, made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one

benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

25. It is evident that the doctrine of election is based on the rule of estoppel the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

26. Be that as it may, so far as the instant case is concerned, the High Court has totally overlooked the facts of the present case and allowed the writ petition. The impugned order, therefore, cannot be sustained in law and is hereby set aside. The appeals are accordingly allowed. However, in the facts of the case, there shall be no order as to costs.

D.G. Appeals allowed.

J. RAJIV SUBRAMANIYAN & ANR.
v.
M/S. PANDIYAS & ORS.
(Civil Appeal No. 3865 of 2014)

MARCH 14, 2014

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

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

s.13(8) - Right of borrower - Held: The provision contained in s.13(8) is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected u/ Article 300A of the Constitution - Therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act - Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property - Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers - The notice is also necessary to provide the required opportunity to the borrower to take all possible steps for retrieving his property or at least ensure that in the process of sale the secured asset derives the maximum benefit and the secured creditor or anyone on its behalf is not allowed to exploit the situation of the borrower by virtue of the proceedings initiated under the SARFAESI Act - Constitution of India, 1950 - Article 300A.

s.13 - Sale of Non performing asset - Sale consideration only Rs.10,000 above the reserve price whereas property worth much more - Held: The secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers - Sale null and void being in violation of provisions of s.13 and rr.8 and 9 and liable to be set aside - Security Interest (Enforcement) Rules, 2002 - rr.8 and 9.

s.13 - Sale of Non performing asset - Single judge of the High Court after holding that the sale was invalid as there was violation of rules, directed making of payments by borrowers to the Bank with clear direction that on such payment, insofar as the bank is concerned its dues would be settled - Not only borrowers made the payment as directed which was accepted by bank, the Bank even accepted the said judgment and did not file any appeal thereagainst - Only the buyer filed the appeal - In the facts of the case, once the payment is made to the buyer by borrowers the possession of the property shall be delivered to the borrowers with no further liability towards the bank.

SECURITY INTEREST (ENFORCEMENT) RULES, 2002:

rr.8 and 9 - Held: Any sale effected without complying with the rules would be unconstitutional and null and void.

r.8(8) - Sale by any method other than public auction or public tender shall be on such terms as may be settled between the parties in writing - In the instant case, no terms were settled between the parties that the sale can be effected by Private Treaty - The Borrowers were not even called to the joint meeting between the Bank and the Sale Agent - There was violation of rules rendering the sale void.

Respondent no.1 and 2 had taken various loans from respondent no.3-Bank. Upon failure of respondent no.1

and 2 to repay the loan, their assets mortgaged with respondent no.3-Bank were classified as Non-Performing Assets. Respondent no.3-Bank issued a demand notice and then a possession notice under the SARFAESI Act. Respondent no.1 and 2 challenged the two notices before the High Court. Meanwhile, auction sale was fixed but no sale took place as there were no bidders. Respondent no.1 and 2 sought cancellation of auction notice and sought permission of respondent no3-Bank to sell the secured assets by private treaty. The outstanding balance to the bank was Rs.1.57 crores.

Respondent Nos.1 and 2 made a payment of Rs.42 lacs to respondent no.3-Bank, by selling machinery with the permission of respondent no.3-Bank. A request was also made for an extension of two months for paying the remaining amount after selling the secured assets. Respondent no.3-Bank gave approval for private sale of the immovable property and the secured assets were sold in favour of the appellant for a consideration of 123.10 lacs. The sale was affected through Ge-Winn Management Company, Resolution Agents.

The reserve price of the secured assets was fixed at 123 lacs. Sale deed was executed in favour of the appellants by respondent No.3 on 20th December, 2006, as the entire consideration was paid on 15th December, 2006. On 21st December, 2006, respondent Nos.1 and 2 were informed by respondent No.3-Bank that the secured assets had been sold for more than the amount offered by them. Respondent Nos.1 and 2 filed writ petition without disclosing that the earlier writ petition challenging the auction notice had been withdrawn without the court giving liberty to respondent Nos. 1 and 2 to file a fresh writ petition.

The single judge of the High Court allowed the writ petitions. The sale in favour of the a o

be vitiated on the ground that respondent No.3-Bank failed to follow the mandatory provisions of Rules 8(5), 8(6) and 9(2) of the Security Interest (Enforcement) Rules, 2002. But a direction was issued to refund the amount paid by the petitioner i.e. Rs.1crore 41 lacs with interest at 9% per annum from April, 2007. The Division Bench of the High Court upheld the order of the single judge. The instant appeals were filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1. The findings recorded by the High Court that there has been a violation of Security Interest (Enforcement) Rules, 2002 were perfectly justified. The provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset can not deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002. In view of Rules 8 and 9(1), any sale effected without complying with the same would be unconstitutional and, therefore, null and

void. In the present case, there is an additional reason for declaring that sale in favour of the appellant was a nullity. Rule 8(8) states that sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing. There were no terms settled in writing between the parties that the sale can be affected by Private Treaty. In fact, the borrowers - respondent Nos. 1 and 2 were not even called to the joint meeting between the Bank - Respondent No.3 and Ge-Winn held on 8th December, 2006. Therefore, there was a clear violation of the aforesaid Rules rendering the sale illegal. Generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured creditors are expected to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, sale consideration is only Rs.10,000/- over the reserve price whereas the property was worth much more. The sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002. The sale effected in favour of the appellants on 18th December, 2006 is liable to be set aside. [paras 11, 13 to 18] [1150-E; 1151-D-G; 1152-B-H; 1153-A-C]

Mathew Varghese vs. M.Amritha Kumar & Ors. **2014 (2) Scale 331 - relied on.**

2. The borrowers -Respondent No.1 and 2 had evaluated the property at Rs.11[illegible]s

acknowledged in their letter dated 28th August, 2006. Therefore, the reserve price was fixed based upon the said figures. The appellants bought the property for more than the reserve price. The appellants paid the entire consideration within three days of the sale, i.e., on 15th December, 2006. The Sale Deed was executed in their favour on 20th December, 2006. Possession was admittedly delivered on 20th December, 2006 also. The appellants have also incurred substantial loss as they have been unnecessarily dragged into litigation. [Para 21] [1153-G-H; 1154-B]

3. The single judge of the High Court after holding that the sale in question was invalid, directed making of payments by respondent Nos. 1 and 2 to respondent No.3 bank with clear direction that on such payment, insofar as the bank is concerned its dues shall stand settled. Not only respondent Nos. 1 and 2 made the payment as directed which was accepted by respondent No.3 bank, insofar as respondent No.3 bank is concerned it even accepted the said judgment and did not file any appeal thereagainst. Only the appellant filed the appeal. Though the order of the Single Judge about the validity of the sale had been affirmed, the Division Bench interfered with the other direction of the Single Judge which should not have been done as bank had not challenged the order of the Single Judge. In the facts of this case, once the payment is made to the appellant by respondent Nos.1 and 2, the possession of the property shall be delivered to the respondent Nos.1 and 2 with no further liability towards the bank. [para 27] [1155-G-H; 1156-A-C]

4. The sale in favour of the appellants and the subsequent delivery of possession to the appellants is *null and void*. The sale is accordingly set aside. The appellants are directed to deliver the possession of the property purchased by them under the Sale Deed dated to Respondent Nos. 1 and 2 immediately upon receiving

the entire amount; Respondent No.3 directed to refund the entire proceeds of the FDR in which the sale consideration was deposited together with accrued interest forthwith. Respondent Nos. 1 and 2 will ensure that the entire amount due to the appellants is paid on or before 15th June, 2014. Upon receipt of the entire amount, the possession shall be delivered to Respondent Nos. 1 and 2. [Para 28] [1156-D-G]

United Bank of India vs. Satyawati Tondon & Ors. **2010 (8) SCC 110: 2010 (9) SCR 1 - referred to.**

Case Law Reference:

2010 (9) SCR 1	**referred to**	**Para 4**
2014 (2) Scale 331	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3865 of 2014.

From the Judgment and Order dated 14.06.2011 of the High Court of Madras at Madurai at W.A. No. 417 of 2011.

WITH

Civil Appeal No. 3866 of 2014.

Ashok Desai, Dhruv Mehta, Vikas Singh, T. Harish Kumar, Y. Prakash, T.K. Dharmarajan, N. Shoba, Sri Ram J. Thalapathy, V. Adihmoolam, Sanjay Kapur, Priyanka Das, Lekha Vishwanath, Anmol Chandan for the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. These special leave petitions are directed against the final judgment and order dated 14th June, 2011 passed by the Madras High Court (Madurai Bench) in W.A.No.417 of 2011 dismissing the aforesaid Writ Appeal filed by the appellants.

3. We have heard the learned counsel for the parties at length.

4. Mr. Ashok Desai learned senior counsel appearing on behalf of the appellants has submitted that although many issues have been raised in the SLP, he is not pressing the point that the High Court erred in entertaining the writ petition filed by respondent Nos.1 and 2. The point with regard to the maintainability of the writ petition was taken on the basis of a judgment of this Court in the case of *United Bank of India vs. Satyawati Tondon & Ors.*[1]. It was urged before the High Court that an alternative remedy being available to respondent Nos.1 and 2 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002), the writ petition would not be maintainable. The second issue with regard to the maintainability was based on the fact that earlier respondent Nos. 1 and 2 had filed Writ Petition Nos.5027-28 of 2006 challenging the auction sale notice dated 23rd May, 2006. However, these writ petitions were withdrawn on 3rd July, 2006. The High Court did not give any liberty to respondent Nos. 1 and 2 to file fresh writ petition. Mr. Desai very fairly submitted that it is not necessary to examine the issues on maintainability of the writ petition, as the entire issue is before this Court on merits.

5. Mr. Ashok Desai has pointed out that respondent Nos.1 and 2 had taken various loans from respondent No.3-Bank. Upon failure of Respondent Nos. 1 and 2 to repay the loan, the assets of respondent Nos.1 and 2 which had been mortgaged with respondent No.3-Bank were classified as non-performing assets (NPA). Inspite of such action having been taken by respondent No.3-Bank, respondent Nos.1 and 2 failed to regularize the bank account. Therefore, on 8th June, 2005, the bank-respondent No.3 issued notice under Section 13(2) of the SARFAESI Act, 2002 followed by a possession notice on 12th January, 2006 under Section 13(4) of the said Act. Respondent Nos.1 and 2 challenged the aforesaid two notices by filing Writ Petition Nos. 4174/2006, 4175/2006, 5027/2006 and 5028/

1. 2010 (8) SCC 110.

2006. In the meantime, auction sale was fixed on 7th July, 2006. But no sale took place as there were no bidders. On 28th August, 2006, respondent Nos. 1 and 2 sought cancellation of the auction notice and sought permission of respondent No.3-Bank to sell the secured assets by private Treaty. It was stated that as on that date the outstanding balance due to the bank was a sum of Rs.1.57 crores. A request was made to break up the aforesaid amount as follows :

(a) Machineries of M/s. Suruthi Fabrics - 0.40 lacs

(b) Land and building of M/s. Suruthi Fabrics - 0.70 lacs

(c) Pandias Garment Factory land and Building - 0.47 lacs
And Suruthi Fabrics 5.51 acres Land

6. Permission was sought to sell the assets as stated above within six months. On 11th September, 2006, respondent Nos.1 and 2 made a payment of Rs.42 lacs to respondent No.3-Bank, by selling machinery with the permission of respondent No.3-Bank. A request was also made for an extension of two moths for paying the remaining amount after selling the secured assets. On 8th December, 2006, respondent No.3-Bank gave approval for private sale of the immovable property to the appellants and for issue of sale certificate. On the very same date, the secured assets were sold in favour of the petitioner for a consideration of 123.10 lacs. It is not disputed by Mr. Vikas Singh, learned senior counsel appearing for Respondent No.3, that the sale was affected through Ge-Winn Management Company, Resolution Agents. This is also evident from the proceedings of the meeting held between respondent No.3-Bank and Ge-Winn on 8th December, 2006.

7. We may point out here that the reserve price of the secured assets was fixed at 123 lacs. Sale deed was executed in favour of the appellants by respondent No.3 on 20th December, 2006, as the entire considerations have been paid on 15th December, 2006. On 21s

respondent Nos.1 and 2 were informed by respondent No.3-Bank that the secured assets had been sold for more than the amount offered by them in the letter dated 28th August, 2006. At that stage, respondent Nos.1 and 2 filed Writ Petition No.325 of 2007 without disclosing that the earlier Writ Petition Nos.5027-28/2006 challenging the auction notice dated 23rd May, 2006 had been withdrawn without the court giving liberty to respondent Nos. 1 and 2 to file a fresh writ petition.

8. Upon completion of the proceedings inspite of the preliminary objections taken by the appellants, the learned Single Judge allowed the writ petitions. The sale in favour of the petitioner was held to be vitiated on the ground that respondent No.3-Bank failed to follow the mandatory provisions of Rules 8(5), 8(6) and 9(2) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'Rules, 2002'). But a direction was issued to refund the amount paid by the petitioner i.e. Rs.1crore 41 lacs with interest at 9% per annum from April, 2007.

9. Aggrieved by the aforesaid order, the appellants filed Writ Appeal No.4127/2011 in the High Court, which has also been dismissed.

10. Mr. Ashok Desai submits that the petitioner is a bona fide purchaser and has paid the full consideration. Sale deed has been duly executed. Possession of the property is with the appellants since 2006. Therefore, respondent Nos.1 and 2 should not be permitted at this stage to claim that the sale is vitiated on the ground that it has been affected through an agent of respondent No.3-Bank, namely, Ge-Winn. Mr. Desai submitted that the Single Judge as well as the Division Bench have wrongly held that there has been violation of Rules 8(5), 8(6), 8(8) and 9(2) of the Rules, 2002. Mr. Desai further submitted that it would be equitable to permit the petitioner to keep the plot which is adjacent to the property of the petitioner. Respondent Nos.1 and 2 can be permitted to take the other plots.

11. Mr. Dhruv Mehta, learned senior counsel appearing on behalf of the respondent Nos. 1 and 2 relying on the judgment of this Court in *Mathew Varghese Vs. M.Amritha Kumar & Ors.* in C.A.No.1927-1929 of 2014 decided on 10th February, 2014 submits that the Rules, 2002 are mandatory in nature. In the present case, the sale has been effected in violation of the aforesaid rules. Both the learned Single Judge as well as the Division Bench have come to the conclusion that the provisions of the aforesaid rules have not been followed. It is not disputed by any of the parties that there is no agreement between respondent Nos. 1 and 2 and respondent No.3-Bank, in writing, to affect the sale by Private Treaty. Mr. Vikas Singh, learned senior counsel appearing for respondent No.3-Bank, however, pointed out that the respondent Nos.1 and 2 had filed a review petition in which it was averred that they may be permitted to sell the secured assets by Private Treaty. Therefore, according to Mr. Vikas Singh, respondent Nos. 1 and 2 cannot now be heard to say that they had not given their consent to affect the sale by Private Treaty. We are unable to accept the submission made by Mr. Vikas Singh that there is no violation of the Rules, 2002. In our opinion, the findings recorded by the learned Single Judge as well as the Division Bench of the High Court that there has been a violation of Rules, 2002 are perfectly justified.

12. This Court in the case of *Mathew Varghese Vs. M.Amritha Kumar & Ors.*[2] examined the procedure required to be followed by the banks or other financial institutions when the secured assets of the borrowers are sought to be sold for settlement of the dues of the banks/financial institutions. The Court examined in detail the provisions of the SARFAESI Act, 2002. The Court also examined the detailed procedure to be followed by the bank/financial institutions under the Rules, 2002. This Court took notice of Rule 8, which relates to Sale of immovable secured assets and Rule 9 which relates to time of sale, issue of sale certificate and delivery of possession etc. With regard to Section 13(1), this Court observed that Section 13(1) of SARFAESI Act, 2002 gives a free hand to the secured

2. 2014 (2) Scale 331.

creditor, for the purpose of enforcing the secured interest without the intervention of Court or Tribunal. But such enforcement should be strictly in conformity with the provisions of the SARFAESI Act, 2002. Thereafter, it is observed as follows:-

> "A reading of Section13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act."

13. This Court further observed that the provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300A of the Constitution of India. Therefore, the secured creditor as a trustee of the secured asset can not deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002. Therefore, the creditor should ensure that the borrower was clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property. Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers. The notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002. Thereafter, in Paragraph 27, this Court observed as follows:-

> "27. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a SECURED ASSET, cannot take place without duly informing the borrower of the time

> and date of such sale or transfer in order to enable the borrower to tender the dues of the SECURED CREDITOR with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale."

14. As noticed above, this Court also examined Rules 8 and 9 of the Rules, 2002. On a detailed analysis of Rules 8 and 9(1), it has been held that any sale effected without complying with the same would be unconstitutional and, therefore, null and void.

15. In the present case, there is an additional reason for declaring that sale in favour of the appellant was a nullity. Rule 8(8) of the aforesaid Rules is as under:-

> "Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing."

16. It is not disputed before us that there were no terms settled in writing between the parties that the sale can be affected by Private Treaty. In fact, the borrowers - respondent Nos. 1 and 2 were not even called to the joint meeting between the Bank - Respondent No.3 and Ge-Winn held on 8th December, 2006. Therefore, there was a clear violation of the aforesaid Rules rendering the sale illegal.

17. It must be emphasized that generally proceedings under the SARFAESI Act, 2002 against the borrowers are initiated only when the borrower is in dire-straits. The provisions of the SARFAESI Act, 2002 and the Rules, 2002 have been enacted to ensure that the secured asset is not sold for a song. It is expected that all the banks and financial institutions which resort to the extreme measures under the SARFAESI Act, 2002 for sale of the secured assets to ensure, that such sale of the asset provides maximum benefit to the borrower by the sale of such asset. Therefore, the secured

to take bonafide measures to ensure that there is maximum yield from such secured assets for the borrowers. In the present case, Mr. Dhruv Mehta has pointed out that sale consideration is only Rs.10,000/- over the reserve price whereas the property was worth much more. It is not necessary for us to go into this question as, in our opinion, the sale is null and void being in violation of the provision of Section 13 of the SARFAESI Act, 2002 and Rules 8 and 9 of the Rules, 2002.

18. We, therefore, have no hesitation in upholding the judgments of the learned Single Judge and the Division Bench of the High Court to the effect that the sale effected in favour of the appellants on 18th December, 2006 is liable to be set aside.

19. This now brings us to moulding the relief in the peculiar facts and circumstances of this case.

20. As noticed earlier, Mr. Ashok Desai had emphasized on behalf of the appellants that no blame at all can be attributed to them. The bank had decided to sell the immovable properties to the appellants for Rs.1,23,10,000/- against the reserve price of Rs.1,23,00,000. This is evident from the joint meeting of the bank held with Ge-Winn on 10th December, 2006, wherein it is observed as follows:-

> "Referring to the above in the presence of the undersigned it has been decided to effect the sale to M/s. Susee Automobiles Pvt. Ltd., Madurai and Smt. Nirmala Jeyablan, W/o Shri Jayabaaalan, No.4, S.V. Nagar, S.S. Colony, Madurai for a consideration of Rs.123.10 lakhs (Rupees one crore twenty three lakhs and ten thousand only) against the reserve price of Rs.123.00 lakhs and issue Sale Certificate for registration under private treaty."

21. Mr. Desai had also pointed out that the borrowers - Respondent No.1 and 2 had evaluated the property at Rs.117 lakhs. The evaluation was acknowledged by Respondent Nos. 1 and 2 in the letter dated 28th August, 2006. Therefore, the

reserve price was fixed based upon the aforesaid figures. The appellants bought the property for more than the reserve price. The appellants paid the entire consideration within three days of the sale, i.e., on 15th December, 2006. The Sale Deed was executed in their favour on 20th December, 2006. Possession was admittedly delivered on 20th December, 2006 also. The appellants have also incurred substantial loss as they have been unnecessarily dragged into litigation. He pointed out that the appellants have in fact incurred losses of Rs.3 crores as they were deprived of using the property in view of the interim orders passed by the High Court and they were forced to take other property on monthly rent of Rs.3 lakhs from January 2007. He, therefore, submitted that the proposal made by the appellants for being permitted to keep the plot adjacent to the property already owned by them, be accepted. In the alternative, learned senior counsel submitted that the High Court has unnecessarily reduced the amount of interest on the amount deposited by the appellants with the bank would bear only 4% interest. He submitted that the appellants are entitled to 18% compound interest since the date the amount was deposited till refund.

22. On the other hand, Mr. Dhruv Mehta pointed out that property of Respondent No.1 has been sold for a ridiculously low price, as the bank is interested only in regularizing the account of the borrower. He has submitted that respondent Nos. 1 and 2 are prepared to compensate the appellants, to a reasonable extent, but not to the extent claimed by Mr. Desai.

23. On the other hand, Mr. Vikas Singh has submitted that in case the sale is to be set aside and the properties have to be returned to the borrowers, the dues of the bank also have to be secured, which are now in the region of Rs.4 crores.

24. We have considered the submissions made by the learned counsel for the parties.

25. Initially on our suggestion, respondent Nos. 1 and 2 had quantified the amount in accordance wit d

by the learned Single Judge. The learned Single Judge had ordered refund of Rs.1,41,00,000/-, (Representing Rs.1,23,10,000/- towards Sale Price and Rs.18,90,000/- towards Stamp Duty with interest @9% per annum from April 2007). However, since we had accepted the second alternative (partially) of Mr. Ashok Desai, the appellants and respondents have jointly submitted the following chart:-

Amount quantified by the Learned Single Judge	Interest@ 18% from April 2007 to 15.06.2014	Total
Rs. 1,41,00,000/- Rs. 1,23,10,000/- Sale Price Rs. 18,90,000/- (Stamp Duty)	Rs. 1,84,00,500/-	Rs. 3,25,00,500/-

26. Mr. Dhruv Mehta has stated that Respondent Nos. 1 and 2 are prepared to refund the sale amount paid by the appellants as Sale Price together with 18% simple interest from 1st July, 2007 till 15th June, 2014. The total amount spent on Stamp Duty shall also be refunded to the appellants. The total amount shall be paid to the appellants by 15th June, 2014. Mr. Desai had pointed out that the amount deposited with the bank, which is said to be lying in a FDR Bearing 8.25% per annum ought to be refunded by the bank to the appellants. Upon the entire amount being repaid to the appellants, the possession of the property purchased by the appellants will be delivered to the Respondent Nos.1 and 2.

27. Insofar as the submission of Mr. Vikas Singh learned senior counsel is concerned we are unable to accept the same in the facts and circumstances of this case It would be relevant to point out that the learned Single Judge of the High Court after holding that the sale in question was invalid, directed making of payments by respondent Nos. 1 and 2 to respondent No.3 bank with clear direction that on such payment, insofar as the bank is concerned its dues shall stand settled. Not only

respondent Nos. 1 and 2 made the payment as directed which was accepted by respondent No.3 bank, insofar as respondent No.3 bank is concerned it even accepted the said judgment and did not file any appeal thereagainst. Only the appellant filed the appeal. Though the order of the learned Single Judge about the validity of the sale had been affirmed, the Division Bench interfered with the other direction of the learned Single Judge which should not have been done as bank had not challenged the order of the learned Single Judge. We are, therefore, of the opinion that in the facts of this case, once the payment is made to the appellant by respondent Nos.1 and 2 in the manner stated hereinafter, the possession of the property shall be delivered to the respondent Nos.1 and 2 with no further liability towards the bank.

28. In view of the aforesaid, we hold that the sale in favour of the appellants dated 18th December, 2006 and the subsequent delivery of possession to the appellants is null and void. The sale is accordingly set aside. The appellants are directed to deliver the possession of the property purchased by them under the Sale Deed dated 20th December, 2006 to Respondent Nos. 1 and 2 immediately upon receiving the entire amount as directed hereunder:-

(i) The State Bank of India - Respondent No.3 directed to refund the entire proceeds of the FDR in which the sale consideration was deposited together with accrued interest forthwith.

(ii) The Respondent Nos. 1 and 2 will ensure that the entire amount due to the appellants is paid on or before 15th June, 2014.

(iii) Upon receipt of the entire amount, the possession shall be delivered to Respondent Nos. 1 and 2.

29. With these observations, the appeals are disposed of with no order as to costs.

D.G.